



March 25, 2014

Transmitted via E-Mail

Office of General Counsel
2331 Phillips Road
Tallahassee, FL 32308
Email: PublicRecords@fdle.state.fl.us

Re: Public Records Request, FDLE Docket No. PRR 2014-598

To Whom It May Concern,

I write in response to your e-mail of March 18, 2014 (attached as Exhibit A), in which you respond to the ACLU's March 13, 2014 public records request to the FDLE (the "Request") (attached as Exhibit B). The ACLU's Request seeks records regarding the FDLE's acquisition and use of cell site simulators, including policies and guidelines governing their use. The ACLU appreciates the release of the records attached to your email. However, the ACLU contests the redactions to those records as overbroad, and objects to the FDLE's failure to fully process or respond to the Request. Accordingly, the ACLU respectfully requests that the FDLE process the remainder of the Request and produce all responsive records. *See* § 119.07(1), Fla. Stat.

The FDLE's response fails to satisfy the requirements of the Public Records Act. Eight pages of the produced records are redacted in full, and portions of two additional pages are redacted in part. The cover email's only explanation for these redactions consists of the text of four statutory exemptions to the Act, without discussion of why or how they apply. Further, the FDLE does not indicate how many additional records have been withheld in full, stating only that "[w]e have provided all non-exempt information that may be provided pursuant to Florida Public Records Law." Ex. A at 2. This wholly conclusory response fails to "state . . . with particularity the reasons for the conclusion that the record is exempt." § 119.07(1)(f), Fla. Stat.

There is no indication that the FDLE searched for the full range of records responsive to the Request. The Department provided records related to the purchase of cell site simulators and related technology from Harris Corporation, copies of the Electronic Surveillance Support Team Mutual Aid

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Agreements with local and regional law enforcement agencies, and a nondisclosure agreement acknowledgement form. These records are at least partly responsive to categories 1–5 of the ACLU’s Request. *See* Ex. B at 2–3. The FDLE provided no records responsive to categories 7–12 of the Request, *see id.* at 3–4, no explanation of whether it searched for and identified such records, and no discussion of why such records are exempt from disclosure. The Public Records Act requires public records custodians to “respond to [records] requests in good faith.” § 119.07(1)(c). “A good faith response includes making reasonable efforts to determine from other officers or employees within the agency whether such a record exists and, if so, the location at which the record can be accessed.” *Id.* Although a statutory exemption may be asserted to withhold specific records or portions of records, *id.* § 119.07(d)–(e), there is no basis for failure to search for all responsive records and to apprise the requester of the results of that search.

Further, the redactions to those records the Department did produce are overbroad. For example, the three fully-redacted pages following the FDLE Non-Disclosure Acknowledgement Form appear from context to be the text of the nondisclosure agreement itself. If this is so, the ACLU cannot understand why that agreement is properly covered by any of the cited exemptions: it is not “data processing software,” § 119.071(1)(f), Fla. Stat.; not “surveillance techniques or procedures,” *id.* § 119.071(2)(d); not “criminal justice information derived from federal [or state] criminal justice information systems,” *id.* § 943.053(2); and not “federal criminal history records and information,” *id.* § 943.054. The other redactions to the released records are likewise insufficiently justified and apparently overbroad. The underlying material should be disclosed. *Id.* § 119.071(1)(d).

The importance of faithfully responding to a duly submitted public records request cannot be overstated: it is necessary “in order to preserve our basic freedom.” *Bludworth v. Palm Beach Newspapers, Inc.*, 476 So. 2d 775, 779 (Fla. 4th DCA 1985). As courts have repeatedly explained, “the purpose of the Public Records Act ‘is to open public records to allow Florida’s citizens to discover the actions of their government.’” *Bent v. State*, 46 So. 3d 1047, 1049 (Fla. 4th DCA 2010). For that reason, “[t]he Act is to be liberally construed in favor of open government, and exemptions from disclosure are to be construed narrowly and limited to their stated purpose.” *Marino v. Univ. of Fla.*, 107 So. 3d 1231, 1233 (Fla. 1st DCA 2013).¹ The FDLE’s response frustrates the purpose of the Act and leaves the public with little information about an area of government conduct that raises serious questions of constitutional law.

¹ *Accord Times Publ’g Co. v. State*, 827 So. 2d 1040, 1042 (Fla. 2d DCA 2002); *Christy v. Palm Beach Cnty. Sheriff’s Office*, 698 So. 2d 1365, 1366 (Fla. 4th DCA 1997).

