

EXHIBIT 13

1 RANDY JAMES HOWE

2 Purpose.

3 (Whereupon, the witness reviews the
4 material provided.)

5 THE WITNESS: Okay. 09:12

6 BY MR. HANDEYSIDE:

7 Q. So the language in the Defendants'
8 responses to the interrogatories that I asked you
9 to review tracks closely with the language in the
10 Purpose paragraph in the CBP directive; is that 09:12
11 correct?

12 A. It's very similar.

13 Q. Is this language an accurate
14 description of the Government interests that CBP
15 claims are served by conducting border searches of 09:12
16 electronic devices?

17 A. I don't know if I understand your
18 question.

19 Q. Let me put it this way: Are there any
20 Government interests that border searches of 09:12
21 electronic devices serve other than those
22 described in the response to
23 Interrogatory Number 1 or the Purpose paragraph of
24 the CBP directive?

25 A. Some of these topics are pretty broad: 09:12

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2 customs, immigration, law enforcement. Some -- I
3 mean, there's -- there's a lot that -- that goes
4 with those.

5 Q. Well, I'm asking, Is this an accurate 09:13
6 description of the interests that -- the
7 Government interests that are served by searching
8 electronic devices at the border?

9 A. I think it's accurate, sure.

10 Q. Are there any other interests that 09:13
11 those searches serve, besides what's set out here
12 in the interrogatory response and the Purpose
13 paragraph in the directive?

14 A. It's a lengthy document. It gets in a
15 lot of different areas. So just to pinpoint one 09:13
16 particular paragraph, I think it's difficult.

17 Q. So the interrogatory asks for CBP and
18 ICE to identify and describe all of the Government
19 interests that are served by Defendants' policies
20 and practices on border searches of -- border 09:13
21 device searches and confiscations. And so
22 the answer provides a description of those
23 interests that tracks with this Purpose paragraph.

24 I am just trying to figure out if
25 there are any others, besides what's listed 09:14

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national security, something else; is that fair?

A. I think that's what I said.

Q. Okay.

Does CBP conduct border searches of
electronic devices for the purpose of gathering
intelligence? 09:25

MS. EDNEY: Objection to the extent
it calls for law enforcement privilege
information. 09:25

But you can try to answer in a
nonprivileged way.

THE WITNESS: The information --
well, as we're -- we're border security
officers. We're -- we're interacting with
travelers as they present themselves
for admission to the U.S., and we want to
be satisfied that individual is admissible
to the U.S. and that they're -- they're
not -- their belongings, their merchandise
are not coming into the United States
contrary to law. 09:25
09:26

Searching electronic devices is no
different than checking a traveler's
belongings. So if during the -- the 09:26

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process of searching the devices we come
across some law enforcement information
that's of benefit, then, you know,
that -- that could potentially be
retained.

09:26

BY MR. HANDEYSIDE:

Q. That sounds like a yes.

Is one purpose for conducting the
searches of electronic devices to essentially
gather intelligence about individuals who are
entering the United States?

09:26

MS. EDNEY: Objection:

mischaracterizing his testimony.

BY MR. HANDEYSIDE:

09:27

Q. I'm just looking for a straight answer
for the question.

A. The purpose of our officers is to --
in the role at the border is to make a
determination of the admissibility of the traveler
and then what's being presented at the border, and
in furtherance of that -- that role, that
obligation, is to make that determination. If in
the process of -- of making that determination, we
come across law enforcement information, that's

09:27

09:27

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2 A U.S. citizen is automatically
3 admissible; isn't that right?

4 A. If we're satisfied that they're U.S.
5 citizen, they're admissible, but -- yes. 09:28

6 Q. So -- so a U.S. citizen for whom
7 admissibility is not in question, does CBP then
8 have an interest in gathering information about
9 that citizen using a -- a border search of an
10 electronic device, even if there's no suspicion of 09:29
11 any violation of the law?

12 MS. EDNEY: Objection to the extent
13 it calls for law enforcement sensitive
14 information.

15 THE WITNESS: The officers have an 09:29
16 obligation to -- to make a determination,
17 if we're talking about U.S. citizens, that
18 they're admissible to the United States
19 and that anything that's being presented
20 at the time that they're applying for 09:29
21 admission is admissible to the U.S.,
22 that's not being brought in contrary to
23 law.

24 So they could be bringing
25 contraband. They could be involved in 09:29

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belongings, by potential law enforcement sensitive information that we have on that individual to make a determination whether or not that person is admissible and whether or not their belongings and merchandise that they're bringing in is of concern to -- to CBP. 09:38

Q. Okay. But based on this answer and based on the description of the purpose for the device searches that's in the CBP directive, is it fair to say that CBP conducts electronic device searches at the border partly for the purpose of conducting risk assessments? 09:38

A. If we do search somebody's electronic device or search their luggage or anything that we do to make that determination, the officer determination, that's a part of the function. 09:38

Q. And is it then fair to say that CBP conducts border searches of electronic devices at least partly for the purpose of sharing information with other elements of the Federal Government responsible for analyzing terrorist threat information? 09:39

MS. EDNEY: Objection to the extent it calls for law enforcement sensitive 09:39

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2 information.

3 THE WITNESS: The determinations
4 that we make on those individuals, if
5 there's information that we've determined 09:39

6 is of law enforcement value -- and it
7 could be sensitive, I guess -- but if
8 there's law enforcement value related to
9 what we do -- customs, immigration, other
10 violations of law -- and it has been 09:39
11 gathered at that point, then it could be
12 shared.

13 MR. HANDEYSIDE: I'll ask the court
14 reporter to mark this document as
15 CBP Deposition Exhibit 5. 09:39

16 - - -

17 (CBP Deposition Exhibit Number 5,
18 Privacy Impact Assessment for the
19 TECS System: Platform
20 DHS/CBP/PIA-021, August 12, 2016, 09:39
21 marked for identification, as of
22 this date.)

23 - - -

24 BY MR. HANDEYSIDE:

25 Q. Are you familiar with this document? 09:40

1 RANDY JAMES HOWE

2 A. I don't recall if this was in the
3 materials that were provided to -- and I don't
4 know if I read this before.

5 Q. This is -- this is actually publicly 09:40
6 available document. And as you can see, it's the
7 Privacy Impact Assessment for the TECS System
8 Platform dated August 12th, 2016.

9 And, briefly, what is TECS?

10 A. TECS is our main law enforcement 09:40
11 system that we use to perform our role.

12 Q. And at times, information that is
13 derived from border searches of electronic devices
14 is maintained in TECS; is that correct?

