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U.S. Customs and Border Protection

OT: RR: FAPL
H189357MBP

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MAY 14 2012

RE: Freedom of Information Act Appeal; File No. 2011F11327

Dear Mr. Rumold:

This letter responds to your appeal of the response you received from Dorothy Pullo, Director – FOIA Division, in response to the Freedom of Information Act ("FOIA") request you submitted to Customs and Border Protection ("CBP"). On May 10, 2011, you requested five categories of information related to CBP's use of Cellebrite or any similar data extraction tools.

Specifically, you requested:

(1) All records describing the frequency with which CBP utilizes Cellebrite, or any similar technology, to perform data extraction on mobile or other electronic devices;

(2) All manuals, guides, or directives setting forth guidelines for the appropriate use of Cellebrite, or an other similar data extraction technology;

(3) All records describing the capabilities, limitations, or potential uses of the Cellebrite system, or any similar data extraction technology;

(4) All records related to the use of the Bluetooth or infrared connectivity of the Cellebrite system, or any other similar data extraction technology, to extract data from mobile or other electronic devices;

(5) Any records describing or discussing the legal requirements necessary to extract data from an electronic device when using the Cellebrite system, or any other similar data extraction technology.

Ms. Pullo responded to your request on August 16, 2011, explaining that CBP located 109 pages of responsive records, but released none of those records to you. Instead, she

explained that 14 pages of those records are already available via CBP's online FOIA Library and provided you with the website URL to access those records. She withheld the remaining 95 pages of records pursuant to the FOIA.

In a letter received on October 17, 2011, you appealed Ms. Pullo's decision to withhold those records in full, arguing that this agency "applied the exemptions of FOIA more broadly than the law permits" and "failed to segregate and release information not otherwise exempt from disclosure." For the following reasons, we concur with your assessment and release 91 of the 96 previously withheld pages[1] with some redactions made to protect the privacy of individuals named in those records and to safeguard law enforcement techniques and procedures practiced by the agency. We continue to withhold the remaining five pages in full to protect law enforcement techniques and procedures practiced by the agency.

Release of Additional Information

The Freedom of Information Act was enacted to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The law provides the public with the right to receive records and information from the government in order to further democratic principles and allow for independent evaluation of government action.

In his first day in office, President Barack Obama issued a memorandum that made clear that his administration would dedicate itself to the principles that motivated Congress to enact the FOIA. The President explained that "accountability requires transparency" and demanded that federal agencies "adopt a presumption in favor of disclosure in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government." That view is largely consistent with Supreme Court precedent reading the FOIA to espouse "a general philosophy of full agency disclosure." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976). Nevertheless, some governmental information is exempted under clearly delineated statutory language. 5 U.S.C. § 552(b) et seq. Thus, while "disclosure, not secrecy, is the dominant objective of [FOIA]," there are some records that exist outside the statute's broad reach. *Rose*, 425 U.S. at 361.

In furtherance of those interests, both I and another attorney in my office re-reviewed the CBP records initially withheld by Ms. Pullo. After this review, we have concluded that much of the information withheld should have been released. The records span four documents: a two-page spreadsheet providing data on the frequency with which CBP utilizes Cellebrite and any similar technologies to perform data extraction on mobile or other electronic devices ("Statistics"); a 21-page directive issued by CBP's Laboratory and Scientific Services on portable digital media examination and analysis ("Lab Directive"); a 68-page Microsoft PowerPoint presentation training CBP personnel on the use of Cellebrite ("Training Presentation"); and a five-page Concept of Operations

[1] Ms. Pullo's response letter indicated that 95 total pages were withheld. On review, a 96th page was identified in the file as responsive to your request.

governing the review and analysis of information encountered at the border ("Concept of Operations"). We have attached the first three documents, with some redactions, to this letter. The fourth continues to be withheld in full.

Although FOIA Division may have applied too broad a brush in withholding the attached documents in full, please note that we have now provided you with the greatest amount of information in these records as possible. The direct language of the Freedom on Information Act instructs federal agencies to provide any "reasonably segregable portion of a record" to "any person requesting such record after deletion of the portions which are exempt." 5 U.S.C. §552(b). To comport with this requirement, this office "differentiate[d] among the contents of a document rather than to treat it as an indivisible 'record' for FOIA purposes." *Fed. Bureau of Investigation v. Abramson*, 456 U.S. 615, 626 (1982). President Obama instructed federal agencies to be exacting when applying FOIA exemptions, explaining that "in the face of doubt, openness prevails." We do not take this charge lightly; only the information protected by the statutorily defined exemptions has been blacked out on your copies of the records.