The ACLU respectfully requests that the FDLE fully process the Request without delay, release nonexempt records, and explain with particularity any redactions or withholdings of records.

Sincerely,



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EXHIBIT A

Mehwish Ansari

From: Nathan Wessler
Sent: Tuesday, March 18, 2014 11:16 AM
To: Mehwish Ansari
Subject: FW: Public Records Response, FDLE Docket No. PRR 2014-598: Information Pertaining to FDLE ESST
Attachments: Search Criteria from MarketView.pdf; SOIGScanner14031012060_Redacted.pdf; PO Information from SPURS View.docx

From: PublicRecords [mailto:PublicRecords@fdle.state.fl.us]
Sent: Tuesday, March 18, 2014 10:03 AM
To: Nathan Wessler
Subject: Public Records Response, FDLE Docket No. PRR 2014-598: Information Pertaining to FDLE ESST

Dear Mr. Wessler:

RE: Public Records Request Response, FDLE Docket No. PRR 2014-598
Information Pertaining to FDLE ESST

Please find attached records in response to your public records request. These records are provided pursuant to Florida's Public Records Law, Chapter 119, Florida Statutes. If you have any problems accessing the data from the hyperlinks, we will be happy to print the documents for you at \$0.15 per page, in accordance with FS 119.07(4)(a) and FS 119.07(4)(d).

FDLE has agreements for ESST support with eleven agencies. All agreements are identical; attached is one entire agreement with the signature pages from all the agreements (11) provided.

Information pertaining to FDLE ESST is generally exempt from disclosure per the following.

FS 119.071(1)(f) Data processing software obtained by an agency under a licensing agreement that prohibits its disclosure and which software is a trade secret, as defined in s. 812.081, and agency-produced data processing software that is sensitive are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. The designation of agency-produced software as sensitive shall not prohibit an agency head from sharing or exchanging such software with another public agency.

FS 119.071(2)(d) Any information revealing surveillance techniques or procedures or personnel is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. Any comprehensive inventory of state and local law enforcement resources compiled pursuant to part I, chapter 23, and any comprehensive policies or plans compiled by a criminal justice agency pertaining to the mobilization, deployment, or tactical operations involved in responding to an emergency, as defined in s. 252.34, are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution and unavailable for inspection, except by personnel authorized by a state or local law enforcement agency, the office of the Governor, the Department of Legal Affairs, the Department of Law Enforcement, or the Division of Emergency Management as having an official need for access to the inventory or comprehensive policies or plans.

FS 943.053 (2) Criminal justice information derived from federal criminal justice information systems or criminal justice information systems of other states shall not be disseminated in a manner inconsistent with the rules instituted by the National Crime Prevention and Privacy Compact, as approved and ratified in s. 943.0543, or with other applicable laws or rules.

FS 943.054 Exchange of federal criminal history records and information.—

(1) Criminal history information derived from any United States Department of Justice criminal justice information system is available:

(a) To criminal justice agencies for criminal justice purposes.

(b) Pursuant to applicable federal laws and regulations, including those instituted by the National Crime Prevention and Privacy Compact, for use in connection with licensing or local or state employment or for such other uses only as authorized by federal or state laws which have been approved by the United States Attorney General or the Attorney General's designee.

(c) For issuance of press releases and publicity designed to effect the apprehension of wanted persons in connection with serious or significant offenses.

(2) The exchange of federal criminal history information is subject to cancellation if dissemination is made outside the receiving departments or related agencies.

(3) A criminal justice agency may refer to federal criminal history records and disclose to the public factual information concerning the status of an investigation; the apprehension, arrest, release, or prosecution of an individual; the adjudication of charges; or the correctional status of an individual when such disclosure is reasonably contemporaneous with the event to which the information relates.

(4) Provisions of this section are required by the Federal Government as a condition of utilizing the United States Department of Justice criminal history record information systems.

We have provided all non-exempt information that may be provided pursuant to Florida Public Records Law. If you have any questions concerning your request, please contact us at (850) 410-7676.

Sincerely,

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PublicRecords@fdle.state.fl.us

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EXHIBIT B



March 13, 2014

Transmitted via U.S. Mail and E-mail

Florida Department of Law Enforcement
Attn: Debora Hartman
P.O. Box 1489
Tallahassee, FL 32302
publicrecords@fdle.state.fl.us

Re: Public Records Request Regarding Use of Cell Site Simulators

To Whom It May Concern,

I am writing on behalf of the American Civil Liberties Union (“ACLU”) to seek records regarding the acquisition, possession, and use of cell site simulators by the Florida Department of Law Enforcement (“FDLE”).