15 MS. EDNEY: Objection to the extent 09:41
16 it calls for law enforcement privilege.

17 THE WITNESS: Yeah, one more time on
18 the question.

19 BY MR. HANDEYSIDE:

20 Q. At times, information that is derived 09:41
21 from border searches of electronic devices is
22 maintained in TECS; is that accurate?

23 MS. EDNEY: Same objection.

24 THE WITNESS: Any search that we do
25 of electronic device is recorded within 09:41

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2 TECS, in -- in electronic media portion
3 of -- of TECS.

4 BY MR. HANDEYSIDE:

5 Q. Okay. If you could turn to Page 3, at 09:41
6 the bottom there, in describing the TECS platform,
7 the exhibit says, The TECS platform is the
8 underlying infrastructure designed to facilitate
9 the maintenance and sharing of law enforcement,
10 inspection, intelligence gathering and operational 09:41
11 records among the TECS user community.

12 Is that a description of -- is that an
13 accurate description, in your mind, of how TECS is
14 used?

15 A. I think so, yes. 09:42

16 Q. And part of that purpose for TECS is
17 intelligence gathering-related?

18 A. That's what it says.

19 Q. So information derived from border
20 searches of electronic devices that is maintained 09:42
21 in TECS will at least partly be used for TECS's
22 purposes, right, which is partly intelligence
23 gathering; is that correct?

24 MS. EDNEY: Objection: vague.

25 THE WITNESS: I think it's an 09:42

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offshoot of it. The intent is to make that determination on the traveler, but if there is law enforcement beneficial information that is retained, then it would be shared through intelligence gathering.

09:42

BY MR. HANDEYSIDE:

Q. Going back to Exhibit 2, the interrogatory response. And we've already read this part, but the response to Interrogatory 1 states that CBP uses border searches of electronic devices to ensure compliance with customs, immigration and other laws that Defendants are authorized to enforce and administer. And that's the middle paragraph.

09:42

09:43

What are these other laws that CBP is authorized to enforce and administer?

A. We're responsible for enforcing hundreds of laws from -- from other organizations, other law enforcement, so agriculture laws, FDA, you know. So as products or things that enter into the U.S., that's a part of our -- our role on behalf of those other agencies.

09:43

Q. Do the other laws include tax laws?

09:43

1 RANDY JAMES HOWE

2 BY MR. HANDEYSIDE:

3 Q. So if CBP suspects that one individual
4 might be engaged in some violation of the law, can
5 CBP search the devices of that person's traveling 09:52
6 companions for evidence related to that potential
7 violation?

8 A. It's a difficult hypothetical.
9 Depending upon the circumstances and the totality
10 of the circumstances, the judgment and the 09:52
11 information that the officer has, it's --
12 it's -- it's a hypothetical. I just -- that's
13 difficult to -- to say yes or no.

14 Q. Does CBP have the authority to do
15 that? 09:53

16 A. We have the authority to search any
17 person that presents themself at the border.

18 Q. Including for the purpose of
19 identifying potential evidence of someone else's
20 crime? 09:53

21 MS. EDNEY: Objection: speculative.

22 THE WITNESS: Yeah, I think you're
23 just rewording your initial question.
24 It's difficult for me to -- hypothetical
25 situation, to speculate. 09:53

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2 BY MR. HANDEYSIDE:

3 Q. I'm asking about CBP's authority, and
4 you've been designated to -- to testify on -- on
5 these subjects. 09:53

6 So CBP's authority, as you're
7 testifying, to conduct border searches of
8 electronic devices -- does that authority include
9 conducting those searches to identify potential
10 evidence of someone else's crime? 09:54

11 MS. EDNEY: Objection:
12 argumentative.

13 THE WITNESS: Hypothetical questions
14 are difficult to speculate what the answer
15 is. I mean, it's based on the totality 09:54
16 and the circumstances, the information
17 that the officer has in front of them and
18 the -- what they're dealing with, the
19 issue at hand. It's hard to say.

20 BY MR. HANDEYSIDE: 09:54

21 Q. Are there instances in which that has
22 happened?

23 A. There may have.

24 Q. Is there a policy that would prevent
25 such a search? 09:54

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2 MS. EDNEY: Objection: vague.

3 THE WITNESS: We know that officers
4 can search phones, with no suspicion, as
5 part of the border search authority, just 09:54
6 as a part of their role and -- and making
7 their determination of admissibility of
8 the people and what they're bringing in.

9 So that's a -- that's a part of it.

10 BY MR. HANDEYSIDE: 09:55

11 Q. What about if CBP has concerns about
12 an individual's admissibility to the United
13 States? Can CBP conduct searches of the
14 electronic devices of the family and friends of
15 that individual to determine that individual's 09:55
16 admissibility?

17 A. Difficult hypothetical, but
18 potentially.

19 Q. Is there any part of the policy that
20 would prevent CBP from doing that? 09:55

21 A. We have the authority to search
22 electronic devices. It's well founded, so . . .

23 Q. Even if those family and friends are
24 U.S. citizens?

25 A. Again, depending on the totality and 09:56

1 RANDY JAMES HOWE

2 the circumstances, there may be instances where
3 U.S. citizens have their phone searched.

4 Q. In order to identify evidence related
5 to the admissibility of someone else? 09:56

6 A. It's a hypothetical. It's difficult
7 to -- to -- to know for sure in that case, but
8 based on the facts of that case, the officer has
9 to make their judgment whether or not it's better
10 informed. 09:56

11 MR. HANDEYSIDE: I'll ask the court
12 reporter to mark this document as
13 CBP Deposition Exhibit 6.

14 - - -
15 (CBP Deposition Exhibit Number 6, 09:56
16 Privacy Impact Assessment Update
17 for CBP Border Searches of
18 Electronic Devices
19 DHS/CBP/PIA-008(a), January 4,
20 2018, Bates stamped Defs. 0174 09:56
21 through Defs. 0195, marked for
22 identification, as of this date.)

23 - - -

24 THE WITNESS: Thanks.

25

1 RANDY JAMES HOWE

2 border is to identify digital content that is of
3 itself unlawful; is that right?