Information Redacted Pursuant to Exemption (b)(6) and (b)(7)(C)

Exemptions (b)(6) and (b)(7)(C) both relate to protecting personal privacy and have been invoked here only to protect personally identifying information of the CBP employees and other third parties who appear in CBP records. Under the FOIA, privacy encompasses the "individual's control of information concerning his or her person." *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989). Exemption (b)(6) protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Exemption (b)(7)(C) excludes records or information compiled for law enforcement purposes, but only to the extent that the production of such materials "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

To determine whether this information ought to be withheld under either exemption, an agency must balance the privacy interests involved against the public interest in disclosure. *Reporters Comm. for Freedom of the Press*, 489 U.S. at 762. In this case, both Exemptions (b)(6) and (b)(7)(C) are asserted to protect the names of CBP employees found in the responsive records. The primary consideration is to protect those employees from unnecessary "harassment and annoyance in the conduct of their official duties and in their private lives," which could conceivably result from the public disclosure of their identity. *Nix v. U.S.*, 572 F.2d 998, 1006 (4th Cir. 1978).

As a threshold requirement, Exemption (b)(6) can only be applied to "personnel and medical and similar files." 5 U.S.C. § 552(b)(6). However, the range of documents falling within these categories is interpreted broadly so as to include all government records "which can be identified as applying to that individual." *Dep't of State v. Washington Post*, 456 U.S. 595, 602 (1982) (quoting H. R. Rep. No. 1497, 89th Cong., 2nd Sess., 11 (1966)). Once this threshold is met, the issue becomes whether disclosure

of the information at issue "would constitute a clearly unwarranted invasion of personal privacy," *Rose*, 425 U.S. at 373, an undertaking that requires balancing the privacy interests of the individual against the public interest in disclosure. That balance can be properly struck where "personal references or other identifying information [are] deleted." *Id.* at 380.

In order to compel release of materials, there must be at least some public interest in their disclosure because "something, even a modest privacy interest outweighs nothing every time." *Cappabianca v. U.S. Customs Serv.*, 847 F. Supp. 1558, 1564 (M.D. Fl. 1994). In this case, you provide no explanation of a public interest furthered by the release of CBP employee names. This is likely because there is none. The identity of these individuals would not provide any insight whatsoever regarding agency action. Without any genuine, public interest, there is little reason to identify the third parties found in these documents. Accordingly, Exemption (b)(6) has been applied here to withhold the names and other markings identifying CBP officers or other third parties identified in the records.

Although the protections available under Exemption (b)(7)(C) are not the same as Exemption (b)(6), the analysis is the same, requiring the balance of the privacy interests involved against the public interest in disclosure. *Lewis v. Dep't of Justice*, 609 F.Supp.2d 80, 84 (D.D.C. 2009). However, because exemption (b)(7)(C) contains broader protections than exemption (b)(6)[2], the two exemptions differ in the "magnitude of the public interest that is required" to overcome the privacy interests involved, with an extra thumb on scale in favor of redaction once Exemption (b)(7)(C) privacy issues are implicated. *Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 496 n.6 (1994).

Like Exemption (b)(6), Exemption (b)(7)(C) has also been found to protect the privacy interests of all persons mentioned in law enforcement records, including investigators, suspects, witnesses and informants. *Lewis*, 609 F. Supp. 2d at 84. See also *Roth v. Dep't of Justice*, 2011 U.S. App. LEXIS 13124 (D.C. Cir. June 28, 2011) ("we have 'long recognized,' the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation. [N]ot only the targets of law-enforcement investigations, but also 'witnesses, informants, and ... investigating agents' have a 'substantial interest' in ensuring that their relationship to the investigations 'remains secret.'") (internal citations omitted). The privacy interest at play under Exemption (b)(7)(C) in protecting the third party information located in law enforcement documents is so strong, though, that courts have found that such information is "categorically exempt" from production "unless access to the names and addresses of private individuals... is necessary in order to confirm or refute compelling evidence that

[2] Exemption (b)(7)(C)'s privacy language is broader than the comparable language in Exemption (b)(6) in two respects. First, whereas Exemption (b)(6) requires that the invasion of privacy be "clearly unwarranted," the adverb "clearly" is omitted from Exemption (b)(7)(C). Second, whereas Exemption 6 refers to disclosures that "would constitute" an invasion of privacy, Exemption (b)(7)(C) encompasses any disclosure that "could reasonably be expected to constitute" such an invasion. *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. at 762

the agency is engaged in illegal activity." *SafeCard Services, Inc. v. U.S. Sec. & Exchange Comm'n.*, 926 F.2d 1197, 1206 (D.C. Cir. 1991).

