

VIA MAIL

July 17, 2017

U.S. Immigration and Customs Enforcement
Office of the Principal Legal Advisor
U.S. Department of Homeland Security
500 12th Street, S.W., Mail Stop
5900 Washington, D.C. 20536-5900

Freedom of Information Act Appeal, 2017-ICFO-33419

This letter constitutes an appeal of ICE's denial of expedited processing under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552(a)(3).

EPIC requested twenty-four purchase contracts for mobile forensic technology and all Privacy Impact Assessments ("PIA"), policies, and other documents associated with these purchases from the Immigration and Customs Enforcement ("ICE"). The EPIC FOIA Request established an "urgency to inform the public" about a matter "concerning actual or alleged Federal government activity" and EPIC is "primarily engaged in disseminating information." *See* Appendix A. In an email dated June 20, 2017, ICE denied EPIC's request for expedited processing of EPIC's FOIA Request. *See* Appendix B.

EPIC appeals ICE's denial of expedited processing of EPIC's FOIA Request.

Procedural Background

On June 13, 2017, EPIC submitted EPIC's FOIA Request to ICE via fax. EPIC requested:

- (1) All recent ICE contracts related to purchase of mobile forensics devices and technology, including cloud data analysis¹ 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.
- (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.

¹ "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.

EPIC also requested expedited processing and a fee waiver.

In an email dated June 20, 2017 and received by EPIC that same day, ICE granted EPIC's fee waiver but denied EPIC's expedited processing request ("ICE's June 20th Response"). See Appendix B. EPIC's request was designated ICE case number 2017-ICFO-33419.

EPIC appeals ICE's Denial of Expedited Processing

EPIC is entitled to expedited processing because this request involves a "compelling need." 5 U.S.C. § 552(a)(6)(E)(v)(II). Specifically, the request involves an "urgency to inform the public," about a matter "concerning actual or alleged Federal government activity," and is "made by a person primarily engaged in disseminating information." § 552(a)(6)(E)(v)(II); § 6 C.F.R. 5.5(e)(1)(ii). Additionally, this request concerns "a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." §5.5(e)(1)(iv).

First, there is an "urgency to inform the public" about ICE's purchase and use of mobile and cloud forensic technology at the border. § 5.5(e)(1)(ii). Details regarding the use of mobile and cloud forensic technology at the border is of critical concern to both citizens and elected officials. Congress is currently considering the "Protecting Data at the Border Act", which would require law enforcement to get a warrant for probable cause before the search and seizure of a U.S. citizens phone at the border. S. 823, 115th Cong. (2017). This requirement would extend to both electronic data stored on the device and to any online account searched through the phone. Sen. Ron Wyden (D-Ore.), Sen. Rand Paul(R-Ky.), and Rep. Jared Polis (D-Colo.), and Rep. Blake Farenthold (R-Texas), introduced this bi-partisan bill on April 4, 2017. Additionally, Sen. Wyden sent a letter to DHS on March 20, 2017 requesting additional details about DHS accessing cloud based accounts through traveler's electronic devices.² He has yet to receive a reply to this request.³ The proposed bill and letter concern the exact type of activity which is the subject of EPIC's FOIA Request. A detailed understanding of the technical capability, historical use, governing procedures, data accessed, and privacy impact of mobile and cloud forensic searches is critical to a timely public debate of the bill.

Congress is also in the middle of congressional budget hearings for DHS's 2018 budget. This includes a request for \$7.5 billion in discretionary funding for ICE.⁴ Available records indicate a recent increase in spending on mobile and cloud forensic technology by ICE, with the largest single purchase of \$2 million occurring earlier this year.⁵ A deeper understanding of what is

² Ron Wyden, Letter to Department of Homeland Security Secretary John Kelly, Feb. 20, 2017, available at <https://www.wyden.senate.gov/download/letter-to-dhs-re-border-searches>.