4 A. Or information, yes.

5 Q. Meaning digital contraband, 09:58
6 essentially; is that fair?

7 A. Sure.

8 Q. So child pornography would be one
9 example of digital content that is of itself
10 unlawful; is that correct? 09:58

11 A. Sure.

12 Q. Are there other examples of digital
13 content that is always or almost always unlawful?

14 A. It could be information indicating
15 that they're involved in unlawful activity. 09:58

16 Q. What kind of information would be --
17 of that sort would be always or almost always
18 unlawful?

19 A. Well, evidence of being involved in
20 drug smuggling, weapons smuggling, human 09:59
21 smuggling.

22 Q. Okay. As you said, those are all
23 evidence, right?

24 The content itself, though, would not
25 necessarily be unlawful; is that fair? 09:59

1 RANDY JAMES HOWE

2 MS. EDNEY: Objection: vague; and, I
3 believe, mischaracterizes his testimony.

4 BY MR. HANDEYSIDE:

5 Q. I'm just trying to understand. 09:59

6 So you identified evidence in
7 your answer. I'm trying to find out what are the
8 other things that are like child pornography that
9 are unlawful of themselves, you're not allowed to
10 have that content. 09:59

11 A. It could be information of national
12 security concerns, so information of perhaps
13 supporting terrorism or involved in terrorist
14 acts.

15 Q. So -- so for these purposes, let's -- 10:00
16 let's define "unlawful content" as -- as any
17 content that of itself violates customs laws.

18 Does that help?

19 A. Was that a question?

20 Q. I'm trying to -- I'm trying to 10:00
21 identify what kinds of content itself on the
22 device cannot be brought into the United States
23 aside from child pornography.

24 A. I think I just replied, with evidence
25 of terrorism. 10:00

1 RANDY JAMES HOWE

2 Q. So, again, evidence of itself is not
3 contraband; is that right?

4 MS. EDNEY: Objection: argumentative
5 and vague. 10:00

6 BY MR. HANDEYSIDE:

7 Q. I'm trying to distinguish between
8 what's evidence and what's unlawful of itself,
9 like child pornography.

10 MS. EDNEY: Also, objection because 10:00
11 it calls for a legal conclusion.

12 THE WITNESS: I'm not following
13 what -- where you're going.

14 BY MR. HANDEYSIDE:

15 Q. So when I've asked about things like 10:00
16 child pornography that you're not allowed to have
17 on your phone, you've responded by answering that
18 there's evidence related to terrorism, evidence
19 related to other possibly unlawful activities.

20 That evidence, though, of itself is 10:01
21 not contraband; is that right?

22 A. When you're comparing it to
23 pornography, I guess not.

24 Q. Okay.
25 So -- and I'm not -- I'm not trying to 10:01

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argue. I just want to be precise about what it is that CBP might be looking for on a device, aside from child pornography, that of itself is illegal. There's evidence, and then there's illegal content.

10:01

So are there any other examples like child pornography that you can think of that are illegal of themselves?

A. I keep coming back to terrorism, that information that they committed a terrorist act is unlawful.

10:01

Q. Okay. So if they committed a terrorist act, that's unlawful.

A picture of it on a phone reflecting that -- the picture of itself wouldn't be unlawful, would it?

10:02

MS. EDNEY: Objection: calls for a legal conclusion, also to the extent it's asking for law enforcement sensitive information.

10:02

MR. HANDEYSIDE: The witness is a law enforcement officer. He's designated to testify on behalf of the law enforcement agency.

10:02

1 RANDY JAMES HOWE

2 BY MR. HANDEYSIDE:

3 Q. I'm wondering if a picture reflecting
4 possible terrorist act of itself is illegal.

5 A. It's an unlawful act. It's -- it's 10:02
6 strong information.

7 Q. Certainly.
8 Information that of itself is not
9 contraband, correct?

10 A. Contraband in the sense of being 10:02
11 counterterrorism, related to counterterrorism,
12 terrorism.

13 Q. So evidence or information related to
14 the unlawful act of terrorism?

15 A. Yes. 10:02

16 Q. Okay.

17 MR. HANDEYSIDE: I'll ask the court
18 reporter to mark as CBP Deposition
19 Exhibit 7, this document.

20 - - - 10:03

21 (CBP Deposition Exhibit Number 7,
22 Defendants' Objections and
23 Responses to Plaintiffs' Second Set
24 of Requests for Production and
25 Plaintiffs' Third Set of 10:03

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2 electronic devices that can -- it conducts yield
3 contraband, essentially.

4 MS. EDNEY: Objection to the
5 vagueness.

10:04

6 THE WITNESS: I'm just reading what
7 the statement says. And the question
8 again.

9 BY MR. HANDEYSIDE:

10 Q. So CBP cannot say how many of the 10:04
11 searches of electronic devices it conducts at the
12 border yield actual digital contraband; is that
13 accurate?

14 A. Yes.

15 Q. Nor can it say how many of the 10:05
16 searches yield what CBP would consider evidence of
17 criminal activity; is that right?

18 A. I think we have a -- we have
19 difficulty in producing those metrics and
20 capturing, yes. 10:05

21 Q. So why hasn't CBP tracked the number
22 of device searches that have yielded digital
23 contraband?

24 A. I believe that we didn't have
25 the necessary adjustments to the -- to the system 10:05

1 RANDY JAMES HOWE

2 BY MR. HANDEYSIDE:

3 Q. Okay.

4 And I understand that the response
5 says that the decision to conduct a border search 10:12
6 of an electronic device rests exclusively with
7 CBP.

8 I'm wondering, though, do other
9 agencies -- can they request that CBP conduct a
10 border search of an electronic device? 10:12

11 MS. EDNEY: Objection to the extent
12 it calls for law enforcement privilege
13 information.

14 But you can answer.

15 THE WITNESS: My same answer is 10:13
16 that -- as a part of our role in informing
17 us to be able to -- to do that search --
18 rests with us -- the authority to make
19 that decision; so it's all part of the
20 process. 10:13

21 BY MR. HANDEYSIDE:

22 Q. And understanding that CBP makes the
23 decision, does it take requests to do so?

24 MS. EDNEY: Objection: same
25 objection, law enforcement privilege. 10:13

1 RANDY JAMES HOWE

2 THE WITNESS: Yeah, the information
3 that's being gathered by the officer from
4 the other agency helps us make that
5 decision. 10:13

6 BY MR. HANDEYSIDE:

7 Q. When CBP mentions "information
8 provided by other law enforcement agencies," do
9 those other law enforcement agencies include state
10 and local law enforcement agencies? 10:13

11 A. We're informed by a host of state,
12 local and Federal law enforcement.

13 Q. So information from state and local
14 can be, again, part of that totality of the -- of
15 the circumstances or information that CBP uses to 10:14
16 make decisions about whether to search electronic
17 devices at the border?

