

December 3, 2021

VIA CERTIFIED MAIL & FOIAonline

FOIA Officer
U.S. Customs and Border Protection
90 K Street, NE
FOIA Division
Washington, DC 20229

To Whom It May Concern:

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 the Department of Homeland Security’s (“DHS”) U.S. Customs and Border Protection (“CBP”).

EPIC requests records related to CBP’s communications and contracts with Babel Street and purchase and use of Babel Street’s software. Babel Street sells a location-tracking software called Locate X, which reportedly allows users to access current, retrospective, and subsequent location data from cell phones that enter certain physical perimeters.¹

Documents Requested

EPIC requests disclosure of the following documents:

1. All emails, communications, and memoranda:
 - a. Shared between CBP and any representative from Babel Street;
 - b. Or referencing Babel Street, Locate X;
 - c. Or shared since 2017 and mentioning location data or geolocation;
2. All contracts, contract proposals, purchase card transaction worksheets, quotes, invoices, receipts, orders, and licenses:
 - a. Between CBP and Babel Street;
 - b. Between CBP and other vendor(s) mentioning Babel Street or Locate X;
3. All presentations and sales or marketing materials mentioning Babel Street or Locate X;
4. Any training materials, handbooks, or presentations:
 - a. Mentioning Babel Street or Locate X;
 - b. Or concerning the collection, use, disclosure/dissemination, or retention of location data and created or shared since 2017;
5. Any Privacy Impact Assessments (PIAs), Privacy Threshold Analysis (PTAs), privacy policies, instructions, directives, or other privacy analyses:
 - a. Concerning use of Babel Street software or Locate X;

¹ Charles Levinson, *Through Apps, Not Warrants, ‘Locate X’ Allows Federal Law Enforcement to Track Phones*, PROTOCOL (Mar. 5, 2020), <https://www.protocol.com/government-buying-location-data>.

- b. Or concerning the collection, use, disclosure/dissemination, or retention of location data or geolocations;
6. All reports, legal analyses, white papers, talking points, and briefing materials:
 - a. Concerning use of Babel Street software or Locate X and shared by or with CBP since 2017;
 - b. Or concerning the collection, use, disclosure/dissemination, or retention of location data or geolocations and shared by or with CBP since 2017.

EPIC requests all responsive documents in electronic format to be emailed directly to FOIA.cbp@epic.org.

Background

Babel Street is a U.S.-based technology company that sells the location-tracking software Locate X.² To track cell phones, Locate X uses location data acquired from data brokers that, in turn, compile data from mobile applications. As one former official reported to *Protocol*, Locate X allows government officials to “draw . . . a geo-fence around the vicinity of [a] site,” capture cell phones that had been in that site at a certain time, and identify the prior and subsequent movements of those devices.³ Locate X can also be used by federal officials to “identify mobile devices carried near popular border crossing points into the U.S. and pull up the historical location data for those devices, viewing where they’ve been in the preceding months.”⁴

Government spending data shows CBP has contracted with Babel Street or for Babel Street software several times since 2017. CBP entered into a \$981k contract for Babel Street

² *Babel Street*, BABEL STREET, <https://www.babelstreet.com>.

³ Levinson, *supra* note 1.

⁴ *Id.*

software in 2017,⁵ followed by a \$3.8m contract in 2021.⁶ Other DHS agencies⁷ and other federal agencies⁸ have entered into substantial contracts for Babel Street software as well.

The public has the right to know about CBP's purchase and use of Babel Street location-tracking software. CBP's contracts with Babel Street are especially troubling in light of the 2018 Supreme Court decision in *Carpenter v. United States*, which held unconstitutional the government's warrantless access of cell site location information.⁹ Especially concerning to the Supreme Court was how rapid technological developments are providing the government with a previously unanticipated level of access to extensive information about individuals.¹⁰ Despite this Supreme Court decision, CBP's contracts with Babel Street are one of several attempts by DHS agencies to obtain location data through third party commercial vendors.¹¹ CBP should produce documents informing the public about its contracts and communications with Babel Street, how it is employing Babel Street's location-tracking technology, and how it is assessing the software's risks to privacy rights.