³ Office of Ron Wyden, April 4, 2017 Press Release, available at <https://www.wyden.senate.gov/news/press-releases/wyden-paul-polis-and-farenthold-bill-requires-warrants-to-search-americans-digital-devices-at-the-border>

⁴ John F. Kelly, testimony before U.S. Senate Committee on Homeland Security and Governmental Affairs (Jun 6, 2017), available at <http://www.hsgac.senate.gov/download/kelly-testimony-06-06-2017>

⁵ Federal Procurement Data System public records search, https://www.fpds.gov/ezsearch/search.do?q=Cellebrite+PIID%3A%22HSCEMD17P00012%22&s=FPDSNG.COM&templateName=1.4.4&indexName=awardfull&sortBy=OBLIGATED_AMOUNT&desc=Y. See also Thomas Fox-Brewster, *US Immigration Splurged \$2.2 Million On Phone Hacking Tech Just After Trump's Travel Ban* (Apr. 13, 2017, 8:30AM),

being purchased is critical to fairly evaluate this large budget request. Without full details concerning the kind and use of mobile and cloud forensic technology by ICE, both the American public and their representatives remain in the dark about the scope of this technology as well as impact on their privacy as they evaluate pending legislation.

Second, this subject of public urgency concerns “actual or alleged Federal government activity.” § 5.5(e)(1)(ii). The search of mobile phones and use of mobile forensic technology at the border has been both reported by citizens and confirmed by government officials. ICE has documented the ability of the mobile forensic technology purchased to extract data from both phones and cloud accounts associated with a phone⁶. The 2009 Privacy Impact Assessment for Electronic Device Searches⁷ and related policy review document⁸ outline procedures for both physical and forensic electronic device searches at the border. In oral testimony before the Homeland Security and Governmental Affairs Committee, DHS Secretary John Kelly confirmed that DHS and ICE may search and hold phones at the border from travelers “whether they are citizens or non-citizens coming in” and confirmed there are procedures for the search of phones at the border.⁹

Secretary Kelly’s testimony corroborates numerous reports of mobile search activity at the border. NBC reporters documented twenty-five separate cases of American citizens being forced to unlock and/or turn over their phones for search at the border, including one citizen who reports being tackled and held in a choke hold for refusing to hand over his phone.¹⁰ A NASA employee also reported being detained while his government issued phone was searched by border agents in a separate room.¹¹ Similarly, an American traveler reported being questioned, handcuffed, and forced to unlock his phone for search before being allowed to leave the United States.¹²

Aside from these anecdotal reports, DHS and CPB data indicates an increase in electronic device searches at the border in 2016, with 5000 searches conducted by DHS agencies, including ICE, in February 2017 alone.¹³ Former DHS chief privacy officer Mary Ellen Callahan called this increase “significant” and noted that the increase “was clearly a conscious strategy [and] not happenstance.”¹⁴ Taken together with citizen’s stories and government statements, it is clear that

<https://www.forbes.com/sites/thomasbrewster/2017/04/13/post-trump-order-us-immigration-goes-on-mobile-hacking-spending-spree/#5b9648d7a1fc>.

⁶ Department of Homeland Security, Computer Forensics Tool Testing reports, available at

<https://www.dhs.gov/publication/mobile-device-acquisition>.

⁷ Thomas S. Winkowski and Kumar C. Kibble, *Privacy Impact Assessment for the Border Searches of Electronic Devices*, Department of Homeland Security (Aug. 25, 2009),

https://www.dhs.gov/sites/default/files/publications/privacy_pia_cbp_laptop.pdf.

⁸ 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>.

⁹ Senator Rand Paul, *Sen. Rand Paul to DHS: Bill of Rights should protect Americans returning from overseas - 6/6/17*, YouTube (Jun. 6, 2017), <https://www.youtube.com/watch?v=GNaWkWm5Vjc>

¹⁰ Cynthia McFadden et al., *American Citizens: U.S. Border Agents Can Search Your Cell Phone*, NBC News (Mar. 13, 2017, 7:29PM), <http://www.nbcnews.com/news/us-news/american-citizens-u-s-border-agents-can-search-your-cellphone-n732746>

¹¹ Loren Grush, *A US-born NASA scientist was detained at the border until he unlocked his phone*, The Verge (Feb. 12, 2017, 12:37PM), <https://www.theverge.com/2017/2/12/14583124/nasa-sidd-bikkannavar-detained-cbp-phone-search-trump-travel-ban>

¹² Daniel Victor, *What Are Your Rights if Border Agents Want to Search Your Phone?*, New York Times (Feb. 14, 2017),

<https://www.nytimes.com/2017/02/14/business/border-enforcement-airport-phones.html>

¹³ *Supra* note 12.

