

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ELECTRONIC PRIVACY INFORMATION)	
CENTER,)	
)	
Plaintiff)	
)	
v.)	Civil Action No. 14-cv-317 (EGS)
)	
DRUG ENFORCEMENT ADMINISTRATION,)	
)	
Defendant)	

DEFENDANT’S SUPPLEMENTAL BRIEF IN RESPONSE TO JUNE 17, 2019, ORDER

The Court’s June 17, 2019, minute order directed the parties to submit supplemental briefs on “[h]ow disclosing the names of agencies that have access to Hemisphere data ‘would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions’” under FOIA Exemption 7(E), 5 U.S.C. § 552(b)(7)(E).

As explained in earlier filings, Hemisphere is a program used by the Drug Enforcement Administration (DEA) and other law enforcement authorities to obtain access to telephone records in the course of law enforcement investigations. In this case, the DEA has withheld information that could reveal what specific law enforcement agencies have access to Hemisphere apart from DEA, whose use of Hemisphere has been publicly confirmed. *See* Def.’s Mem. in Supp. of Mot. for Summ. J. 22, ECF No. 15.

Courts in this Circuit have frequently treated law enforcement agencies’ use of electronic tools and systems as “techniques and procedures” under FOIA Exemption 7(E). *E.g.*, *Shapiro v. U.S. Dep’t of Justice*, 893 F.3d 796, 800–01 (D.C. Cir. 2018) (holding that the FBI’s use of the commercially available Accurint database qualified for protection under Exemption 7(E)); *Associated Press v. FBI*, 265 F. Supp. 3d 82, 99 (D.D.C. 2017) (holding that an “iPhone hacking

tool” amounted to a “law enforcement technique”). The D.C. Circuit has established that, even when it is already public knowledge that law enforcement agencies use particular tools or systems, more specific details of how law enforcement agencies use those tools or systems may nevertheless be properly withheld under Exemption 7(E). *See, e.g., Shapiro*, 893 F.3d at 800–01 (noting that although the FBI’s use of the Accurint database was publicly known, more specific details of how the FBI used Accurint could still be withheld under Exemption 7(E)); *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep’t of Justice*, 160 F. Supp. 3d 226, 242–44 (D.D.C. 2016) (upholding assertion of Exemption 7(E) to protect information about drone equipment used by the FBI because the information could reveal the specific “capabilities and limitations” of the FBI’s drones). Accordingly, while some information about Hemisphere and its use by law enforcement is public knowledge, other details about the use of Hemisphere that remain confidential may be withheld under Exemption 7(E).

The D.C. Circuit’s decision in *Sack v. U.S. Department of Defense*, 823 F.3d 687 (D.C. Cir. 2016), demonstrates that the kinds of details that may be withheld under Exemption 7(E) include information that sheds light on “when . . . agencies are likely to employ” the techniques or procedures, *id.* at 694, as well as information about the specific capabilities and weaknesses of different law enforcement agencies. Among the documents at issue in *Sack* were reports produced by the Defense Intelligence Agency containing assessments of polygraph programs in use at four different federal law enforcement agencies. *See id.*; *Sack v. U.S. Dep’t of Def.*, 6 F. Supp. 3d 78, 90–91 (D.D.C. 2013) (passages in the district court opinion providing more detailed factual information about the reports at issue). The D.C. Circuit noted that the reports discussed “the strengths and weaknesses” of the polygraph programs in use at each agency, *Sack*, 823 F.3d at 694, and disclosure of that information “could reasonably risk circumvention of the law” by

helping criminals “subvert polygraph examinations,” *id.* at 694–95.

Similarly, in this case, DEA properly withheld information that could identify specific law enforcement agencies that have access to Hemisphere because that information reveals information about those agencies’ capabilities that could help criminals subvert law enforcement efforts. Information about the capabilities of specific law enforcement agencies can be useful to criminals whose activities fall under the jurisdiction of those agencies. For example, a criminal enterprise engaged in trafficking illegal weapons across the U.S.-Canada border might find it useful to know whether particular law enforcement tools are available to U.S. Customs and Border Protection, the Bureau of Alcohol, Tobacco, Firearms, and Explosives, or local police departments in border cities. *Cf. Soghoian v. U.S. Dep’t of Justice*, 885 F. Supp. 2d 62, 75 (D.D.C. 2012) (upholding withholding of details of electronic surveillance methods and observing that “[k]nowing what information is collected, how it is collected, and more importantly, when it is *not* collected, is information that law enforcement might reasonably expect to lead would-be offenders to evade detection”); *Elec. Privacy Info. Ctr. v. Office of the Dir. of Nat’l Intelligence*, 982 F. Supp. 2d 21, 30 (D.D.C. 2013) (“There is little doubt that the names of particular datasets and the agencies from which they originate would allow interested onlookers to gain important insight into the way ODNI and its partners operate.”).

Information on which particular law enforcement agencies have access to Hemisphere qualifies as information concerning law enforcement “techniques and procedures” under Exemption 7(E), and that information was properly withheld in this case.

Date: June 24, 2019

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

MARCIA BERMAN

Assistant Branch Director

/s/ JAMES C. LUH

JAMES C. LUH

Senior Trial Counsel

United States Department of Justice

Civil Division, Federal Programs Branch

1100 L St NW

Washington DC 20530

Tel: (202) 514-4938

E-mail: James.Luh@usdoj.gov

Attorneys for Defendant