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August 10, 2015

Col. Kriste Kibbey Etue, Director
Michigan State Police
333 S. Grand Ave.
P.O. Box 30634
Lansing, MI 48909-0634

Re: Appeal, FOIA Request Number CR-109954-15

Dear Col. Etue,

This letter constitutes an appeal, pursuant to MCL 15.240, of the Michigan State Police's ("MSP") response to Freedom of Information Act ("FOIA") request number CR-109954-15 (the "Request"), submitted by the ACLU of Michigan ("ACLU") on May 12, 2015, and seeking records regarding MSP's acquisition and use of "cell site simulator" technology. See Ex. A (ACLU's Request). Assistant FOIA Coordinator Jessina Beckner's response letter granting in part and denying in part the ACLU's Request and providing some responsive records is dated July 21, 2015. See Ex. B. For ease of reference, the responsive records MSP released in response to the Request (the "Release") are appended with Bates Stamp numbering at the bottom of the pages. See Ex. C.

The ACLU appeals MSP's response to the Request on three grounds. First, MSP did not conduct an adequate search for records responsive to Item 1 of the Request. Second, MSP inappropriately redacted information contained in records released as responsive to Item 1 of the Request. Sections 13(1)(v) and 13(1)(y) of FOIA do not provide a proper basis for redaction and, even if they did, MSP has waived its ability to withhold much of the redacted information. Third, MSP inappropriately withheld records responsive to Item 3 of the request by invoking the Arms Export Control Act and International Traffic in Arms Regulations. Those authorities do not apply to the records at issue.

Adequacy of the Search for Records Responsive to Item 1 of the Request

MSP released 201 pages of records responsive to Item 1 of the Request,[1] which sought "[r]ecords regarding the Michigan State Police's acquisition of cell site simulators, including invoices, purchase orders, contracts, loan agreements, solicitation letters, correspondence with companies providing the devices, and similar correspondence." See Ex. A. All of the records produced in response to this portion of the Request relate to MSP's purchase of cell site simulators and associated equipment from

[1] See Ex. C, Release, at 0001–0201.

the Harris Corporation in 2013. As is apparent from publicly available materials, however, MSP initially purchased cell site simulators from Harris Corporation well before 2013, including at least one purchase in 2006. Records of such purchases are responsive to Item 1 of the Request and should have been identified and produced.

According to the publicly available agenda of the September 12, 2006, meeting of the State Administrative Board, in 2006 MSP requested approval to purchase a "Cellular Tracking System" from the Harris Corporation for $206,500.[2] It is inconceivable that MSP produced no records relating to this request for purchasing approval. Indeed, a similar entry appears on the State Administrative Board's agenda for its July 23, 2013 meeting, where MSP sought approval for a new contract with the Harris Corporation to purchase "Surveillance Equipment" for $593,450.[3] The more than 200 pages of purchase records released in response to the ACLU's Request correspond to this 2013 purchase from the Harris Corporation. If such records exist for the 2013 purchase, they should also exist for the 2006 purchase.

Moreover, records released by MSP indicate that in 2013 MSP purchased upgrades to its existing StingRay and KingFish cell site simulator devices.[4] The fact that MSP was *upgrading* its StingRay and KingFish equipment in 2013 means, of course, that it originally *purchased* those devices in one or more previous transactions. Records of the previous transactions should exist in MSP's files.

An adequate search for records would have produced records of MSP's purchase of cell site simulator equipment in 2006 and later. Accordingly, the ACLU respectfully requests that MSP conduct an additional search and produce responsive records.

Redactions to Records Responsive to Item 1 of the Request

The ACLU contests the redaction of information in the records produced as responsive to Item 1 of the Request.[5] MSP invoked sections 13(1)(v) and 13(1)(y) of FOIA as the basis for the redactions. However, the redactions are not justified by those disclosure exemptions and, even if they were, MSP has waived its ability to withhold much of the redacted information.

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[2] https://www.michigan.gov/documents/unavailable_document_171268_7.pdf at 41.