¹⁴ *Id.*

the practice of federal agencies searching mobile phones at the border is an ongoing activity, and will likely continue to increase if 2017 trends continue.

Third, EPIC is an organization “primarily engaged in disseminating information,” § 1700.12(c)(2), because “EPIC satisfies the definition of ‘representative of the news media.’” *EPIC v. DOD*, 241 F.Supp.2d 5, 15 (D.D.C. 2003). EPIC “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(ii). As the Court in *EPIC v. DOD* explained, “EPIC researches issues on privacy and civil liberties, reports on this information, analyzes relevant data, evaluates the newsworthiness of material and puts the facts and issues into context, publishing and distributing this “news” to the public in books. 241 F. Supp. 2d at 11. Additionally, “every two weeks, for the past eight years, EPIC has published and disseminated its newsletter,” sharing “information that is about current interest to the public.” *Id.* at 13 (internal quotation marks and citations omitted).

Finally, this request concerns “a matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence.” §5.5(e)(1)(iv). Beginning in February 2017, there has been extensive national and international media coverage of mobile phone searches at the U.S. border by outlets such as NBC,¹⁵ CNN,¹⁶ The New York Times,¹⁷ NPR,¹⁸ The Atlantic,¹⁹ The Verge,²⁰ and The Guardian,²¹

¹⁵ Cynthia McFadden et al., *American Citizens: U.S. Border Agents Can Search Your Cell Phone*, NBC News (Mar. 13, 2017, 7:29PM), <http://www.nbcnews.com/news/us-news/american-citizens-u-s-border-agents-can-search-your-cellphone-n732746>; E.D. Cauchi, *What If U.S. Border Agents Ask for Your Cellphone?*, NBC News (Apr. 4, 2017, 12:56PM), <http://www.nbcnews.com/news/us-news/what-if-u-s-border-agents-ask-your-cellphone-n742511>; E.D. Cauchi, *Border Agents Searches of Americans’ Cellphones Spark Lawsuit*, NBC News (Mar. 28, 2017, 11:27 AM), <http://www.nbcnews.com/news/us-news/border-agent-searches-americans-cellphones-spark-lawsuit-n739491>; Cynthia McFadden, *Invasive phone searches of Americans are raising concerns*, Today Show (Mar. 14, 2017), <http://www.today.com/video/invasive-phone-searches-of-americans-are-raising-concerns-897425475534>.

¹⁶ Tal Kopan, *Privacy rights at border draw scrutiny under Trump immigration crackdown*, CNN (Mar. 18, 2017, 8:47 AM), <http://www.cnn.com/2017/03/18/politics/border-searches-trump-policy/index.html>; Tal Kopan, *First on CNN: Senator seeks answers on border cell phone searches*, CNN (Feb. 20, 2017, 3:42PM), <http://www.cnn.com/2017/02/20/politics/border-search-cell-phones-ron-wyden-dhs-letter/index.html>; Masuma Ahuja, *Can they search my phone? A guide to your rights at the border*, CNN (Feb. 16, 2017, 4:07PM), <http://www.cnn.com/2017/02/16/us/border-legal-rights-faq-trnd/index.html>; Emanuella Grinberg and Jay Croft, *American NASA scientist says his work phone was seized at airport*, CNN (Feb. 15, 2017, 5:57PM), <http://www.cnn.com/2017/02/13/us/citizen-nasa-engineer-detained-at-border-trnd/index.html>