⁵ *Delivery Order (DO)*, PIID No. HSBP1017J00831, USASPENDING, https://www.usaspending.gov/award/CONT_AWD_HSBP1017J00831_7014_HSHQDC13D00026_7001 (Delivery Order from CBP to Thundercat Technology, LLC for \$981k with a September 21, 2017 start date).

⁶ *Delivery Order (DO)*, PIID No. 70B03C21F00001121, USASPENDING, https://www.usaspending.gov/award/CONT_AWD_70B03C21F00001121_7014_HSHQDC12D00013_7001 (Delivery Order from CBP to Panamerica Computers, Inc. for \$3.8m with a September 22, 2021 start date).

⁷ See, e.g., *Definitive Contract*, PIID No. 70US0921C70090075, USAspending, https://www.usaspending.gov/award/CONT_AWD_70US0921C70090075_7009_-NONE_-NONE- (Definitive Contract from the U.S. Secret Service to Babel Street for \$229k with a September 22, 2021 start date); *Purchase Order (PO)*, PIID No. 70Z08420PXVA03000, USAspending, https://www.usaspending.gov/award/CONT_AWD_70Z08420PXVA03000_7008_-NONE_-NONE- (Purchase Order from the U.S. Coast Guard to Babel Street for \$166k with a January 29, 2020 start date); *Blanket Purchase Agreement (BPA) Call*, PIID No. 70CMSD19FC0000052, USASPENDING, https://www.usaspending.gov/award/CONT_AWD_70CMSD19FC0000052_7012_70CMSD19A00000007_7012 (Blanket Purchase Agreement Call from ICE to Babel Street, Inc. for \$1.5m with a September 12, 2019 start date); *Delivery Order (DO)*, PIID No. 70CMSD18FR0000226, USASPENDING, https://www.usaspending.gov/award/CONT_AWD_70CMSD18FR0000226_7012_HSHQDC13D00002_7001 (Delivery Order from ICE to Thundercat Technology, LLC for \$1.1m with a September 19, 2018 start date).

⁸ See, e.g., *Definitive Contract*, PIID No. 2032H321C00020, USAspending, https://www.usaspending.gov/award/CONT_AWD_2032H321C00020_2001_-NONE_-NONE- (Definitive Contract from the Department of the Treasury to Babel Street for \$28k (and a \$154k potential amount) with a July 15, 2021 start date); *Delivery Order (DO)*, PIID No. 19AQMM18F4045, USAspending, https://www.usaspending.gov/award/CONT_AWD_19AQMM18F4045_1900_NNG15SD26B_8000 (Delivery Order from the Department of State to Thundercat Technology, LLC for \$125k with a September 20, 2018 start date); *Purchase Order (PO)*, PIID No. DJM17A32P0036, USAspending, https://www.usaspending.gov/award/CONT_AWD_DJM17A32P0036_1544_-NONE_-NONE- (Purchase Order from the Department of Justice to Babel Street for \$61k with a September 11, 2017 start date); *Purchase Order (PO)*, PIID No. W912K316P0032, USAspending, https://www.usaspending.gov/award/CONT_AWD_W912K316P0032_9700_-NONE_-NONE- (Purchase Order from the Department of Defense to Thundercat Technology, LLC for \$20k with an August 9, 2016 start date).

⁹ *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

¹⁰ *Id.* at 2217-19, 2223.

¹¹ See Rani Molla, *Law Enforcement is Now Buying Cellphone Location Data from Marketers*, VOX RECODE (Feb. 7, 2020), <https://www.vox.com/recode/2020/2/7/21127911/ice-border-cellphone-data-tracking-department-homeland-security-immigration>.

Expedited Review

EPIC is entitled to expedited processing of this request because there is an urgency to inform the public about a government activity.¹² Under DHS FOIA regulations, a request shall be “given expedited treatment” when there is “an urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information.”¹³ EPIC’s request qualifies for expedited processing under these grounds.

First, there is a clear urgency to inform the public about DHS’s use of location-tracking technology. As evidenced by media publications and statements by congressional representatives, the public is growing increasingly concerned by government surveillance, particularly the government location-tracking practices and access to detailed location data.¹⁴ Moreover, there is an urgency to inform the public about CBP’s use of this software on immigrants, noncitizens, and immigrant communities. DHS agencies have faced considerable public scrutiny in the last few years and even in the last few weeks about their practices of targeting noncitizens, infringing on their rights, and displaying a lack of respect for their human dignity.¹⁵

Second, EPIC is an organization “primarily engaged in disseminating information” as a news media requester.¹⁶ As the Court explained in *EPIC v. DOD*, “EPIC satisfies the definition of ‘representative of the news media’” under the FOIA.¹⁷ Accordingly, EPIC is entitled to expedited processing of this request under 6 C.F.R. § 5.5(d)(1)(ii).