[3] https://www.michigan.gov/documents/micontractconnect/07_23_2013_Minutes_Unsigned_428566_7.pdf at 12; see also Ex. C, Release at 0113 (providing excerpt from agenda showing MSP's 2013 request for approval of contract with Harris Corporation to purchase the surveillance equipment described and listed in the released records).

[4] See Ex. C, Release at 0042 (email with subject line "StingRay upgrade"); *id.* at 0044 (email with subject line "KingFish upgrade").

[5] The ACLU does not contest the redaction of names of undercover officers withheld pursuant to section 13(1)(s) of FOIA.

The released records include copies of purchase orders, purchase requisitions, price quotations, invoices, and shipping manifests that each contain itemized lists of the equipment, software, and services purchased from the Harris Corporation in 2013. Although MSP released the prices for each item, it redacted the name, identification number, and description for every item (except "training"). A number of the produced records also contain justifications for MSP's purchase of the cell site simulator devices, but significant portions of those explanations are redacted.[6] None of these redactions are supported by the provisions of FOIA.

Section 13(1)(v) of FOIA exempts from disclosure "[r]ecords or information relating to a civil action in which the requesting party and the public body are parties." MCL 15.243(1)(v). No such civil action exists between the ACLU and MSP, and MSP identified none in its response letter. Withholding of records or information is not justified by this provision.

Section 13(1)(y) of FOIA exempts from disclosure "[r]ecords or information of measures designed to protect the security or safety of persons or property . . . unless disclosure would not impair a public body's ability to protect the security or safety of persons or property or unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance." MCL 15.243(1)(y).

Release of the names of devices and the justifications for purchasing them will not "impair [MSP's] ability to protect the security or safety of persons or property." Cell site simulators are "measures designed to protect the security or safety of persons or property" to the same extent that every other law enforcement investigative tool or technique is. Just like information about fingerprint kits, binoculars, radar guns, squad cars, helicopters, handguns, and handcuffs, information about which models of cell site simulator MSP has purchased and why it did so will not impair MSP's ability to carry out its law enforcement duties. Numerous state and local law enforcement agencies across the country have concluded as much, and have released records detailing which cell site simulator devices they purchased from Harris Corporation,[7] and the reasons why such

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[6] See Ex. C, Release at 0015, 0017, 0036, 0039, 0071, 0107.

[7] See, e.g., John Dodge, *After Denials, Chicago Police Department Admits Purchase Of Cell-Phone Spying Devices*, CBS Chicago, Oct. 1, 2014, http://chicago.cbslocal.com/2014/10/01/chicago-police-department-admits-purchase-of-cell-phone-spying-devices/ (showing Chicago Police Department document listing "StingRay II – Upgrade" and related purchases); Anne Arundel County, Maryland, Contract Awards $25,000 and Over, Mar. 14, 2014, at 12 http://www.aacounty.org/CentServ/Purchasing/Resources/Contracts_Spreadsheet_February%2014.pdf (listing purchase of "Hailstorm Transportable Cellular" tracking system from Harris Corporation); Virginia House of Delegates, House Appropriations Committee, Distributed Funds 3, Feb. 3, 2014, http://hac.state.va.us/Committee/files/2014/02-03-14/MFCUPart2.pdf (allocating funds to Chesterfield, Virginia, Police Department "to purchase the StingRay I to HailStorm

purchases were sought.[8] Information about the Harris Corporation's cell site simulator devices and their capabilities is widely known,[9] and releasing the names of the purchased devices and the reasons for acquiring them will not cause harm.

