

VIA E-MAIL

June 13, 2017

Catrina Pavlik-Keenan
FOIA Officer
United States Immigration and Customs Enforcement
Freedom of Information Act Office
500 12th Street, SW, Stop 5009
Washington, D.C. 20536-5009
ice-foia@dhs.gov

Dear Ms. Pavlik-Keenan,

This letter constitutes a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. 552(a)(3), and is submitted on behalf of the Electronic Privacy Information Center (“EPIC”) to United States Immigration and Customs Enforcement (“ICE”).

Over the last three years, ICE signed contracts with multiple mobile forensic technology companies totaling \$5.3M, including a \$2M purchase from Cellebrite in March 2017. Since the 2009 Privacy Impact Assessment on Border Searches of Electronic Devices (“PIA”), ICE also has not released guidance, reports, or policies discussing updated technology or search capabilities used at the border. DHS should have conducted a new Privacy Impact Assessment upon procuring and implementing any new technology¹ and there should be new guidance for ICE officers on its use.

EPIC seeks ICE’s contracts, PIAs, policies and procedures, and other documents related to the purchase and use of mobile forensic devices and technology.

Documents Requested

(1) All recent ICE contracts related to purchase of mobile forensics devices and technology, including cloud data analysis² and decryption. Contract numbers and vendors attached.

(2) All guidance, training materials, manuals, or other policies and procedures on ICE use of mobile data forensics technology at the border and in the US interior, including the use of cloud analysis and decryption.

¹ U.S. Department of Homeland Security, *Privacy Impact Assessments* (Aug. 24, 2015), <https://www.dhs.gov/privacy-impact-assessments> (last visited June 8, 2017).

² “Cloud data analysis” includes technology and software which enable access to and copying of data located on social media, online storage, and other digitally based applications and programs.

(3) All ICE Privacy Impact Assessments, or other privacy and civil liberties assessments, dated after August 29, 2009 and involving mobile forensic technology, including for decryption and cloud analysis.

Background

ICE is one of the largest law enforcement organizations in the United States. The agency enforces federal border laws and conducts homeland security investigations, operating both at the US border and the interior.³

ICE's law enforcement activities frequently include mobile device searches. Within the past year, DHS increased the number mobile device searches at the border fivefold,⁴ impacting both US citizens and international travelers.⁵ Several American citizens have reported being forced to unlock their phones or provide passwords and subsequently having their phones searched in front of them or taken and held for several hours before being returned.⁶ Yet cell phone privacy carries Constitutional significance. In the U.S. interior, cell phone searches incident to arrest require a warrant.⁷ However, at the border, cell searches are still bound by the limited, dual purposes of the border search exception: the detection of contraband and entitlement to enter the country.⁸

Over the last several years, ICE tested the devices made by⁹ and signed contracts with multiple providers of mobile forensic technology, totaling \$5.4M.¹⁰ In March 2017, ICE made their largest purchase yet, a new \$2M purchase from Cellebrite for "IT and

³ *Who We Are*, Ice.gov, <https://www.ice.gov/about>.

⁴ Gillian Flaccus, *Electronic media searches at border crossing raise worry*, AP News (Feb 18, 2017), <https://apnews.com/6851e00bafad45ee9c312a3ea2e4fb2c/electronic-media-searches-border-crossings-raise-worry>.

⁵ Cynthia McFadden et al, *American Citizens: U.S. Border Agents Can Search Your Cellphone*, NBC News (Mar 13, 2017, 3:06 PM), <http://www.nbcnews.com/news/us-news/american-citizens-u-s-border-agents-can-search-your-cellphone-n732746>.

⁶ *Id.* See also Loren Grush, *A US-born NASA scientist was detained at the border until he unlocked his phone*, The Verge (Feb 12, 2017, 12:37 PM) <https://www.theverge.com/2017/2/12/14583124/nasa-sidd-bikkannavar-detained-cbp-phone-search-trump-travel-ban>; Dael Victor, *What Are Your Rights if Border Agents Want to Search Your Phone?*, The New York Times (Feb 14, 2017), https://www.nytimes.com/2017/02/14/business/border-enforcement-airport-phones.html?_r=0.

⁷ *Riley v. California*, 134 S. Ct. 2473, 2493 (2014).

⁸ *Carroll v. United States*, 267 U.S. 132, 154 (1924).