¹² 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5(e)(1)(ii).

¹³ 6 C.F.R. § 5.5(d)(1)(ii).

¹⁴ See, e.g., Levinson, *supra* note 1; Molla, *supra* note 11; Byron Tau, *Law Enforcement’s Use of Commercial Phone Data Stirs Surveillance Fight*, WALL ST. J. (Sept. 15, 2021), <https://www.wsj.com/articles/law-enforcements-use-of-commercial-phone-data-stirs-surveillance-fight-11631707201>; Joseph Cox, *CBP Refused to Tell Congress How It Is Tracking Americans Without a Warrant*, VICE MOTHERBOARD (Oct. 23, 2020), <https://www.vice.com/en/article/n7vwex/cbp-dhs-venntel-location-data-no-warrant> (discussing Senators Ron Wyden, Elizabeth Warren, Sherrod Brown, Ed Markey, and Brian Schatz’ calls on “the DHS Office of the Inspector General (DHS OIG) to investigate CBP’s warrantless domestic surveillance of phones”); Zak Doffman, *COVID-19 Phone Location Tracking: Yes, It’s Happening Now—Here’s What You Should Know*, FORBES (Mar. 27, 2020), <https://www.forbes.com/sites/zakdoffman/2020/03/27/covid-19-phone-location-tracking-its-moving-fast-this-is-whats-happening-now/?sh=367d213111d3>;

¹⁵ See, e.g., Eileen Sullivan & Zolan Kanno-Youngs, *Images of Border Patrol’s Treatment of Haitian Migrants Prompt Outrage*, N.Y. TIMES (Sept. 21, 2021), <https://phr.org/our-work/resources/zero-protection-how-u-s-border-enforcement-harms-migrant-safety-and-health>; Jasmine Aguilera, *‘Family Separation 2.0.’ Parents in ICE Detention Have to Decide Whether to Keep Their Children or Release Them to Sponsors*, TIME (July 27, 2020), <https://time.com/5866659/ice-parents-children-detention-coronavirus-release>; *Family Separation Under the Trump Administration – A Timeline*, S. POVERTY L. CTR. (June 17, 2020), <https://www.splcenter.org/news/2020/06/17/family-separation-under-trump-administration-timeline>; Grace Meng, *ICE Raids on US Immigrant Families Risk Serious Abuses*, HRW (July 12, 2019), <https://www.hrw.org/news/2019/07/12/ice-raids-us-immigrant-families-risk-serious-abuses-0>; Kathryn Hampton, *Zero Protection: How U.S. Border Enforcement Harms Migrant Safety and Health*, Physicians for Human Rts. (Jan. 10, 2019), <https://phr.org/our-work/resources/zero-protection-how-u-s-border-enforcement-harms-migrant-safety-and-health>.

¹⁶ 6 C.F.R. § 5.5(e)(1)(ii).

¹⁷ 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

In submitting this request for expedited processing, EPIC certifies that this explanation is true and correct to the best of its knowledge and belief.¹⁸

Fee Waiver

EPIC is a “representative of the news media” for fee classification purposes.¹⁹ Because EPIC is a “news media” requester and, as a non-profit organization, has no commercial interest in the requested records, EPIC is entitled to receive the requested records with only duplication fees assessed.²⁰

In addition, any duplication fees should be waived because: (1) “[d]isclosure 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) “[d]isclosure of the information is not primarily in the commercial interest of” EPIC.²¹

(1) Disclosure of the requested information will contribute significantly to public understanding of government activities.

DHS components evaluate four factors to determine whether a disclosure is in the public interest: (i) whether the subject of the requested records concerns “identifiable operations or activities of the federal government”; (ii) whether the disclosure is “meaningfully informative about government operations or activities in order to be ‘likely to contribute’ to an increased public understanding of those operations or activities”; (iii) whether the disclosure contributes “to the understanding of a reasonably broad audience of persons interested in the subject”; and (iv) whether “the public’s understanding of the subject” will be “enhanced by the disclosure to a significant extent.”²² EPIC’s request satisfies all four factors.