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upgrade . . . , the Harpoon PA Kit, Harpoon Dual Band C, Harpoon Dual Band70 which all amplifies the transmission signal from HailStorm to larger receiving areas, HailStorm software, [and] an AmberJack, which is an antenna upgrade"); Harris Corporation, Quotation for Sunrise Police Department, Mar. 13, 2013, https://www.aclu.org/sites/default/files/field_document/sunrise_fl_-_harris_corp_quotation_130313.pdf (providing price quotation for purchase of StingRay II-to-HailStorm upgrade and associated equipment and software); Municipality of Anchorage, Anchorage Assembly, Minutes for the Regular Meeting of July 21, 2009, at 3, http://www.muni.org/Departments/Assembly/Clerk/PassedLegislation/2009%20Minutes/Minutes%20072109.PDF (approving Anchorage Police Department's purchase of "KingFish Dual-Mode Cellular Phone Surveillance and Tracking System from Harris Corporation"); County of Erie, New York, Purchase Order, Dec. 12, 2008, http://www.nyclu.org/files/Purchase-Orders.pdf (listing purchase of "KingFish" and "StingRay" systems from Harris Corporation); Jacksonville, Florida, Purchase Order, Feb. 6, 2007, https://www.aclu.org/sites/default/files/field_document/07.01.2014%20-%20PRR%2019037%20RESPONSE%20TO%20CUSTOMER.pdf (purchase order listing purchase of StingRay, KingFish, AmberJack, associated software packages, and other items).

[8] See, e.g., Kate Martin, *Documents: Tacoma Police Using Surveillance Device to Sweep Up Cellphone Data*, News Tribune, Aug. 26, 2014, http://www.thenewstribune.com/news/local/article25878184.html (quoting documents released by Tacoma, Washington, Police Department explaining that purchase of cell site simulators was needed because "[t]he Hailstorm upgrade is necessary for the Stingray system to track 4G LTE phones" and "[t]his new equipment offers enhanced technological capabilities for the Tacoma Police Department Explosives Ordinance Detail (EOD) with IED (improvised explosive device) prevention, protection, response and recovery measures"); Anchorage Police Department, Memorandum, June 24, 2009, https://www.documentcloud.org/documents/2180196-anchorage-pd-harris-memo.html (providing detailed justification of need to purchase KingFish cell site simulator from Harris Corporation, including explaining capabilities of device); Virginia House of Delegates, House Appropriations Committee, Distributed Funds 3, *supra* (explaining that Chesterfield, Virginia's purchase of "StingRay I to HailStorm upgrade . . . will allow officers to transmit and receive communications signals from targeted cell devices"); City of Miami, Inter-Office Memorandum, Nov. 13, 2008, https://www.aclu.org/sites/default/files/field_document/47993.pdf (providing detailed description of the capabilities of the StingRay, KingFish, and attached amplifier, converter, and AmberJack antenna and reasons why these devices and device upgrades are needed).

[9] See, e.g., Stephanie K. Pell and Christopher Soghoian, *Your Secret Stingray's No Secret Anymore: The Vanishing Government Monopoly Over Cell Phone Surveillance and Its Impact on National Security and Consumer Privacy*, 28 Harv. J.L. & Tech 1 (2014)

Further, "the public interest in disclosure of the redacted information outweighs the public interest in nondisclosure." MCL 15.243(1)(y). The public interest in information about law enforcement acquisition and use of cell site simulators is high, and has generated extensive news coverage and legislative and judicial oversight. In Michigan, revelation by the Oakland County Sheriff's Office last year that it had purchased a Hailstorm device from the Harris Corporation led to in-depth press reporting,[10] a legislative oversight hearing in Lansing,[11] and at least one town-hall meeting hosted by a legislator.[12] Elsewhere in the country, release of information about which cell site simulator devices law enforcement agencies have purchased and their justifications for doing so have likewise generated extensive press coverage.[13] In several

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(detailing publicly available information about cell site simulators); Ryan Gallagher, *Meet the Machines That Steal Your Phone's Data*, Ars Technica, Sept. 23, 2013, http://arstechnica.com/tech-policy/2013/09/meet-the-machines-that-steal-your-phones-data (describing each of Harris Corporation's models of cell site simulators and related equipment).