18 MS. EDNEY: Objection to the extent
19 it calls for law enforcement privilege.

20 But you can answer. 10:14

21 THE WITNESS: Yeah, the information
22 that we have from these other law
23 enforcement agencies informs the officer
24 to make that determination. It's all a
25 part of the process. 10:14

1 RANDY JAMES HOWE

2 BY MR. HANDEYSIDE:

3 Q. Does information from foreign
4 government also inform CBP's decisions, at times,
5 to conduct border searches of electronic devices? 10:14

6 MS. EDNEY: Objection to the extent
7 it calls for law enforcement privilege
8 information.

9 But you can answer.

10 THE WITNESS: I'm not sure exactly 10:14
11 what I can say that's not law enforcement
12 privilege, other than to say that I know
13 we have information-sharing agreements
14 with some countries.

15 BY MR. HANDEYSIDE: 10:15

16 Q. Okay. The response identifies "other
17 law enforcement agencies."

18 Are there other agencies that are not
19 law enforcement agencies that provide information
20 that CBP benefits from in determining whether to 10:15
21 search electronic devices?

22 MS. EDNEY: Objection to the extent
23 it calls for law enforcement privilege
24 information.

25 But if you can answer. 10:15

1 RANDY JAMES HOWE

2 A. If we're satisfied they're American,
3 U.S. citizen, yes.

4 Q. And, essentially, the same is true for
5 lawful permanent residents? 10:17

6 They're admissible to the
7 United States, by definition; is that right?

8 A. By definition.

9 Q. So is determining the intentions of a
10 U.S. citizen upon entry a valid purpose for a 10:17
11 border search of that citizen's electronic
12 device?

13 A. Can you restate the question?

14 Q. Is determining the intentions of a
15 U.S. citizen upon entry to the United States a 10:17
16 valid purpose for conducting a border search of
17 that citizen's electronic device?

18 A. Their intention of entering the
19 United States?

20 Q. What they're intending to do upon 10:18
21 entry, when they get here.

22 A. Well, they're applying for admission,
23 so it's pretty clear what they're intending.

24 Q. Is -- is it a valid purpose for
25 conducting a border search to decide or figure out 10:18

1 RANDY JAMES HOWE

2 A. We're focused on the individual and
3 what they're bringing into the United States.

4 Q. Okay.

5 MR. HANDEYSIDE: Maybe now is a good 10:20
6 time for a break.

7 THE WITNESS: It sounds good.

8 MR. HANDEYSIDE: Ten minutes?

9 MS. EDNEY: Sure.

10 - - - 10:20

11 (Whereupon, a recess was taken from
12 10:20 a.m. to 10:33 a.m.)

13 - - -

14 MS. EDNEY: Before we start again,
15 we'd like to make one clarification 10:33
16 regarding a question you asked earlier.

17 Mr. Howe.

18 THE WITNESS: You asked about
19 agencies that provide information in TECS,
20 the law enforcement agencies, and I was 10:33

21 thinking for law enforcement purpose, so I
22 didn't recall -- obviously, FDA, USDA,
23 Consumer Product Safety -- you know, that
24 type of -- those agencies, nonlaw
25 enforcement, they may have information in 10:33

1 RANDY JAMES HOWE

2 TECS.

3 BY MR. HANDEYSIDE:

4 Q. I see.

5 A. I just wanted to clarify that. 10:33

6 Q. Thank you.

7 Just a quick follow-up.

8 So those agencies do contribute

9 information to TECS?

10 A. We have arrangements with -- with some 10:33

11 agencies to have -- to be able to put information

12 in TECS.

13 Q. And some -- at least some parts of

14 those agencies will also, then, have access to

15 TECS? 10:34

16 A. Yes, with certain limitations, I'm

17 sure.

18 Q. Okay.

19 I'd like to move on to Topic 7. If

20 you go back to Exhibit 1, the notice of 10:34

21 deposition, and review Topic 7.

22 (Whereupon, the witness reviews the

23 material provided.)

24 THE WITNESS: Okay.

25

1 RANDY JAMES HOWE

2 BY MR. HANDEYSIDE:

3 Q. Just briefly, what is the role of a
4 CBP officer at primary inspection?

5 A. The primary officer or the CBP officer 10:34
6 is the individual that will interact with every
7 single traveler as they present themselves, so
8 it's their role to quickly and efficiently make
9 that determination on that traveler, whether or
10 not they're admissible to the United States and 10:34
11 what they're presenting is not coming in contrary
12 to law or there's no contraband, et cetera.

13 Q. I see.

14 And when CBP officers at primary
15 encounter travelers seeking to enter the 10:35
16 United States, they run queries in the TECS
17 system; is that right?

18 A. Every traveler that we interact with,
19 we collect their documentation. So we look at
20 their passports. We do query our database. 10:35

21 Q. Meaning TECS?

22 A. Yes.

23 Q. And -- and the queries of TECS will
24 yield some information about the traveler,
25 including past travel information; is that 10:35

1 RANDY JAMES HOWE

2 accurate?

3 A. It will -- the primary officer will
4 see whether or not there's any recent crossing
5 history, so whether or not they crossed into the 10:35
6 United States recently and where they crossed.
7 That's the only information that's presented to --
8 to the -- to the officers as far as the traveler,
9 if we're just talking about the traveler.

10 If they're in a vehicle and a land 10:36
11 border environment, there might be information
12 about the registration of the vehicle.

13 Q. Okay. So I think you said that the
14 officer views recent travel information.

15 Is that -- was that accurate? 10:36

16 A. Recent crossing information, so the
17 mere fact that they crossed into the United States
18 and where and when.

19 Q. Okay. And what do you -- and by
20 "recent," can you provide any further detail about 10:36
21 what constitutes "recent"?

22 A. I think it's set for six months, over
23 the last six months, or it might be 12 months.
24 It's one of those type of periods.

25 Q. Okay. And is -- is that something 10:36

1 RANDY JAMES HOWE

2 that -- that information generated for the officer
3 at primary by -- automatically, or does the
4 officer have to enter information in order to
5 access that information? 10:36

6 A. If we're just talking about the
7 crossing information, it just appears on the
8 screen.

9 Q. And are there any limits on the
10 authority of CBP officers at primary to refer 10:37
11 travelers to secondary?

12 A. Any limits?

13 Q. Right.

14 A. Well, that officer's responsibility is
15 to make that quick and efficient determination. 10:37
16 If they're unable to do so in a reasonable amount
17 of time, we have secondary inspection, really is
18 kind of a comanagement extension of -- of primary.