Cell site simulators, also called IMSI catchers (in reference to the unique identifier—or international mobile subscriber identity—of wireless devices), impersonate a wireless service provider’s cell tower, prompting cell phones and other wireless devices to communicate with them. These devices are often called “Stingrays,” after the leading model produced by the Melbourne, Florida-based Harris Corporation.¹ Cell site simulators are commonly used in two ways: to collect unique numeric identifiers associated with phones in a given location, or to ascertain the location of a phone when the officers know the numbers associated with it but don’t know precisely where it is. Both of these uses raise privacy concerns. Collecting unique identifiers of all phones in a particular location inherently collects location data on many innocent people. And using a cell site simulator to ascertain the location of a specific cell phone can reveal that it is in a constitutionally protected place, such as a home, that has traditionally been immune from search unless law enforcement agents obtain a warrant based on probable cause.

¹ Other models of cell site simulators marketed by Harris Corp. include the “Triggerfish,” “Kingfish,” and “Hailstorm.” See Ryan Gallagher, *Meet the Machines that Steal Your Phone’s Data*, *Ars Technica* (Sept. 25, 2013), <http://arstechnica.com/tech-policy/2013/09/meet-the-machines-that-steal-your-phones-data/>.

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Press reports and court opinions have revealed that Florida law enforcement agencies use cell site simulators in criminal investigations.² For example, the Miami-Dade Police Department purchased a cell site simulator as early as 2006, and the Tallahassee Police Department has been using cell site simulators since at least 2008.³ Press reports indicate that the FDLE has “spent more than \$3 million buying a fleet of Stingrays” that it makes available to local police departments in the state.⁴

This request seeks additional information about the FDLE’s acquisition, possession, and use of cell site simulators.

PUBLIC RECORDS REQUEST

In light of the foregoing and pursuant to the Florida Public Records Law, Chapter 119, Florida Statutes, and Article 1, Section 24 of the Florida Constitution, the ACLU hereby requests records relating to the FDLE’s use of cell site simulators⁵ as detailed below:

1. Records regarding the FDLE’s acquisition of cell site simulators, including invoices, purchase orders, contracts, loan agreements, solicitation letters, correspondence with companies providing the devices, and similar documents.
2. Records of all contracts, agreements, and communications with Harris Corporation.

2 See, e.g., John Kelly & Britt Kennerly, *Special Report: Police Agencies Can Grab Data from Your Cellphone*, Florida Today (Dec. 9, 2013), <http://www.floridatoday.com/article/20131208/NEWS01/312080020/Special-Report-Police-agencies-can-grab-data-from-your-cellphone> (“Local and state police, from Florida to Alaska, are buying Stingrays with federal grants aimed at protecting cities from terror attacks, but using them for far broader police work.”).

3 See David Minsky & Tim Elfrink, *Cell-phone Tracking: Miami Cops Know Where You Are*, Miami New Times (Feb. 16, 2012), <http://www.miaminewtimes.com/2012-02-16/news/cell-phone-tracking-miami-cops-know-where-you-are/> (“Between 2006 and 2008, the MDPD paid at least \$300,000 for two machines called the StingRay and the KingFish.”); *Thomas v. State*, 127 So. 3d 658 (Fla. 1st DCA 2013) (discussing Tallahassee Police Department’s use of cell site simulator in a criminal investigation).

4 *Cell Tower Dumps Not Used Locally*, Fort Myers News-Press, Dec. 8, 2013, at A6.

5 The ACLU seeks records regardless of how they identify cell site simulators, including generic descriptions such as “cell site simulator,” “IMSI catcher,” “WITT Technology,” “cell site emulator,” or “digital analyzer” and specific model names such as “Stingray,” “Triggerfish,” “Kingfish,” or “Hailstorm.”