[10] See, e.g., Joel Kurth & Lauren Abdel-Razzaq, *Secret Military Device Lets Oakland Deputies Track Cellphones*, Detroit News, Apr. 4, 2014, http://www.detroitnews.com/article/20140404/SPECIAL/304040043; John Turk, *Sheriff's Office: Hailstorm is Legal, Lawful and Doesn't Take Cell Phone Data from Those Not Fugitives*, Oakland Press, Apr. 13, 2014, http://www.theoaklandpress.com/general-news/20140413/sheriffs-office-hailstorm-is-legal-lawful-and-doesnt-take-cell-phone-data-from-those-not-fugitives.

[11] See Press Release, Michigan House Republicans, *Rep. Tom McMillin Holds Hearing Over Concerns About Massive Cellular Data Collection of Innocent Users*, May 13, 2014, http://gophouse.org/rep-tom-mcmillin-holds-hearing-concerns-massive-cellular-data-collection-innocent-users/; John Turk, *Experts Question Transparency of Cell Phone Tracking Device Owned by Sheriff's Office at Legislative Hearing*, Oakland Press, May 16, 2014, http://www.theoaklandpress.com/general-news/20140516/experts-question-transparency-of-cell-phone-tracking-device-owned-by-sheriffs-office-at-legislative-hearing.

[12] Press Release, Michigan House Republicans, *McMillin to Host Town Hall on Hailstorm, StingRay Surveillance Technology Used by Oakland County Sheriff's Department*, June 25, 2014, http://gophouse.org/mcmillin-host-town-hall-hailstorm-stingray-surveillance-technology-used-oakland-county-sheriffs-department/.

[13] See, e.g., Robert Patrick, *Controversial Secret Phone Tracker Figured in Dropped St. Louis Case*, St. Louis Post-Dispatch, Apr. 19, 2015, http://www.stltoday.com/news/local/crime-and-courts/controversial-secret-phone-tracker-figured-in-dropped-st-louis-case/article_fbb82630-aa7f-5200-b221-a7f90252b2d0.html; Justin Fenton, *Baltimore Police Used Secret Technology to Track Cellphones in Thousands of Cases*, Baltimore Sun, Apr. 9, 2016, http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-stingray-case-

states, release of information about cell site simulator purchases has led to legislative reform[14] or increased oversight from judges.[15] Information about cell site simulator use has also led to increased oversight at the federal level.[16]

Even if withholding of information were otherwise justified under Section 13(1)(y), MSP has waived its ability to redact the names of the devices purchased from

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20150408-story.html; Fred Clasen-Kelly, *CMPD's Cellphone Tracking Cracked High-Profile Cases*, Charlotte Observer, Nov. 22, 2014, www.charlotteobserver.com/2014/11/22/5334827/cmpds-cellphone-tracking-cracked.html; Michael Bott & Thom Jensen, *9 Calif. Law Enforcement Agencies Connected to Cellphone Spying Technology*, ABC News10, Mar. 6, 2014, http://www.news10.net/story/news/investigations/watchdog/2014/03/06/5-california-law-enforcement-agencies-connected-to-stingrays/6147381/; John Kelly, *Cellphone Data Spying: It's Not Just the NSA*, USA Today, June 13, 2014, http://www.usatoday.com/story/news/nation/2013/12/08/cellphone-data-spying-nsa-police/3902809/; Jennifer Valentino-DeVries, *How 'Stingray' Devices Work*, Wall St. J. (Sept. 21, 2011), http://blogs.wsj.com/digits/2011/09/21/how-stingray-devices-work/.

[14] See Kate Martin, *New Law Requires Warrants for Stingray Use*, News Tribune, May 11, 2015, http://www.thenewstribune.com/news/local/politics-government/article26288260.html (describing law passed by Washington State legislature); Joshua Brustein, *State Laws Start Catching Up to Police Phone Spying*, Bloomberg Business News, Mar. 24, 2015, http://www.bloomberg.com/news/articles/2015-03-24/state-laws-start-catching-up-to-police-phone-spying (discussing Virginia and Washington laws requiring warrant for cell site simulator use).