19 So it's really just an extension of
20 what the primary officer started and wasn't able 10:37
21 to accomplish in a short period of time.

22 You have to rapidly make those
23 decisions. You know, a million people a day
24 enter the United States, so we have to do that
25 quickly. 10:37

1 RANDY JAMES HOWE

2 process. So the TECS system, which is what the
3 primary officer uses -- that TECS is also in
4 secondary. It's a secondary module of -- of TECS,
5 so it all is interconnected. So the primary 10:39
6 officer -- if we're referring somebody, the
7 secondary officer would bring up that referral
8 and then indicate in the secondary portion of
9 TECS what occurred in that secondary inspection.

10 Q. Okay. But is it correct to say that 10:40
11 every time someone is referred to secondary,
12 there will be a record in TECS that reflects
13 that?

14 A. Yes.

15 Q. And if a traveler's electronic device 10:40
16 was searched during secondary inspection, there's
17 also a TECS record that reflects that -- that
18 device search?

19 A. Every single device search that's
20 completed is recorded in TECS in an electronic 10:40
21 media subset of secondary.

22 Q. Okay. And so when the CBP officer at
23 primary conducts those TECS queries, do those
24 queries yield records that reflect the prior
25 referrals to secondary inspection for a traveler? 10:40

1 RANDY JAMES HOWE

2 MS. EDNEY: Objection:

3 mischaracterizes his testimony.

4 THE WITNESS: I gave you a very,
5 very unique situation. Whether or not 10:43

6 it's ever been done, I don't know, and
7 certainly not something that's out of the
8 norm.

9 BY MR. HANDEYSIDE:

10 Q. Okay. So the -- let me ask a 10:43
11 different way.

12 The CBP officers at primary -- is
13 their access to TECS limited while they're in that
14 function at primary, other than the exception that
15 you just described? 10:44

16 A. Yes, extremely limited, just whether
17 or not there's any lookouts in the system
18 potentially for that traveler and any recent
19 crossing history.

20 Q. Okay. And that's a limitation that is 10:44
21 technical; the -- the system does not permit them
22 to access the other parts of TECS when they're in
23 that role?

24 A. It's more than technical. It's -- it
25 might be technical. That's why I said I -- I 10:44

1 RANDY JAMES HOWE

2 primary officer.

3 I'm not -- I don't know if that's
4 happened before.

5 Q. Okay. Looking at the same page there, 10:48
6 what's a lookout?

7 A. It would be an alert in the system
8 that -- either entered by CBP or potentially other
9 law enforcement agencies of information of a
10 traveler or on a vehicle. It could be a stolen 10:48
11 vehicle; it could be a lookout.

12 Q. Okay. This page here, the same page,
13 Defs. 177, Footnote 8 says, As part of processing
14 individuals at the border, DHS/CBP conducts
15 prearrival and predeparture TECS queries, which 10:49
16 include checks against lookouts such as wants and
17 warrants, watch list matches, et cetera.

18 What is a want in this context?

19 A. Somebody who's wanted for a -- by a
20 law enforcement entity. 10:49

21 Q. Other than someone for whom there's
22 already a warrant been issued?

23 A. I'm not following what you're asking.

24 Q. If someone's wanted --

25 A. It would be a lookout. 10:49

1 RANDY JAMES HOWE

2 Q. -- wanted for what?

3 For questioning, I guess?

4 MS. EDNEY: Objection: hypothetical.

5 THE WITNESS: Somebody could have 10:49

6 committed murder; somebody could have

7 robbed a bank.

8 BY MR. HANDEYSIDE:

9 Q. Sure.

10 In which case, there would be a 10:49

11 warranty pending, probably, correct?

12 I'm trying to understand what's the

13 difference between a want and a warrant.

14 MS. EDNEY: If you know.

15 THE WITNESS: Yeah, I don't -- I 10:50

16 think it's the same thing, to warrant

17 somebody who's wanted for committing a

18 crime.

19 BY MR. HANDEYSIDE:

20 Q. Okay. Who can create wants -- or I'm 10:50

21 sorry -- lookouts?

22 MS. EDNEY: Objection.

23 If you know.

24 THE WITNESS: Anybody that has that

25 authority within TECS. So for CBP, if 10:50

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somebody had violated -- violated the terms and conditions of a previous mission, we would potentially be on the lookout.

10:50

Other law enforcement agencies could have lookouts.

BY MR. HANDEYSIDE:

Q. Okay. I'm sorry to keep jumping around here --

10:50

A. I'm fine.

Q. -- if you could turn to Exhibit 5, which was the TECS platform privacy impact assessment.

If you could turn to Page 12, and there's a heading there that says Lookout Records Services. And the second paragraph there -- sorry. The second sentence in that paragraph says, A TECS lookout record may be created by CBP or other TECS partner agencies.

10:51

10:51

What are partner agencies for the purpose of this lookout records?

MS. EDNEY: I'm going to object to the extent it's calling for law enforcement information.

10:51

1 RANDY JAMES HOWE

2 agencies, which are apparently listed on Page 41
3 in this appendix, when referring to the lookout
4 records services, it refers to TECS partner
5 agencies. And maybe you don't know. 10:53

6 I'm just wondering if there's a reason
7 for the difference there, if the TECS partner
8 agencies for lookout purposes are different.

9 A. I don't know, but they seem to be one
10 and the same. 10:53

11 Q. Okay. Do lookouts last for any
12 particular amount of time?

13 MS. EDNEY: Objection to the extent
14 it calls for law enforcement privilege
15 information. 10:53

16 But answer, if you can.

17 THE WITNESS: Again, the question.

18 BY MR. HANDEYSIDE:

19 Q. Do lookouts last for any particular
20 amount of time? 10:53

21 MS. EDNEY: Same objection.

22 THE WITNESS: I would say they last
23 as long as there's pertinence.

24 BY MR. HANDEYSIDE:

25 Q. And does the presence of a lookout in 10:53

1 RANDY JAMES HOWE

2 an individual's TECS record cause that person to
3 be referred to secondary inspection?

4 MS. EDNEY: Objection to the extent
5 it calls for law enforcement privilege 10:53
6 information.

7 But you can answer, if you can.

8 THE WITNESS: If there's -- if
9 there's a lookout requiring a referral to
10 secondary that would -- that's what the 10:54
11 primary officer sees, then they would be
12 referred.

