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April 15, 2014

Transmitted via U.S. Mail and Fax

Terrence O. Lynch
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Office of the General Counsel
2601 West Broward Boulevard
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Fax: 954-321-5040

Re: Public Records Request Regarding Cell Site Simulators

Dear Mr. Lynch,

I write in response to your letter of April 1st, 2014 (attached as Exhibit A), in which you respond to the ACLU's February 28, 2014, public records request to the Broward County Sheriff's Department ("BCSO"). The ACLU's request seeks records pertaining to the acquisition and use of cell site simulators, including guidelines and policies concerning their use. Your response is patently inadequate, as it lacks a basis in law and fact and violates the Florida Public Records Act, § 119.07, Florida Statutes. Accordingly, the ACLU requests that the City immediately process the Request and produce responsive records. *See* § 119.07(1), Fla. Stat.

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 City's response frustrates the purpose of the Act and leaves the public with no 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 BCSO's blanket assertion of an exemption is unwarranted. It is tantamount to a refusal to confirm or deny the existence of responsive records, which is not permitted under Florida law. I am aware of only one Florida case where a government agency "refus[ed] to confirm or deny the existence of the records sought by" the requester. *Lorei v. Smith*, 464 So. 2d 1330, 1332 (Fla. 2d DCA 1985) (per curiam). Although the court resolved the case on other grounds, it explicitly disapproved of the agency's response, cautioning that "we do not condone public agency silence when confronted with a chapter 119 request." *Id.* at 1332 n.1. Indeed, 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 wholly refusing to process a request on the basis of broad claims of exemption.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

The BCSO's response is also inappropriate because it is wholly conclusory and fails to "state . . . with particularity the reasons for the conclusion that the record is exempt." § 119.07(1)(f), Fla. Stat. It may be that, upon processing the request, the BCSO identifies specific material that is properly covered by the exemption contained in § 119.017(2)(d). But it is neither logical nor plausible that every responsive record would fall within that exemption, and the BCSO's response letter provides insufficient explanation on this point. For example, invoices, sole source contract justification letters, mutual aid agreements, and policy documents describing legal standards regarding the use of cell site simulators will not compromise sensitive surveillance techniques nor "place personnel . . . at risk." The documents are sought in an attempt to determine whether or not the BCSO's investigation techniques are violating the constitutional rights guaranteed by the United States and Florida constitutions. Police and sheriffs' departments throughout Florida have determined that they can answer press queries and respond to public records requests about possession and use of cell site simulators by searching for and releasing responsive documents and explaining the need for any specific redactions.[2] There is no reason why the BCSO cannot do the same.

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[2] *See, e.g.*, Jennifer Portman, *TPD Changes Tracking Policy*, Tallahassee Democrat, Apr. 13, 2014, http://www.tallahassee.com/article/20140413/NEWS01/304130018 (discussing Tallahassee Police Department's release of list of investigations in which cell site simulators were used); Jennifer Portman, *Is Cellphone Stingray Invasive or Essential?*, Tallahassee Democrat, Mar. 16, 2014, http://www.tallahassee.com/apps/pbcs.dll/article?AID=2014303170020 (quoting Tallahassee Chief of Police Michael DeLeo and Leon County Sheriff's Office officials discussing those departments' use of cell site simulators); 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-

Further, the reading the BCSO attaches to § 119.071(2)(d) is far more expansive than the statute allows. Section 119.071(2)(d) exempts "information revealing surveillance techniques or procedures or personnel." It is distinct from the exemption for "active criminal investigative information," § 119.071(2)(c), which the BCSO does not invoke. The BCSO does not explain why *all* responsive records would reveal information properly within the scope of § 119.071(2)(d), and does not explain why responding to the request would "compromise . . . [its] ability . . . to conduct investigations [or] place personnel conducting those investigations at risk." As stated in its initial request, the ACLU does not seek records relating to active investigations. The BCSO's response is wholly inadequate and unresponsive to the ACLU's request.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

The BCSO is not above the requirements of the Public Records Act. The ACLU respectfully requests that the BCSO process the Request without delay, release nonexempt records, and explain with particularity any redactions or withholdings of records.[3] *See Tribune Co. v. Cannella*, 458 So. 2d 1075, 1079 (Fla. 1984) ("The only delay permitted by the Act is the limited reasonable time allowed the custodian to retrieve the record and delete those portions of the record the custodian asserts are exempt."). We look forward to your updated response.

Sincerely,

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Report-Police-agencies-can-grab-data-from-your-cellphone (citing Miami-Dade Police Department purchasing records showing acquisition of Stingray device and quoting Assistant State Attorney Wayne Holmes of Brevard and Seminole Counties explaining that he has "weighed frequent police requests for . . . Stingray surveillance"); *Cell Tower Dumps Not Used Locally*, Fort Myers News-Press, Dec. 8, 2013, at A6 (reporting that records released by the Florida Department of Law Enforcement show that it has "spent more than $3 million buying a fleet of Stingrays" that it makes available to local police departments in the state).

[3] The ACLU reminds the City of its ongoing responsibility to preserve responsive records, including any which it may claim are exempt from disclosure. § 119.07(1)(h–i), Fla. Stat.