[15] Adam Lynn, *Tacoma Police Change How They Seek Permission to Use Cellphone Tracker*, News Tribune, Nov. 15, 2014, http://www.thenewstribune.com/2014/11/15/3488642_tacoma-police-change-how-they.html?sp=/99/289/&rh=1 (explaining that upon learning that police had been using cell site simulators without informing courts of such, judges in Tacoma, Washington, began requiring law enforcement agencies that want to use the devices to swear in affidavits that they will not store data collected from third parties who are not targets of the investigation); Fred Clasen-Kelly, *CMPD's Cellphone Tracking Cracked High-Profile Cases*, Charlotte Observer, Nov. 22, 2014, www.charlotteobserver.com/2014/11/22/5334827/cmpds-cellphone-tracking-cracked.html (after the local newspaper in Charlotte, North Carolina, revealed that police had been using stingrays for eight years pursuant to pen register orders, but had not made their intent to do so explicit in their applications, a judge denied an application for such an order, a first for that court).

[16] See Erin Kelly, *Stingray Surveillance Sparks Privacy Concerns in Congress*, USA Today, Aug. 3, 2015, http://www.usatoday.com/story/news/politics/2015/08/03/stingray-surveillance-privacy-issa/30933707/.

the Harris Corporation because it has officially acknowledged that information. As courts have repeatedly held in relation to the federal Freedom of Information Act, "when information has been officially acknowledged, its disclosure may be compelled even over an agency's otherwise valid exemption claim." *American Civil Liberties Union v CIA*, 404 US App DC 235, 239–240; 710 F3d 422 (2013) (internal quotation marks omitted)); accord *New York Times Co v US Dep't of Justice*, 756 F3d 100, 120 (CA 2, 2014).[17]

MSP has officially acknowledged information about the specific cell site simulator devices it has purchased in two ways. First, MSP released emails revealing that it sought to purchase a "StingRay upgrade" and a "KingFish upgrade" in 2013.[18] This officially disclosed information shows both that MSP owns StingRay and KingFish cell site simulators, and that it purchased upgrades of them. Accordingly, MSP cannot redact information about its purchase or upgrade of StingRay and KingFish devices in other documents.

Second, MSP released the cost of each item or device purchased from the Harris Corporation. Because the costs of Harris Corporation's line of cell site simulators and associated devices and hardware are publicly available from official sources, releasing the cost of each device or item necessarily reveals its actual identity. One source of this information is the U.S. General Services Administration, which publishes a price list of Harris Corporation equipment marketed and sold to federal agencies.[19] For example, according to a 2014 edition of that price list, the HailStorm costs $169,602; "KingFish X1 to HailStorm Upgrade" costs $119,907; and a Harpoon (CONUS) costs $18,419.[20] Accounting for inflation from 2013 to 2014, these prices correspond with the items costing $169,500, $120,000, and $18,550 in the purchasing documents released by MSP, indicating that MSP purchased a Hailstorm, KingFish-to-Hailstorm upgrade, and Harpoon signal amplifier. Other publicly available records, including purchase records and invoices released by other police departments, confirm the identity of other items purchased by MSP, including software packages to allow the Hailstorm to track phones

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[17] See also *Founding Church of Scientology v NSA*, 197 US App DC 305, 312–13; 610 F2d 824 (1979) (suppression of "well publicized" information would frustrate policies of the federal FOIA without advancing countervailing interests); *Lamont v Dep't of Justice,* 475 F Supp 761, 772 (SDNY, 1979) (Weinfeld, J.) (the "sunshine" purposes of the federal FOIA would be thwarted if information was withheld after it had been "specifically revealed to the public")

[18] See Ex. C, Release at 0042 (email with subject line "StingRay upgrade"); *id.* at 0044 (email with subject line "KingFish upgrade").

[19] See U.S. General Services Administration, Federal Supply Service, Information Technology Schedule Pricelist, Harris Corporation (Mar. 11, 2014), available at https://web.archive.org/web/20140804113923/https://www.gsaadvantage.gov/ref_text/GS35F0283J/0ML8KB.2S6VTT_GS-35F-0283J_HARRISMOD162.PDF.