Once the threshold requirement that the information be found in "law enforcement" records is met[3] and the privacy interests described in Exemption (b)(7)(C) are triggered, the onus shifts to the requester to show government misconduct. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004). That showing must be "more than a bare suspicion" of official misconduct – it must "warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Id.* at 174. Otherwise, the balancing requirement does not come into play. *Boyd v. Dep't of Justice*, 475 F.3d 381, 388 (D.C. Cir. 2007). Having determined that these records were compiled law enforcement purposes and without any evidence indicating misconduct, information that could identify CBP employees has been redacted.

Information Redacted Pursuant to Exemption (b)(7)(E)

Exemption (b)(7)(E) exempts material that was compiled for law enforcement purposes and that would disclose the "techniques and procedures" or "guidelines" for "law enforcement investigations or prosecutions." 5 U.S.C. § 552(b)(7)(E). Application of this exemption is limited, however, to cases in which disclosure "could reasonably be expected to risk circumvention of the law." *Id.* Like Exemption (b)(7)(C), information that falls within Exemption (b)(7)(E)'s purview is "categorically exempt" from disclosure. *Fisher v. Dep't of Justice*, 772 F.Supp. 7, 12 at n. 9 (D.D.C. 1991).

Here, Exemption (b)(7)(E) has been applied to withhold specific law enforcement techniques, procedures, and guidelines followed by agency personnel when analyzing and examining electronic devices for investigative purposes. These include:The names and descriptions of the tools used by the agency when examining electronic devices for investigative purposes, the specific step-by-step instructions and methodologies in which data is attained by and transferred to the agency, the type of encryption used by the agency when transmitting evidenciary and investigative computer files, the location in which extracted data is saved, and the record keeping methods in which the agency documents the receipt of any extracted data. The release of this information could enable bad actors to block the transfer of data, introduce viruses or other malware into agency computer systems, exploit CBP electronic systems, or gain better understanding of the strengths, limitations, and vulnerabilities of the data extraction process. Similarly, this information could identify the specific ways that CBP utilizes data transfer technology, and thus allow bad actors to focus their attempts at circumvention to those specific uses.

Exemption (b)(7)(E) has similarly been applied to withhold the entirety of the Concept of Operations document. This document has been a point of contention between CBP and

[3] It is well established that CBP has a law enforcement mandate. *Coastal Delivery Corp. v. U.S. Customs Serv.*, 272 F. Supp. 2d 958, 963 (C.D. Cal. 2003). Exemption (b)(7)(E) has been applied to all four sets of records released today. Each describes agency techniques, policies, and procedures related to the analysis of electronic media and were created pursuant to the agency's charge to protect this nation's borders. They are clearly compiled for law enforcement purposes.

EFF since at least 2007. The document was initially identified in response to an October 31, 2007 FOIA request from the Asian Law Caucus ("ALC") and the Electronic Frontier Foundation. In response to that request, CBP withheld the Concept of Operations in full, because the document included "name and composition of special unit, step-by-step instructions on how to process certain information, information regarding certain capabilities, parameters and resources, detailed coordination procedures between CBP and another agency, information which would reveal the strengths or weaknesses of certain law enforcement methods, information which would reveal the scope and focus of certain law enforcement technique, and information which would reveal precise details regarding certain examination and inspection methods and guidelines." This information, we reasoned, "would permit persons to devise strategies designed to circumvent the examination and inspection procedures developed by CBP."