13 BY MR. HANDEYSIDE:

14 Q. I see.

15 So are there different kinds of 10:54
16 lookouts, then, some requiring referral and some
17 not requiring referral?

18 MS. EDNEY: Objection to the extent
19 it calls for law enforcement privilege
20 information. 10:54

21 You can answer, if you can.

22 THE WITNESS: I think it's the same
23 answer.

24 BY MR. HANDEYSIDE:

25 Q. When a person has been -- been 10:54

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referred to secondary inspection because of a
lookout, is it likely that the officers, then, in
secondary will search that individual's electronic
devices?

10:54

MS. EDNEY: Objection to the extent
it calls for law enforcement and asking a
hypothetical.

THE WITNESS: It depends upon what
the lookout is for. If this is a lookout
due to a previous agriculture violation,
there may not be a need, depending upon
the totality of the circumstances.

10:54

BY MR. HANDEYSIDE:

Q. Are lookouts one reason why some
individuals experience border searches of
electronic devices on more than one occasion?

10:55

MS. EDNEY: Objection to the extent
it calls for law enforcement information.

THE WITNESS: Yeah. The officers
that conduct secondary and perform border
searches do that on the basis of the
totality of the circumstances of the
information they have in front of them, so
what the traveler is telling us and maybe

10:55

10:55

1 RANDY JAMES HOWE

2 some law enforcement information as well.

3 BY MR. HANDEYSIDE:

4 Q. Okay. Let's turn to Exhibit 6 again.

5 This is the device search privacy assessment. 10:55

6 If you could turn to Page 10, which is
7 Bates stamped Defs. 184. The heading there says
8 Storage of Information Extracted from an
9 Electronic Device in the Automated Targeting
10 System. 10:56

11 What's the automated targeting system?

12 A. It's a system that CBP uses to kind of
13 do risk assessments of law enforcement information
14 to help us be better informed on travelers.

15 Q. And so feel free to read this 10:56
16 paragraph, if you need to --

17 A. Yeah.

18 Q. -- my understanding is that
19 information from devices that are searched at the
20 border is at least sometimes entered into ATS; is 10:56
21 that accurate?

22 A. If there's information that -- that
23 has been gathered through a search, through --
24 through an advanced search and there's law
25 enforcement benefit to that information, then it 10:56

1 RANDY JAMES HOWE
2 could potentially be stored on ATS.

3 Q. Okay.

4 MR. HANDEYSIDE: I'll ask the court
5 reporter to mark this document as 10:57
6 CBP Deposition Exhibit 8.

7 - - -
8 (CBP Deposition Exhibit Number 8,
9 Privacy Impact Assessment for the
10 Automated Targeting System 10:57
11 DHS/CBP/PIA-006(e), January 13,
12 2017, Bates stamped Defs. 0996
13 through Defs. 1056, marked for
14 identification, as of this date.)

15 - - - 10:57

16 BY MR. HANDEYSIDE:

17 Q. Are you familiar with this document?

18 A. I believe this was one of the
19 documents I looked at, yes.

20 Q. So is this the privacy impact 10:57
21 assessment for ATS?

22 A. Right.

23 Q. It begins at Bates stamped Defs. 996.
24 If you could just turn to the first
25 page with text. It's 997. 10:57

1 RANDY JAMES HOWE

2 The second sentence there in the
3 Abstract, it says, ATS is the decision support
4 tool that compares traveler, cargo, and conveyance
5 information against law enforcement, intelligence 10:58
6 and other enforcement data using risk-based
7 scenarios and assessments.

8 Is ATS a system that, then, has partly
9 intelligence purposes?

10 MS. EDNEY: Objection to the extent 10:58
11 it calls for law enforcement privilege.

12 But you can answer.

13 THE WITNESS: It's a tool that CBP
14 uses to, you know, determine when a
15 traveler's a concern or we should have 10:58
16 increased focused on.

17 BY MR. HANDEYSIDE:

18 Q. And I think earlier we talked about
19 how part of the purpose for conducting border
20 searches of electronic devices is to conduct risk 10:58
21 assessments.

22 Is ATS the system that conducts those
23 risk assessments?

24 A. It's a tool that we use. I mean, the
25 officer -- when we're talking before, we were 10:59

1 RANDY JAMES HOWE

2 talking about the officer looking at the totality
3 of the circumstances, gathering information from
4 the traveler.

5 This is a system or a tool that 10:59
6 will -- will be used as well.

7 Q. So let's do it this way: Let's turn
8 to Page 4, Defs. 1000.

9 One function of ATS, then, is to
10 identify some individuals for referral to 10:59
11 secondary inspection?

12 A. There are some -- some rules that are
13 set up, not really specific to individuals, but
14 based on rules, you know, there may be increased
15 focus on individuals to ensure there's no 10:59
16 concerns.

17 Q. And depending on whether someone --
18 someone's information meets those rules, that
19 person then could be flagged by ATS for additional
20 inspection? 11:00

21 A. Yes.

22 Q. In making those risk assessments, does
23 ATS rely on information from TECS?

24 A. Yeah, TECS is one of the systems that
25 it takes information from. 11:00

1 RANDY JAMES HOWE

2 that indicates that we should have a little more
3 scrutiny on that individual.

4 Q. Okay. So it signals, then, to the
5 officer at primary inspection to refer the person 11:01
6 to a secondary inspection?

7 A. Yes.

8 Q. So if ATS indicates that a traveler
9 should be referred to secondary inspection, does
10 the officer at primary have any discretion in 11:02
11 deciding whether to refer that person?

12 A. No. It's a lookout that's -- that
13 informs the primary officer.

14 Q. Okay. And if an individual is
15 referred to secondary inspection based on that 11:02
16 ATS-generated lookout, is it more likely, then,
17 that that person's electronic devices will be
18 searched than if the ATS lookout had not been on
19 that file?

20 MS. EDNEY: Objection based on -- to 11:02
21 the extent it reaches for a law
22 enforcement privilege information.

23 THE WITNESS: The officers use their
24 training and experience and the totality
25 of the circumstances to decide what 11:02

1 RANDY JAMES HOWE

2 it calls for law enforcement privilege.

3 Answer, if you can.

4 THE WITNESS: Could you repeat the
5 question? 11:08

6 I don't know if I can answer it, but
7 I'll try.

8 BY MR. HANDEYSIDE:

9 Q. Sure.

10 Does information obtained from border 11:08
11 searches of electronic devices affect how ATS
12 flags individuals for additional scrutiny at the
13 border?

14 A. I think it could. If there's law
15 enforcement information in there that's of benefit 11:08
16 to CBP that better informs us of an individual
17 that -- that's of concern, then I'd say,
18 potentially, yes.