¹⁷ Daniel Victor, *What Are Your Rights if Border Agents Want to Search Your Phone?*, New York Times (Feb. 14, 2017), <https://www.nytimes.com/2017/02/14/business/border-enforcement-airport-phones.html>; Brian X. Chen, *Crossing the Border? Here’s How to Safeguard Your Data From Searches*, New York Times (Mar. 21, 2017), <https://www.nytimes.com/2017/03/21/technology/personaltech/crossing-the-border-heres-how-to-safeguard-your-data-from-searches.html>; Vivan Yee, *‘They Treated Us Like Criminals’: U.S. Border Crossers Report Sever Reception*, New York Times (May 1, 2017), <https://www.nytimes.com/2017/05/01/us/customs-airports-trump.html>

¹⁸ Brian Naylor, *U.S. Border Patrol Agents Step Up Cellphone Searches*, NPR (Apr. 10, 2017), <http://www.npr.org/2017/04/10/523311433/u-s-border-patrol-agents-step-up-cell-phone-searches>; Brian Naylor, *More Travelers Entering U.S. Are Being Asked For Their Cellphones And Passwords*, NPR (Apr. 11, 2017), <http://www.npr.org/2017/04/11/523313829/more-travelers-are-being-asked-for-their-cellphones-and-passwords-entering-u-s>

¹⁹ Kaveh Waddell, *A Stand Against Invasive Phone Searches at the U.S. Border*, The Atlantic (Feb. 21, 2017), <https://www.theatlantic.com/technology/archive/2017/02/ron-wyden-border-searches/517353/>; Kaveh Waddell, *The Steady Rise of Digital Border Searches*, The Atlantic (Apr. 12, 2017), <https://www.theatlantic.com/technology/archive/2017/04/the-steady-rise-of-digital-border-searches/522723/>; Kaveh Waddell, *A NASA Engineer Was Required to Unlock His Phone at the Border*, The Atlantic (Feb. 13, 2017), <https://www.theatlantic.com/technology/archive/2017/02/a-nasa-engineer-is-required-to-unlock-his-phone-at-the-border/516489/>; Kaveh Waddell, *Give Us Your Passwords*, The Atlantic (Feb. 10, 2017), <https://www.theatlantic.com/technology/archive/2017/02/give-us-your-passwords/516315/>; Conor Friedersdorf, *A Fight to Restore*

among others. Google News saw a 464% increase in traffic related to “border phone search” in 2017.²²

Criticism regarding the government’s practice of mobile phone searches at the border is broad, stretching across partisan lines. Sen. Paul has voiced disapproval for this practice in both the press and in public congressional hearings, recently stating “Americans should not be asked to surrender their rights or privacy at the border”²³ and that he was “not happy” with the policy of seemingly arbitrary searches of mobile phones at the border.²⁴ Similarly, Rep. Farenthold stated “[j]ust because you cross the border doesn’t mean the government has a right to everything on your computer”²⁵ and Sen. Wyden noted “[i]n addition to violating the privacy and civil liberties of travelers, these digital dragnet border search practices weaken our national and economic security.”²⁶

Senators and private citizens have also voiced concern that this practice could be abused by ICE agents. Sen. Wyden introduced S. 823 in part because he felt the practice of searching phones at the border “is just going to grow and grow and grow” and he thought there was “tremendous potential for abuse.”²⁷ Former DHS officer Callahan also noted “that CBP’s increase in searches means it is exploiting the loophole in order to get information they otherwise might not have been able to.”²⁸ Hugh Handeyside from the ACLU’s National Security Project cautioned “[w]e see individual officers and perhaps supervisors as well pushing those limits, exceeding their authority and violating people’s rights.”²⁹

the Constitution at Customs Checkpoints, The Atlantic (Apr. 5, 2017), <https://www.theatlantic.com/politics/archive/2017/04/a-fight-to-restore-the-constitution-at-customs/521940/>

²⁰ Adi Robertson, *New bill would crack down on border phone searches without warrants*, The Verge (Apr. 4, 2017, 2:50PM), <https://www.theverge.com/2017/4/4/15180244/protecting-data-border-act-wyden-paul-device-security-bill>; Nick Statt, *ACLU says demanding US citizens unlock phones at the border is unconstitutional*, The Verge (May 4, 2017), <https://www.theverge.com/2017/5/4/15551492/aclu-us-customs-and-border-patrol-aaron-gach-phone-search>;