⁹ DHS Cyber Forensics Science and Technology division has tested several mobile extraction devices from Cellebrite over the past few years, available at <https://www.dhs.gov/publication/mobile-device-acquisition>. The most recent test of UFED Touch 4.4.0. reveals the ability to extract not only data physically located on the phone like images and videos, but also cloud based social media data. See U.S. Department of Homeland Security Science and Technology Directorate Cyber Security Division, *UFED Touch v4.4.01-Internal Build 4.2.8.36 Test Results for Mobile Device Acquisition Tool* (July 11, 2016), https://www.dhs.gov/sites/default/files/publications/508_Test%20Report_NIST_UFED%20Touch%20v4.4.01%20-%20Internal%20Build%20v4.2.8.36_July_2016_Final.pdf

¹⁰ See Federal Procurement Data System report, available at https://www.fpds.gov/ezsearch/search.do?q=cellebrite+CONTRACTING_AGENCY_NAME%3A%22U.S.+IMMIGRATION+AND+CUSTOMS+ENFORCEMENT%22&s=FPDSNG.COM&templateName=1.4.4&indexName=awardfull.

Telecom-Web-Based Subscription.”¹¹ All previous purchases from Cellebrite were tagged for “Communications Security Equipment and Components” or “Operation Training Devices.”¹² Cellebrite offers a suite of Universal Forensic Extraction Devices (UFED) which unlock, decrypt, and extract phone data including “real-time mobile data, . . . call logs, contacts, calendar, SMS, MMS, media files, apps data, chats, passwords.”¹³ These tools include Cellebrite’s UFED Cloud Analyzer, which can extract private information – even without assistance from the owner - from users cloud based accounts, such as Facebook, Gmail, iCloud, Dropbox, and WhatsApp.¹⁴

Despite numerous new purchases from Cellebrite and other similar manufacturers, DHS’s public policies, assessments, and other public documents have not kept pace. In 2009, DHS published guidance and polices for electronic device searches at the border.¹⁵ The directive applies to all electronic devices and “information contained therein”, but makes no mention of cloud based data. It also offers no specifics about forensic mobile searches. Likewise, a DHS internal review of policies for the copying of data on electronic devices does not clarify if the procedures outlined apply only to data physically on the device or also to data accessed *through* the device.¹⁶ DHS also created a Privacy Impact Assessment for Border Searches of Electronic Devices in 2009, but has since issued no new relevant PIAs.¹⁷ The purchases at issue began in 2016, with testing of “mobile device acquisition” tools increasing over the past three years¹⁸, well after the last PIA.

Request for Expedition

EPIC is entitled to expedited processing of this request. 5 U.S.C. § 552(a)(6)(E)(v)(II). To warrant expedited processing, the FOIA request must concern a matter of (1) “urgency to inform the public about an actual or alleged federal government activity,” and, (2) the request must be “made by a person who is primarily engaged in disseminating information.” 6 C.F.R. § 5.5(e)(1)(ii). This request satisfies both requirements.

First, there is an “urgency to inform the public about an actual or alleged federal government activity.” § 5.5(e)(1)(ii). The “actual . . . federal government activity” at

¹¹ *Id.*

¹² *Id.*

¹³ Cellebrite Mobile Forensics sales materials, 6, available at <http://www.cellebrite.com/Media/Default/Files/Forensics/Solution-Briefs/Mobile-Forensics-Solution-Brief.pdf>

¹⁴ CelleBrite UFED Cloud Analyzer Supported Cloud-Based Data Sources, <http://www.cellebrite.com/Pages/ufed-cloud-analyzer> (last visited June 8, 2017).

¹⁵ U.S. Customs and Border Protection, CBP Directive No. 3340-049 (Aug. 20, 2009), https://www.dhs.gov/xlibrary/assets/cbp_directive_3340-049.pdf.

¹⁶ U.S. Customs and Border Protections, *Assessment and Recommendations*, (Aug. 20, 2010), <https://www.dhs.gov/xlibrary/assets/privacy/privacy-report-cbp-training-border-searches-electronic-devices.pdf>.

¹⁷ *Id.*

¹⁸ U.S. Department of Homeland Security Science and Technology Division, *Test Results for Mobile Device Acquisition*, <https://www.dhs.gov/publication/mobile-device-acquisition> (last visited June 12, 2017).

issue is ICE's multi-million dollar purchase and use of mobile forensic and cloud analysis technology. The Federal Procurement Data System confirms these purchase (see attached spreadsheet).

“Urgency” to inform the public about this activity is clear given the rise in mobile phone searches and the corresponding legal and policy debate. Searches of cellphones by border agencies “tripled from 857 in October 2015 to 2,560 in October 2016, rising to 2,595 in March 2017.”¹⁹ ICE also claims border enforcement authority 100 miles into the US interior, potentially subjecting millions on U.S. soil to mobile device searches if engaged by ICE. Yet, in *Riley v. California*, the U.S. Supreme Court recognized a Constitutionally significant privacy interest in mobile devices. 135 S.Ct. 2473 (2014). Mobile forensic analysis, which can even reach cloud based data, is a uniquely invasive technique raising special privacy concern, even at the border. Indeed, Congress is considering a bill that would require warrants for any mobile phone searches of U.S. persons at the border.²⁰ The bill specifically recognizes the unlawfulness of access to cloud based accounts without warrant.²¹

Second, EPIC is an organization “primarily engaged in disseminating information.” § 5.5(e)(1)(ii). As the Court explained in *EPIC v. Dep’t of Def.*, “EPIC satisfies the definition of ‘representative of the news media’” entitling it to preferred fee status under FOIA. 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

In submitting this detailed statement in support of expedited processing, I certify that this explanation is true and correct to the best of my knowledge and belief.