At litigation, ALC and EFF continued to challenge CBP's application of Exemption (b)(7)(E) to the Concept of Operations, arguing only that the agency failed to meet its burden to withhold information relating to CBP's coordination with other law enforcement agencies. The Northern District of California, however, sustained CBP's decision to withhold the document because releasing the document "would permit persons to know what or who triggers an alert to another specific law enforcement agency." *Asian Law Caucus v. U.S. Customs and Border Prot.*, No. C-08-00842 (November 24, 2008). The court concluded that releasing those coordination procedures "would allow individuals to devise strategies to avoid these triggers." *Id.*

Nevertheless, in the spirit of openness, we have reexamined the Concept of Operations to determine whether any non-exempt material could be segregated and released to you. Unfortunately, we have ultimately concluded the same today as we did in 2008: Any non-exempt information found within the Concept of Operations is so "inextricably intertwined" with exempt information that segregation would not be possible. *Mead Data Cntr., Inc. v. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). The exempt material is interspersed throughout the document in such a way that any releasable material would be of "little informational value." *FlightSafety Servs. Corp. v. Dep't of Labor*, 326 F.3d 607, 613 (5th Cir. 2003). As such, for all the same reasons that we previously withheld the Concept of Operations, we continue to do so today.

Please note that although you yourself may not seek this information for nefarious purposes, "it would appear obvious that those immediately and practically concerned with such matters would be individuals embarked upon clandestine and illicit operations, the detection of which would be frustrated if they were privy to the methods employed... to ferret them out." *Caplan v. Bureau of Alcohol, Tobacco & Firearms*, 587 F.2d 544, 547 (2d Cir. 1978).

In this case, the redacted information could provide wrongdoers with information necessary to avoid detection by the agency or otherwise manipulate information after they had been detected. The release of this information could increase the risk of circumvention of laws and regulations, compromise the electronic records system, facilitate improper access to sensitive investigatory and other law enforcement records,

impede effectiveness of law enforcement activities, and endanger agency investigatory practices and techniques. Given these weighty interests, this information has been properly redacted.

Non-Responsive Information

You will find a small amount of material in the attached Lab Directive has been withheld as "non-responsive." Your request specifically requested information related to data extraction. The limited information that has been redacted as "non-responsive" refers to post-extraction data analysis and thus falls outside the scope of your request.

Alternatively Available Records

Although the FOIA requires an agency to "make records promptly available to any person," 5 U.S.C. § 552 (a)(3), "an agency need not respond to a FOIA request for copies of documents where the agency itself has provided an alternative form of access." *Martinez v. Bureau of Prisons*, 444 F.3d 620, 624 (D.C. Cir. 2006) (quoting *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57 (D.C. Cir. 1990)). In such circumstances, the agency continues to uphold the policy goals of the FOIA and "is not seeking to mask its processes or functions from public scrutiny." *SDC Development Corp. v. Mathews*, 542 F.2d 1116, 1120 (9th Cir. 1976).

Ms. Pullo explained that 14 pages of responsive records were available on CBP's public website. In his memorandum instructing federal agencies on FOIA practice, Attorney General Eric Holder said that "agencies should readily and systematically post information online in advance of any public request" highlighting the fact that "providing more information online reduces the need for individualized requests and may help reduce existing backlogs."

In furtherance of those goals, CBP regularly posts information to its FOIA Library, accessible, as Ms. Pullo described, via the agency's website, http://www.cbp.gov. Records responsive to your second and fifth requests are available – without any redactions – on that site. The nine-page document responsive to your second request, Border Search of Electronic Devices Containing Information, is located on pages 43 through 52 of a larger grouping of CBP Policies and Procedures titled Electronic Devices: Directives and Policies Related to Inspection and Search. The five-page document responsive to the fifth portion of your request is a stand alone document titled CBP Policy Regarding Border Search of Information.

The ability to access these records on the agency's public website easily qualifies as an "alternative form of access" to satisfy the agency's responsibilities under the FOIA. We therefore uphold Ms. Pullo's decision not to include those records in her previous response to your request.

Right to Judicial Review

In the event that you are dissatisfied with the disposition of your appeal, you may obtain judicial review of this decision pursuant to the provisions of 5 U.S.C. §552(a)(4)(B) in the United States District Court in the District in which you reside, in the District where the agency records are situated, or in the United States District Court for the District of Columbia.

The Office of Government Information Services (OGIS) also mediates disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. If you wish to contact OGIS, you may email them at ogis@nara.gov or call 1-877-684-6448.

Sincerely,

Shari Suzuki, Chief
FOIA Appeals, Policy and Litigation Branch