²¹ Olivia Solon, *US border agents are doing ‘digital strip searches’. Here’s how to protect yourself*, The Guardian (Mar 31, 2017, 6AM), <https://www.theguardian.com/us-news/2017/mar/31/us-border-phone-computer-searches-how-to-protect>; David Smith, *‘Extreme vetting’ would require visitors to US to share contacts and passwords*, The Guardian (Apr. 4, 2017, 12:16PM), <https://www.theguardian.com/us-news/2017/apr/04/trump-extreme-vetting-visitors-to-us-share-contacts-passwords>; Alex Hern, *UK tourists to US may get asked to hand in passwords or be denied entry*, The Guardian (Apr. 9, 2017, 1:58PM), <https://www.theguardian.com/us-news/2017/apr/09/uk-tourists-to-us-may-get-asked-to-hand-in-passwords-or-be-denied-entry>; Sam Thielman, *Homeland security misreported number of electronics searches, officials say*, The Guardian (Apr. 11, 2017, 6:23PM), <https://www.theguardian.com/us-news/2017/apr/11/homeland-security-searches-electronics-border>; Olivia Solon, *US border agents could make refugees and visa holders give social media logins*, The Guardian (Feb. 8, 2017, 3:48PM), <https://www.theguardian.com/us-news/2017/feb/08/border-security-facebook-password-trump-travel-ban>; Spencer Ackerman, *US government sued over ‘suspicionless’ device searches by customs officials*, The Guardian (Mar. 27, 2017, 1:54PM), <https://www.theguardian.com/law/2017/mar/27/us-customs-digital-device-searches-privacy-lawsuit-passwords>

²² Google Trends, https://trends.google.com/trends/explore?date=all_2008&geo=US&gprop=news&q=border%20phone%20search

²³ Office of Ron Wyden, April 4, 2017 Press Release, available at <https://www.wyden.senate.gov/news/press-releases/wyden-paul-polis-and-farenthold-bill-requires-warrants-to-search-americans-digital-devices-at-the-border>

²⁴ Senator Rand Paul, *Sen. Rand Paul to DHS: Bill of Rights should protect Americans returning from overseas - 6/6/17*, YouTube (Jun. 6, 2017), <https://www.youtube.com/watch?v=GNaWkWm5Vjc>

²⁵ Office of Ron Wyden, April 4, 2017 Press Release, available at <https://www.wyden.senate.gov/news/press-releases/wyden-paul-polis-and-farenthold-bill-requires-warrants-to-search-americans-digital-devices-at-the-border>

²⁶ Ron Wyden, Letter to Department of Homeland Security Secretary John Kelly, Feb. 20, 2017, available at <https://www.wyden.senate.gov/download/letter-to-dhs-re-border-searches>.

²⁷ Cynthia McFadden et al., *American Citizens: U.S. Border Agents Can Search Your Cell Phone*, NBC News (Mar. 13, 2017, 7:29PM), <http://www.nbcnews.com/news/us-news/american-citizens-u-s-border-agents-can-search-your-cellphone-n732746>

²⁸ *Id.*

²⁹ *Id.*

This concern has led to the publishing of dozens of guides for citizens seeking to protect their devices at the border.³⁰ One such video has been viewed over sixty thousand times.³¹ In his June 6th questioning of Secretary Kelly, Sen. Paul noted that “people are now talking, there are whole people giving you advice to not take your phone abroad because when you come back home your country won’t let you come home unless you let them look at your entire life.”³²

The media interest in and widespread concern over this practice combined with the need to inform the public about the nature and extent of mobile phone searches at the border due to pending legislation create a pressing need for EPIC to receive and disseminate the requested records which can only be met by expedited processing.

I certify that this explanation is true and correct to the best of my knowledge and belief. § 552(a)(6)(E)(vi).

For the foregoing reasons, EPIC is entitled to expedited processing of EPIC’s FOIA Request. 5 U.S.C. § 552(a)(6)(E)(iii); 6 C.F.R. §5.5(e)(1).

Conclusion

Thank you for your consideration of this appeal. I anticipate your determination on our appeal within twenty working days.