[20] See *id.* at 28–29, attached as Ex. D.

operating on the different cellular networks (GSM, CDMA), a maintenance contract for that software, and an Amberjack antenna.[21] Accordingly, MSP has waived any entitlement to withhold the names and descriptions of the items it purchased from the Harris Corporation.

Withholding of Records Responsive to Item 3 of the Request

The ACLU challenges MSP's withholding of records responsive to Item 3 of the Request. Item 3 seeks "[a]ll memoranda of understanding, nondisclosure agreements, contracts, or other agreements with the FBI or any other state or federal agency regarding the Michigan State Police's possession and use of cell site simulators." Ex. A. MSP denied this portion of the Request on the following basis: "Section 13(1)(d) exempts records or information specifically described and exempted from disclosure by statute. The Arms Control Export Act [*sic*] and International Traffic in Arms Regulation (ITAR) act [*sic*] regulates the technology you identified in your request. (See 22 C.F.R. Parts 120-130)." Ex. B.

The Arms Export Control Act (AECA) and International Traffic in Arms Regulations do not apply to the records sought here. If MSP were correct in its sweeping view that disclosure of records requested by the ACLU would violate the AECA, every government agency that has released records or discussed the use of cell site simulators (including MSP), every news outlet reporting on the use of cell site simulators, and every website hosting records relating to cell site simulators obtained from public records requests and from courts, could be prosecuted for committing a felony punishable by up to 20 years imprisonment and up to $1 million in fines per occurrence. See 22 USC 2778(c). None of these entities have been prosecuted for violating the AECA, plainly because the law does not apply to the disclosures at issue.

As discussed in detail in the attached expert declaration filed in a public records lawsuit brought by the ACLU's affiliate in New York, MSP's position is without basis. This is both because cell site simulators are not regulated by the Arms Export Control Act and ITAR, and also because, even if they were regulated, disclosure of the records to

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[21] See, e.g., Florida Department of Law Enforcement, PO Information, Feb. 15, 2012 https://www.aclu.org/files/assets/floridastingray/03.18.2014%20-%20FDLE%20Stingray%20Records%20Stingray%20Purchase%20Orders.pdf, at 1–2 (showing purchase of software packages to allow tracking of GSM and CDMA phones for $22,000 each and Harpoon signal equipment for $20,200 and $18,550); Florida Department of Law Enforcement, PO Information, June 6, 2013, https://www.aclu.org/files/assets/floridastingray/03.18.2014%20-%20FDLE%20Stingray%20Records%20Stingray%20Purchase%20Orders.pdf, at 9–10 (showing purchase of software and maintenance support contract for $20,000); Florida Department of Law Enforcement, PO Information, Oct. 26, 2011, https://www.aclu.org/files/assets/floridastingray/03.18.2014%20-%20FDLE%20Stingray%20Records%20Stingray%20Purchase%20Orders.pdf, at 32 (showing purchase of AmberJack wide-band antenna for $38,400).

the ACLU of Michigan, a U.S. entity, on U.S. soil, does not fall under the AECA's regulation. See Ex. E (Affidavit of Robert Clifton Burns, Esq., *New York Civil Liberties Union v Erie Co Sheriff's Office*, No. I 2014-000206 (NY Sup Ct, Erie Co, February 4, 2015).

The AECA and ITAR regulate "export" of certain munitions and military technology. Export is defined as disclosure to a "foreign person." See 22 USC 2278; 22 CFR 120.15, 120.17; Burns Aff. ¶¶ 15–16, Ex. E. An organization "incorporated to do business in the United States" is defined as a "U.S. person" rather than a "foreign person." 22 CFR 120.15. The ACLU of Michigan is therefore a U.S. person within the meaning of the Act. Thus, providing records to the ACLU cannot be and is not regulated by the AECA and ITAR. A New York court reached this conclusion in ordering a law enforcement agency to release records regarding cell site simulators to the New York Civil Liberties Union:

> Finally, the Court finds that the [records requested by the New York Civil Liberties Union concerning cell site simulators], are not "specifically exempted from disclosure by state or federal statute." The Court rejects respondent's argument that the disclosures sought here would, if made, violate a particular federal statute, regulatory scheme, and executive order forbidding (and indeed criminalizing) the export of certain sensitive technology without government license or the illicit revelation of sensitive information about such sensitive technology to foreign nationals. . . . [T]he Court is satisfied by the showing on this record that petitioner, a New York not-for-profit corporation, is not a "foreign person," meaning that the disclosures sought by it pursuant to FOIL would not in fact run afoul of related federal legal restrictions on the revelation of sensitive technical data about export-restricted arms or technology.

New York Civil Liberties Union v Erie Co Sheriff's Office, 47 Misc 3d 1201(A), 2015 WL 1295966, at *10 (NY Sup Ct, Erie Co, March 17, 2015) (citation and footnote omitted).

Moreover, even if the export of cell site simulator *devices* were regulated by the AECA and ITAR (which it is not, see Burns Aff. ¶¶ 6–9, Ex. E), the release of the requested *information* about cell site simulators would not be regulated. With respect to the transfer of information as opposed to equipment, the AECA only applies to "technical data," defined as "[i]nformation . . . required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles," and does not cover "basic marketing information on function or purpose or general system descriptions of defense articles" or information that is already "published and which is generally accessible or available to the public." 22 CFR 120.10(a)–(b), 120.11, 120.6; Burns Aff. ¶¶ 10–13, Ex. E.

The records requested in Item 3 ("memoranda of understanding, nondisclosure agreements, contracts, or other agreements with the FBI or any other state or federal agency regarding the Michigan State Police's possession and use of cell site simulators") are not "technical data." As the New York court explained,

> the disclosure of public records pursuant to New York's Freedom of Information Law . . . —even records concerning respondent's ownership and use of a cell site simulator device that itself may or may not be subject to arms/munitions or defense technology export restrictions—does not amount to the actual export of such arms, munitions, or defense technology.

New York Civil Liberties Union, 47 Misc 3d 1201(A), 2015 WL 1295966, at *10. For this reason (and others), that court ordered the Erie County Sheriff's Office to release a copy of its nondisclosure agreement with the FBI concerning acquisition and use of cell site simulators.[22] A number of other law enforcement agencies have similarly released their copies of the same document.[23]

Because the AECA and ITAR provide no basis for withholding the records sought in Item 3 of the Request, they should be released.

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We welcome the opportunity to answer any questions you might have about this appeal. I can be reached at (313) 578-6824.

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[22] Agreement between Erie County Sheriff's Office and Federal Bureau of Investigation Re: Acquisition of Wireless Collection Equipment/Technology and Non-Disclosure Obligations, June 29, 2012, http://www.nyclu.org/files/releases/Non-Disclosure-Agreement.pdf; see also *New York Civil Liberties Union*, 2015 WL 1295966, at *11–12 ("[T]he Court has no difficulty in concluding that the disclosure of the non-disclosure agreement would not amount to a federally forbidden export of sensitive technology nor a revelation of information about such technology to a foreign person.").

[23] See, for example, nondisclosure agreements between the FBI and police departments in Baltimore, Maryland (http://www.baltimoresun.com/bal-police-stingray-non-disclosure-agreement-20150408-htmlstory.html), Florida (https://www.documentcloud.org/documents/1814785-hillsborough-county-sheriff-fl.html#document/p1), San Bernadino, California (http://www.cehrp.org/wp-content/uploads/2015/04/San_Bernardino_Co_Sheriff_FBI_NDA_7Dec2012.pdf), Phoenix, Arizona (http://www.cehrp.org/wp-content/uploads/2015/05/Phoenix_PD_FBI_NDA_11Feb2013.pdf), and Minnesota (http://www.cehrp.org/wp-content/uploads/2015/06/Minnesota_BCA_FBI_NDA_5Jun2012.pdf).

Sincerely,

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