Request for “News Media” Fee Status and Fee Waiver

EPIC is a “representative of the news media” for fee classification purposes. *EPIC v. Dep’t of Def.*, 241 F. Supp. 2d 5 (D.D.C. 2003). Based on EPIC’s status as a “news media” requester, EPIC is entitled to receive the requested record with only duplication fees assessed. 5 U.S.C. § 552(a)(4)(A)(ii)(II); 6 C.F.R. § 5.11(d)(1).

Further, any duplication fees should also be waived because (1) disclosure of the requested information is “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government” and (2) disclosure is “not primarily in the commercial interest of the requester.” 5 U.S.C. §552(a)(4)(A)(iii); 6 C.F.R. § 5.11(k). This FOIA request meets all of ICE’s considerations for granting a fee waiver. 6 C.F.R. § 5.11(k)(2-3).

First, EPIC’s request satisfies all four considerations ICE evaluates to determine whether the first requirement for fee waiver – that disclosure “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government” - is met. § 5.11(k)(2). ICE considers: (i) the “subject of the

¹⁹ *Supra* note 7.

²⁰ Protecting Data at the Border Act, S. 823, 115 Congress (2017)

²¹ *Id.*

request must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated”; (ii) disclosure “must be meaningfully informative about government operations or activities in order to ‘likely to contribute’ to an increased public understanding of those operations or activities”; (iii) “disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester” and it “shall be presumed that a representative of the news media will satisfy this consideration”; and/or (iv) the “public's understanding of the subject in question must be enhanced by the disclosure to a significant extent.” § 5.11(k)(2)(i-iv).

To the first consideration, this request “concern[s] identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated.” § 5.11(k)(2)(i). The subject of the request is self-evidently a federal activity. The request involves ICE’s purchase and use of mobile forensic technology to carry out law enforcement functions.

To the second consideration, disclosure of the requested information will “be meaningfully informative about government operations or activities.” § 5.11(k)(2)(ii). Most citizens are not aware of the mobile forensic or cloud analysis capabilities possessed by ICE. While many travelers—particularly international travelers—are aware they may be questioned and searched at the border, they are likely unaware that private data stored in the cloud and not physically on their phones can also be searched. The disclosure of the purchase, use guidelines, and privacy impact assessment of mobile forensic and cloud analysis technology by ICE goes towards a direct understanding of government operations at the border. With over one million travelers crossing our border daily,²² this information impacts a vast range of range of American and international citizens.

To the third consideration, disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester,” because, as stated in the relevant FOIA regulation, it “shall be presumed that a representative of the news media will satisfy this consideration.” § 5.11(k)(2)(iii).

To the fourth consideration, the “public's understanding of the subject in question” will be “enhanced by the disclosure to a significant extent.” § 5.11(k)(2)(iv). As stated in detail on page three, despite numerous new, significant purchases of mobile forensic technology, DHS’s public directives, policies, Privacy Impact Assessments, and other public documents have not kept pace. The requested information will, therefore, enhance the public’s understanding of these device searches to a “significant extent.” *Id.*

Second, EPIC’s request also satisfies both considerations ICE evaluates to determine whether the second requirement for fee waiver – that disclosure is “not primarily in the commercial interest of the requester” - is met. § 5.11(k)(3). ICE

²² See U.S. Customs and Border Protection, “*Day in the Life*” Statistics: Fiscal Year 2016, <https://www.cbp.gov/newsroom/stats/typical-day-fy2016>

considers: (i) whether there is “any commercial interest of the requester... that would be furthered by the requested disclosure”; and/or (ii) whether “the public interest is greater than any identified commercial interest in disclosure.” § 5.11(k)(3)(i-ii).

To the first consideration, EPIC has no “commercial interest . . . that would be furthered by the requested disclosure.” § 5.11(k)(3)(i). EPIC is a registered non-profit organization committed to privacy, open government, and civil liberties.²³

To the second consideration, “the public interest is greater than any identified commercial interest in disclosure” because, as provided in the FOIA regulations, “[c]omponents ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester.” § 5.11(k)(3)(ii). As already described in detail above, EPIC is both news media requester and satisfies the public interest standard.