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

Respectfully submitted,

Stevie DeGroff
EPIC IPIOP Clerk

³⁰ E.g., Andy Greenberg, *A Guide to Getting Past Customs With Your Digital Privacy Intact*, Wired (Feb. 12, 2017), <https://www.wired.com/2017/02/guide-getting-past-customs-digital-privacy-intact/>; Electronic Frontier Foundation, *Digital Privacy at the U.S. Border: Protecting the Data On Your Devices and In the Cloud* (Mar. 10, 2017), <https://www.eff.org/wp/digital-privacy-us-border-2017>; American Civil Liberties Union, *Can Border Agents Search Your Electronic Devices? It’s Complicated* (Mar. 14, 2017, 10:45PM), <https://www.aclu.org/blog/free-future/can-border-agents-search-your-electronic-devices-its-complicated>; Masuma Ahuja, *Can they search my phone? A guide to your rights at the border*, CNN (Feb. 16, 2017, 4:07PM), <http://www.cnn.com/2017/02/16/us/border-legal-rights-faq-trnd/index.html>; Hillary Beaumont, *Invasion of Privacy: Border agents are seizing travellers’ phones and asking for their passwords. Here’s how to protect yourself.*, Vice News (Feb. 17, 2017), <https://news.vice.com/story/how-to-secure-your-phone-when-crossing-the-border>; Authentic Traveling Blog, *Searches, Seizures, and Technology – How to Protect Your Privacy at the U.S. Border* (Apr. 8, 2017), <http://authentictraveling.com/travels/united-states/how-to-protect-your-privacy-at-us-border/>; Brian X. Chen, *Crossing the Border? Here’s How to Safeguard Your Data From Searches*, New York Times (Mar. 21, 2017), <https://www.nytimes.com/2017/03/21/technology/personaltech/crossing-the-border-heres-how-to-safeguard-your-data-from-searches.html>.

³¹ Arielle Berger and Chris Snyder, *U.S. Customs could require you to open your phone at the border – here’s how to protect your privacy*, Business Insider (Apr. 7, 2017, 7:52AM), <http://www.businessinsider.com/protect-phone-data-privacy-united-states-border-customs-require-open-device-david-kennedy-2017-3>

³² <http://rare.us/rare-politics/populist/rand-paul-has-a-tense-exchange-with-dhs-head-john-kelly-over-u-s-citizens-having-their-phones-seized-at-the-border/>

APPENDIX A

VIA E-MAIL

June 13, 2017

Catrina Pavlik-Keenan
FOIA Officer
United States Immigration and Customs Enforcement
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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 it’s 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

APPENDIX B

ICE FOIA Request 2017-ICFO-33419

From: US DHS Immigration and Customs Enforcement FOIA Office
Sent: Tue, Jun 20, 2017 at 13:26
To: FOIA@epic.org

June 20, 2017

Ginger McCall
Electronic Privacy Information Center
1718 Connecticut Avenue NW, Suite 200
Washington, DC 20009

RE: ICE FOIA Case Number 2017-ICFO-33419

Dear Ms. McCall:

This acknowledges receipt of your Freedom of Information Act (FOIA) request to U.S. Immigration and Customs Enforcement (ICE), dated June 13, 2017, your request for a waiver of all assessable FOIA fees, and your request for expedited treatment. Your request was received in this office on June 13, 2017. Specifically, you requested All recent ICE contracts related to purchase of mobile forensics devices and technology, including cloud data analysis² and decryption. Contract numbers and vendors attached (please see original request for more information).