First, the requested records “concern identifiable operations or activities of the federal government.”²³ The government has documented in its spending data its purchases of Babel Street software.²⁴ It is therefore “direct and clear” that the federal government has engaged in this government activity.²⁵

Second, disclosure of the requested records is “‘likely to contribute’ to an increased public understanding of . . . government operations or activities.”²⁶ Disclosure would be “meaningfully informative about government operations or activities” because the government

¹⁸ 5 U.S.C. § 552(a)(6)(E)(vi); 6 C.F.R. § 5.5(e)(3).

¹⁹ *EPIC v. DOD*, 241 F. Supp. 2d at 15.

²⁰ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 6 C.F.R. § 5.11(c)(2).

²¹ 6 C.F.R. § 5.11(k)(1)(i)–(ii); *see also* 5 U.S.C. § 552(a)(4)(A)(iii).

²² 6 C.F.R. § 5.11(k)(2).

²³ *Id.* § 5.11(k)(2)(i).

²⁴ *See supra* notes 5-8 and accompanying text.

²⁵ § 5.11(k)(2)(i).

²⁶ *Id.* § 5.11(k)(2)(ii).

has not been transparent about its communications with Babel Street, Locate X, or its purchase and use of location data generally.²⁷

Third, disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in the subject,” because CBP must “presume[] that a representative of the news media,” such as EPIC, “will satisfy this consideration.”²⁸ The requested records will reach a large audience through EPIC’s website and its online newsletter, the *EPIC Alert*.²⁹ EPIC’s FOIA work is also frequently covered by major media outlets.³⁰

Fourth, “[t]he public’s understanding of the subject in question” will be “enhanced by the disclosure to a significant extent.”³¹ Little is known about how Babel Street’s Locate X software works and how CBP is implementing the software.³² Disclosure of the requested records will help the public better understand how, where, and on whom the two agencies are using this technology and how CBP is justifying the use in light of the privacy risks at stake and the constitutional restrictions on location-tracking technology.

(2) Disclosure of the information is not primarily in the commercial interest of the requester.

EPIC’s request satisfies the “commercial interest” condition for a fee waiver because disclosure of the requested information is “not primarily in the commercial interest” of EPIC, the requester.³³ EPIC has no “commercial interest that would be furthered by the requested disclosure.”³⁴ EPIC is a registered non-profit organization committed to open government, privacy, and civil liberties.³⁵ DHS regulations state that DHS components “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.”³⁶ As described above, EPIC is a news media requester and satisfies the public interest standard.

For these reasons, EPIC’s request for a fee waiver should be granted.

²⁷ See Levinson, *supra* note 1 (discussing the secrecy surrounding Locate X); Cox, *supra* note 11 (discussing how CBP “is refusing to tell Congress what legal authority the agency is following to use commercially bought location data to track Americans without a warrant”); see also Nathan Freed Wessler, *The U.S. Government Is Secretly Using Cell Phone Location Data to Track Us. We’re Suing*, ACLU (Dec. 2, 2020) (discussing lawsuit to compel government response to FOIA request seeking records related to DHS purchase of location data from Venntel, Inc.).

²⁸ *Id.* § 5.11(k)(2)(iii).

²⁹ See EPIC, *About EPIC*, <https://epic.org/epic/about.html>.

³⁰ See EPIC, *EPIC in the News*, https://epic.org/news/epic_in_news.php.

³¹ 6 C.F.R. § 5.11(k)(2)(iv).

³² See *supra* note 27 and accompanying text.

³³ § 5.11(k)(1)(ii).

³⁴ *Id.* § 5.11(k)(3)(i).

³⁵ EPIC, *About EPIC* (2019), <https://epic.org/epic/about.html>.

³⁶ 5.11(k)(3)(ii).

Conclusion

Thank you for your consideration of this request. EPIC anticipates your determination on its request within ten calendar days.³⁷ For questions regarding this request contact Jeramie Scott at (202) 483-1140 x108 or FOIA@epic.org, cc:jscott@epic.org.

Respectfully submitted,

/s Jeramie Scott

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³⁷ 5 U.S.C. § 552(a)(6)(E)(ii)(I).