19 Q. Again, turning back to Exhibit 8,
20 which is the ATS PIA, and if you turn to the page 11:08
21 Bates stamped Defs. 1035.

22 The last full paragraph there that
23 begins with the heading Mitigation -- feel free to
24 read that paragraph silently.

25 (Whereupon, the witness reviews the 11:09

1 RANDY JAMES HOWE

2 material provided.)

3 THE WITNESS: Okay.

4 BY MR. HANDEYSIDE:

5 Q. So it seems to me that this paragraph 11:09
6 is describing how information taken from
7 electronic devices that resides in ATS will be
8 used.

9 Is that fair?

10 A. Yeah, I felt like this -- well, my 11:09
11 last response described this by the way.

12 Q. So the information that -- that CBP
13 gets from electronic devices uploads to ATS --
14 it -- it's used then to determine whether to flag
15 that person again or other people in the future? 11:10

16 MS. EDNEY: Objection to the extent
17 it calls for law enforcement privilege
18 information.

19 THE WITNESS: Clarify again, the
20 information that we do retain that we 11:10
21 determine to be law enforcement use is
22 uploaded in ATS that better informs us in
23 directing our attention to an individual
24 that may be of concern.

25

1 RANDY JAMES HOWE

2 time with some individuals.

3 BY MR. HANDEYSIDE:

4 Q. Okay. Moving to secondary inspection
5 now. 11:11

6 A. Yeah.

7 Q. When an individual has been referred
8 to secondary inspection, CBP officers generally
9 review TECS records related to that person?

10 MS. EDNEY: Objection to the extent 11:11
11 it calls for law enforcement privilege
12 information.

13 THE WITNESS: Secondary officers are
14 making determination on the passenger
15 right then and there so the -- for the 11:11
16 circumstance that they're presenting
17 themselves for admission.

18 So in preparing to look at this
19 passenger -- this traveler, any previous
20 encounters we've had, any previous 11:12
21 secondary referrals and, you know, the
22 outcomes of those, you know, would be
23 informing that officer to do the
24 inspection.

25

1 RANDY JAMES HOWE

2 BY MR. HANDEYSIDE:

3 Q. Okay. Is there a policy or a
4 practice, then, of -- let's put it this way: Is
5 there a policy that CBP officers at secondary 11:12
6 should view TECS records related to individuals?

7 A. If they're doing complete work, they
8 should be. They would be better informed on it --
9 about that traveler. And gathering the totality
10 of the circumstances, they better be informed when 11:12
11 they're about to make this next assessment,
12 because each inspection is unique. Every time
13 they apply for admission, it's different.

14 Q. Okay. And is there a policy regarding
15 what an officer at secondary should do when a 11:12
16 traveler's TECS record reflects one or more prior
17 referrals to secondary inspection?

18 A. Yeah, it's a hypothetical. I mean,
19 those other referrals and secondary encounters,
20 depending upon the circumstances and why they're 11:13
21 there -- yeah, it's -- it's case-by-case.

22 Q. I'm asking if there's a policy, not as
23 a hypothetical. But is there a policy about what
24 an officer should do when an individual's TECS
25 record reflects one or more prior referrals to 11:13

1 RANDY JAMES HOWE

2 secondary inspection?

3 A. Yeah, I don't get your question.

4 Q. Is there -- is there -- does CBP tell,
5 you know, officers in secondary that they should 11:13
6 do something.

7 Is there a course of conduct that
8 they're supposed to take when they review a TECS
9 record and it shows multiple prior referrals to
10 secondary inspection? 11:13

11 A. Yeah. So through the officer's
12 training and experience, they know that they need
13 to be informed about that traveler and use
14 whatever information they have available to them.
15 Looking at previous encounters and looking -- and 11:14
16 reviewing what transcribed informs them to be able
17 to make that decision.

18 Q. And that includes records related to
19 prior searches of an individual's electronic
20 devices? 11:14

21 A. It could be.

22 Q. And, again, is there any policy that
23 instructs CBP officers on what to do if they see
24 that an individual's electronic devices have been
25 searched in the past on one or more prior 11:14

1 RANDY JAMES HOWE

2 A. -- of course, they would need
3 supervisory approval.

4 Q. So for the basic searches, are prior
5 searches of an individual's electronic devices 11:16
6 relevant to whether or not they conduct a search
7 of that individual's devices on that occasion?

8 A. The officer has to rely on their
9 training, experience and the totality of the
10 circumstances they have before them. So if we 11:16
11 encountered somebody before and they had child
12 pornography, then I would say, yes, we would be
13 looking at it again.

14 Q. What if you encountered the individual
15 in the past and they did not have child 11:17
16 pornography, but a search, of course, was
17 nonetheless conducted?

18 A. Yeah, it's based on the training and
19 experience and totality of the circumstances and
20 what we have before them. It depends. 11:17

21 Q. Okay. We can take a break, if you
22 want; otherwise, we can move on to Topic 1.

23 A. Yeah, I'm fine.

24 Sure.

25 Q. Topic 1 is Policies, practices, and 11:17

1 RANDY JAMES HOWE

2 sentence?

3 Q. I read the second sentence in --

4 A. Sorry.

5 Q. -- the second-to-last paragraph. 11:19

6 A. Okay. So what's your question?

7 Q. Are those all valid reasons to conduct
8 a basic search?

9 A. There are some reasons, sure.

10 Q. I take it there are others? 11:20

11 A. Sure.

12 Q. So this isn't a complete list?

13 A. No. This is an OIG report.

14 Q. Do you know what the source of this
15 list of reasons is? 11:20

16 A. Why they wrote that?

17 Q. Yeah.

18 A. I don't know.

19 Q. Okay. I take it CBP officers record
20 the reasons justifying a basic search after they 11:20
21 conduct the search; is that right?

22 A. Part of the process is -- is
23 documenting in TECS, like we said before,
24 electronic medium portion, both the basic and
25 advanced, and the reason -- the information 11:21

1 RANDY JAMES HOWE

2 indicating why it led to that type of search is
3 recorded, yes.

4 Q. Okay. Are they supposed to record
5 those reasons -- the reasons they conducted the 11:21
6 search, in detail?

7 A. Yeah, they're supposed to indicate
8 what led them to conduct that search, the
9 information -- you know, what -- yeah, document
10 what led them to do that. 11:21

11 Q. Sure.
12 And I just -- I just want to
13 understand.

14 You know, they do that in narrative
15 form, or is there, like, a drop-down menu with a 11:21
16 series of approved reasons, or --

17 A. I believe it's a narrative, a
18 narrative.

19 Q. Okay. Let's turn quickly in the same
20 document to Page 990. 11:21

21 If you could just review the
22 paragraph -- the paragraphs that start
23 Recommendation 1 and then the paragraph that says
24 Response.