For these reasons, a full fee waiver should be granted.

Conclusion

Thank you for your consideration of this request. I anticipate your determination on our request within ten calendar days. 5 U.S.C. § 552(a)(6)(E)(ii)(I).

For questions regarding this request I can be contacted at 202-483-1140x111 or FOIA@epic.org.

Respectfully submitted,

/s/ Stevie DeGroff
Stevie DeGroff
EPIC IPIOP Clerk

²³ *About EPIC*, <http://epic.org/epic/about.html>

| Contract ID | Award/IDV Type | Vendor Name | Date Signed | Contracting Office Name |
|----------------|----------------|-------------------------|-------------|--|
| HSCEMD17P00012 | PURCHASE ORDER | CELLEBRITE INC. | 9-Mar-17 | MISSION SUPPORT DALLAS |
| HSCEMD16J00044 | DELIVERY ORDER | CELLEBRITE USA CORP | 17-Aug-16 | MISSION SUPPORT DALLAS |
| HSCEMD16J00037 | DELIVERY ORDER | CELLEBRITE USA CORP | 1-Aug-16 | MISSION SUPPORT DALLAS |
| HSCEMD16P00017 | PURCHASE ORDER | GUIDANCE SOFTWARE, INC. | 11-Feb-16 | INVESTIGATIONS AND OPERATIONS SUPPORT DALLAS |
| HSCEMD16P00033 | PURCHASE ORDER | CELLEBRITE USA CORP | 25-Apr-16 | MISSION SUPPORT DALLAS |
| HSCETE16F00037 | DELIVERY ORDER | MSAB INCORPORATED | 27-Jul-16 | INFORMATION TECHNOLOGY DIVISION |
| HSCEMD16J00021 | DELIVERY ORDER | CELLEBRITE USA CORP | 29-Jun-16 | MISSION SUPPORT DALLAS |
| HSCETE16P00035 | PURCHASE ORDER | SUSTEEN INC | 26-Aug-16 | INFORMATION TECHNOLOGY DIVISION |
| HSCETE17F00004 | DELIVERY ORDER | OXYGEN FORENSICS INC. | 3-Mar-17 | INFORMATION TECHNOLOGY DIVISION |
| HSCEMD16P00033 | PURCHASE ORDER | CELLEBRITE USA CORP | 15-Jun-16 | MISSION SUPPORT DALLAS |
| HSCEMD16J00002 | DELIVERY ORDER | CELLEBRITE USA CORP | 22-Jan-16 | INVESTIGATIONS AND OPERATIONS SUPPORT DALLAS |
| HSCETE17J00166 | DELIVERY ORDER | CELLEBRITE USA CORP | 25-May-17 | INFORMATION TECHNOLOGY DIVISION |
| HSCEMD16J00036 | DELIVERY ORDER | CELLEBRITE USA CORP | 1-Aug-16 | MISSION SUPPORT DALLAS |
| HSCETE16J00048 | DELIVERY ORDER | CELLEBRITE USA CORP | 2-Mar-16 | INFORMATION TECHNOLOGY DIVISION |
| HSCEMD16J00034 | DELIVERY ORDER | CELLEBRITE USA CORP | 28-Jul-16 | MISSION SUPPORT DALLAS |
| HSCEMD16P00092 | PURCHASE ORDER | CELLEBRITE USA CORP | 12-Aug-16 | MISSION SUPPORT DALLAS |
| HSCETE16P00006 | PURCHASE ORDER | MSAB INCORPORATED | 2-Mar-16 | INFORMATION TECHNOLOGY COMMODITIES |
| HSCEMD16P00057 | PURCHASE ORDER | CELLEBRITE USA CORP | 1-Jul-16 | MISSION SUPPORT DALLAS |
| HSCEMD16J00049 | DELIVERY ORDER | CELLEBRITE USA CORP | 22-Aug-16 | MISSION SUPPORT DALLAS |
| HSCEMD17J00025 | DELIVERY ORDER | CELLEBRITE USA CORP | 28-Apr-17 | MISSION SUPPORT DALLAS |
| HSCEMD16J00026 | DELIVERY ORDER | CELLEBRITE USA CORP | 13-Jul-16 | MISSION SUPPORT DALLAS |
| HSCEMD16J00047 | DELIVERY ORDER | CELLEBRITE USA CORP | 7-Sep-16 | MISSION SUPPORT DALLAS |
| HSCEMD16J00005 | DELIVERY ORDER | CELLEBRITE USA CORP | 20-Apr-16 | MISSION SUPPORT DALLAS |
| HSCETE17F00004 | DELIVERY ORDER | OXYGEN FORENSICS INC. | 29-Mar-17 | INFORMATION TECHNOLOGY DIVISION |