3. Copies of all Electronic Surveillance Support Team Multi-Agency Voluntary Cooperation Mutual Aid Agreements entered into with local, county, or regional law enforcement agencies.
4. Records regarding any offers, arrangements, or agreement with local, county, or regional law enforcement agencies to loan, provide use of, or otherwise utilize cell site simulators owned or possessed by the FDLE.
5. All nondisclosure agreements with Harris Corporation, Boeing Corporation (DRT), other companies, and any local, state, or federal agencies regarding the possession and use of cell site simulators.
6. Records regarding policies and guidelines governing use of cell site simulators, including restrictions on when, where, how, and against whom they may be used, limitations on retention and use of collected data, guidance on when a warrant or other legal process must be obtained, and rules governing when the existence and use of cell site simulators may be revealed to the public, criminal defendants, or judges.
7. Records regarding any communications or agreements with wireless service providers (including AT&T, T-Mobile, Verizon, Sprint Nextel, and U.S. Cellular) concerning use of cell site simulators.
8. Records regarding any communications, licenses, waivers, or agreements with the Federal Communications Commission, Federal Bureau of Investigation, or Florida Public Service Commission concerning use of cell site simulators.
9. Records reflecting the number of investigations in which cell site simulators have been used, and the number of those investigations that have resulted in prosecutions.
10. Records reflecting a list of all criminal cases, with docket numbers if available, in which law enforcement officers used a cell site simulator as part of the underlying investigation.
11. All applications submitted to state or federal courts for search warrants or orders authorizing use of cell site simulators in criminal investigations, as well as any warrants or orders, denials of warrants or orders, and returns of warrants associated with those applications. If

any responsive records are sealed, please provide the date and docket number for each sealed document.

12. All records regarding the use of cell site simulators in closed investigations.⁶

We welcome the opportunity to answer any questions you might have about this request in order to better facilitate the production of the public records.

INFORMATION ABOUT THE REQUEST

As required by law, please acknowledge that you have received this public records request and provide an estimated timeframe in which you believe that you will be able to produce the requested records. *See* § 119.07(1)(c), Fla. Stat. (“A custodian of public records and his or her designee must acknowledge requests to inspect or copy records promptly and respond to such requests in good faith.”).

The ACLU is a non-profit organization and the disclosure of the requested records will “promote public awareness and knowledge of governmental actions in order to ensure that governmental officials and agencies remain accountable to the people.” *Forsberg v. Hous. Auth. of City of Miami Beach*, 455 So. 2d 373, 378 (Fla. 1984) (Overton, J., concurring in result). Therefore, we request that you produce the requested records free of charge. However, if you are unable to do so, the ACLU will reimburse you for the reasonable costs associated with fulfilling this request, if your office has a policy of requiring the payment of a copying charge for such records. The fees and costs you may charge are governed by Section 119.07(4), Florida Statutes. **If you anticipate that the total costs associated with fulfilling this request will exceed \$35, please contact me with an estimate of the likely cost before proceeding.**

If you are unable or refuse to provide part or all of the requested public records, please explain in writing and with particularity the reasons for not providing the requested public information in its entirety, as required by Section 119.07(1), Florida Statutes. If any exemption that you assert applies to only a portion of the records (as opposed to the entire record), please redact the portion you claim is exempt, provide copies of the remainder of the record or records, and detail your reasons for the modification as required by Section 119.07(1), Florida Statutes.

⁶ The ACLU does not seek records relating to open investigations. The ACLU does seek records relating to investigations that have been closed, but where judicial proceedings relating to prosecution or appeal are still pending.

We request that you produce responsive materials in their entirety, including all attachments, appendices, enclosures, and/or exhibits. To the extent that a response to this request would require you to provide multiple copies of identical material, the request is limited so that only one copy of the identical material is requested.

If any of the requested records are maintained in a common-format electronic medium, please provide these records in such native electronic medium and not in paper form. For purposes of this request, common electronic formats include (1) American Standard Code for Information Interchange ("ASCII"), (2) files formatted in one of the Microsoft Office Suite, Corel Suite, or OpenOffice Suite (.doc, .xls, .ppt, .mdb, .wpd, etc.), (3) a text file (.txt), or (4) hypertext markup language (.html) or similar web page language. This is the preferred format. However, if any of the requested records are only maintained or only can be produced as electronic images, for example a portable document format (.pdf), (n.b., it is possible to print documents into a PDF format either using Acrobat Professional or a free PDF driver like pdf995.com), then as an alternative, we request this electronic image format. *See* § 119.01(2), Fla. Stat.

Section 119.07(1)(h-i), Florida Statutes, prohibits the destruction of any of the requested records, including any which you may claim are exempt, for a period after the date on which you receive this written request. If we institute a civil action to enforce the Public Records Law with respect to the requested records, you may not dispose of the records except by court order after notice to all affected parties.

Thank you for your prompt attention to this request. If you have any questions, wish to obtain further information about the nature of the records in which we are interested, or need more information in order to expedite this request, please do not hesitate to contact me at (212) 519-7847.

Sincerely,



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