Due to the increasing number of FOIA requests received by this office, we may encounter some delay in processing your request. Per Section 5.5(a) of the DHS FOIA regulations, 6 C.F.R. Part 5, ICE processes FOIA requests according to their order of receipt. Although ICE's goal is to respond within 20 business days of receipt of your request, the FOIA does permit a 10-day extension of this time period. As your request seeks numerous documents that will necessitate a thorough and wide-ranging search, ICE will invoke a 10-day extension for your request, as allowed by Title 5 U.S.C. § 552(a)(6)(B). If you care to narrow the scope of your request, please contact our office. We will make every effort to comply with your request in a timely manner. ICE evaluates fee waiver requests under the legal standard set forth above and the fee waiver policy guidance issued by the Department of Justice on April 2, 1987, as incorporated into the Department of Homeland Security's Freedom of Information Act regulations^[1]. These regulations set forth six factors to examine in determining whether the applicable legal standard for fee waiver has been met. I have considered the following factors in my evaluation of your request for a fee waiver:

- (1) Whether the subject of the requested records concerns "the operations or activities of the government";
- (2) Whether the disclosure is "likely to contribute" to an understanding of government operations or activities;
- (3) Whether disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor or a narrow segment of interested persons;
- (4) Whether the contribution to public understanding of government operations or activities will be "significant";
- (5) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and
- (6) Whether the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requestor.

Upon review of your request and a careful consideration of the factors listed above, I have determined to grant your request for a fee waiver.

Your request for expedited treatment is hereby denied.

Under the DHS FOIA regulations, expedited processing of a FOIA request is warranted if the request involves "circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual," 6 C.F.R. § 5.5(e)(1)(i), or "an urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information," 6 C.F.R. § 5.5(e)(1)(ii). Requesters seeking expedited processing must submit a statement explaining in detail the basis for the request, and that statement must be certified by the requester to be true and correct. 6 C.F.R. § 5.5(e)(3).

ADD ONE OF THE FOLLOWING REASONS:

Your request for expedited processing is denied because you do not qualify for either category under 6 C.F.R. § 5.5(e)(1). You failed to demonstrate a particular urgency to inform the public about the government activity involved in the request beyond the public's right to know about government activity generally. Your letter was conclusory in nature and did not present any facts to justify a grant of expedited processing under the applicable standards.

Your request for expedited processing is denied because you do not qualify for either category under 6 C.F.R. § 5.5(e)(1). You have not established that lack of expedited treatment in this case will pose an imminent threat to the life or physical safety of an individual. While you may be primarily engaged in the dissemination of information, you have not detailed with specificity why you feel there is an urgency to inform the public about the information you have requested. Qualifying urgency would need to **exceed the public's right to know about government activity generally**. You also did not offer sufficient supporting evidence of public interest that is any greater than the public's general interest in the information you have requested. Your letter was conclusory in nature and did not present any facts to justify a grant of expedited processing under the applicable standards.

If you are not satisfied with the response to this request, you have the right to appeal following the procedures outlined in the DHS regulations at 6 C.F.R. § 5.9. Should you wish to do so, you must send your appeal and a copy of this letter, within 90 days of the date of this letter, to:

U.S. Immigration and Customs Enforcement
Office of the Principal Legal Advisor
U.S. Department of Homeland Security
500 12th Street, S.W., Mail Stop 5900
Washington, D.C. 20536-5900

Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at www.dhs.gov/foia.

ICE has queried the appropriate program offices within ICE for responsive records. If any responsive records are located, they will be reviewed for determination of releasability. Please be assured that one of the processors in our office will respond to your request as expeditiously as possible. We appreciate your patience as we proceed with your request.

Your request has been assigned reference number **2017-ICFO-33419**. Please refer to this identifier in any future correspondence. To check the status of an ICE FOIA/PA request, please visit <http://www.dhs.gov/foia-status>. Please note that to check the status of a request, you must enter the 2016-ICFO-XXXXX or 2017-ICFO-XXXXX tracking number. If you need any further assistance or would like to discuss any aspect of your request, please contact the FOIA office. You may send an e-mail to ice-foia@ice.dhs.gov, call toll free (866) 633-1182, or you may contact our FOIA Public Liaison in the same manner. Additionally, you have a right to right to seek dispute resolution services from the Office of Government Information Services (OGIS) which 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. You may contact OGIS as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Regards,

ICE FOIA Office
Immigration and Customs Enforcement
Freedom of Information Act Office
500 12th Street, S.W., Stop 5009
Washington, D.C. 20536-5009
Telephone: 1-866-633-1182
Visit our FOIA website at www.ice.gov/foia

[1] 6 CFR § 5.11(k).