25 A. Okay. 11:22

1 RANDY JAMES HOWE

2 how to decide?

3 A. They're basing on their training and
4 experience and what they do day to day.

5 Q. Do officers have to record the basis 11:49
6 for the national security concern prior to
7 conducting the search?

8 A. We talked about this before. Each and
9 every basic and advanced search is recorded, and
10 the reasoning that led to the search is recorded, 11:49
11 yes.

12 Q. Right.
13 And I'm asking if they have to record
14 the basis for the national security concern before
15 they do it. It sounds like they have to do it 11:49
16 after.

17 Is there a requirement to -- to record
18 that basis beforehand?

19 A. It sounds like a mechanical question
20 and the confines of the inspection and the 11:49
21 physical makeup of the secondary office, but they
22 certainly need supervisory approval before they
23 would do it.

24 Q. Okay. Nothing requires that they then
25 write down the reason before they conduct the 11:50

1 RANDY JAMES HOWE

2 A F T E R N O O N S E S S I O N

3 (12:45 p.m.)

4 - - -

5 RANDY JAMES HOWE, 11:59

6 called for continued examination and, having been
7 previously duly sworn, was examined and testified

8 further as follows:

9 - - -

10 MR. HANDEYSIDE: Back on the record. 11:59

11 - - -

12 EXAMINATION (CONTINUED) BY COUNSEL FOR PLAINTIFFS

13 - - -

14 BY MR. HANDEYSIDE:

15 Q. Let's move on to Topic 2. And Topic 2 12:45

16 is Policies, practices, and training regarding

17 what kinds of information CBP employees should

18 view, document, or copy when they search

19 electronic devices obtained from travelers at the

20 border. 12:46

21 So travelers carry devices that

22 contain many different kinds of information such

23 as photos, contacts or e-mails; is that correct?

24 A. Correct.

25 Q. And the devices contain a very large 12:46

1 RANDY JAMES HOWE

2 volume of information; is that right?

3 A. Some do, sure.

4 Q. So particularly for manual searches,
5 an officer doesn't have time necessarily to 12:46
6 manually search the entire device; is that right?

7 A. Correct.

8 Q. So the officer has to pick and choose
9 which parts of the device to manually search and
10 which ones not to; is that fair? 12:46

11 A. Based on the totality of the
12 circumstances and the inspection, yes.

13 Q. So individual officers have discretion
14 to search whatever kinds of content on the device
15 they choose? 12:46

16 A. No different than the discretion they
17 have to choose what they search in somebody's bag.

18 Q. So that's a yes?

19 A. Yes.

20 Q. So what, if any, instructions does CBP 12:47
21 give to its officers regarding what types of
22 information on a device they should search?

23 A. Well, the foundation of our program is
24 in our directive so the guidance on -- on the
25 whole policies in the directive. More 12:47

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2 versus that?

3 A. Again, we don't tell officers how to
4 search a bag. Based on the totality of the
5 circumstances, to -- you know, pre the electronic 12:48
6 age, when we didn't have things on the device,
7 people would travel with information about their
8 employment, personal information, personal photos,
9 maybe prescriptions, things like that. Officers
10 are trained, based on the totality of the 12:48
11 circumstances, pre the electronic age, to gather
12 information to satisfy them that something is
13 admissible.

14 So it correlates to the same, from
15 looking at a bag into a phone. Based on the 12:49
16 totality of the circumstances and where they're
17 going with their questioning, they're going to
18 look into the area -- just like they look in an
19 area of a bag potentially, they're -- they're
20 going to be looking at a specific area in a phone. 12:49

21 Q. Okay. Understood.

22 So that's a no, there's nothing that
23 says -- no guidance or -- or particular
24 instruction that says what type of data they
25 should focus on; they get to choose that 12:49

1 RANDY JAMES HOWE

2 will have us look in whatever is resident on the
3 phone.

4 Q. What about instead of different kinds
5 of information, types of data? Are there -- are 12:51
6 there kinds of information they're supposed to
7 look for on the phone -- travel history?

8 Is that something that they're
9 instructed to look at?

10 A. I'm not sure what you mean by "travel 12:51
11 history" on the phone.

12 Q. Anything that might reflect someone's
13 travel history, e-mails reflecting ticket
14 reservations? Is that the kind of information
15 that CBP officers are instructed to look at? 12:51

16 A. Anything that's on the phone from the
17 boarding pass, to what you just described.

18 Q. That's -- that includes social and
19 family relationships?

20 A. Whatever is physically resident on 12:52
21 that phone or that device.

22 Q. So some devices have internal tools
23 that can automatically search the content of the
24 device; is that correct?

25 A. I'm not sure what you mean. 12:52

1 RANDY JAMES HOWE

2 A. There may be. I'm not sure.

3 Q. What sources of information would you
4 need to consult in order to -- to find out the
5 answer?

12:53

6 A. I could check with somebody.

7 Q. Those internal search tools can -- can
8 search content under the device that might not be
9 readily visible, like cached content or metadata;
10 is that right?

12:53

11 A. I'm not sure what either one of those
12 refer to.

13 Q. Okay. And so during a basic search,
14 officers will sometimes document the information
15 that they view on an electronic device; is that
16 right?

12:54

17 A. They may.

18 Q. How do they do that?

19 A. If the basic search determine there's
20 some law enforcement-benefited information, it
21 would be recorded within -- within our systems.

12:54

22 Q. Would -- can they record information
23 verbatim as it sits on the device?

24 A. Whatever is pertinent that's a law
25 enforcement benefit -- that could be recorded.

12:54

1 RANDY JAMES HOWE

2 Q. -- so some people, I think, refer to
3 that as cached content, when you're browsing the
4 Internet, it downloads a certain amount of
5 information, keeps it on the device even though it 01:11
6 just immediately prior had been stored on a remote
7 server somewhere.

8 Are there any limits on searching that
9 kind of content, cached content?

10 A. We have the ability to search 01:12
11 whatever's physically resident on the phone. I'm
12 not familiar with that term. But if you're saying
13 that's resident on the phone, then it would be
14 searchable.

15 Q. Okay. So even if a device is disabled 01:12
16 from network connectivity, it's still possible,
17 isn't it, to, say, scroll through a person's
18 Web-based e-mail that's -- that's on a -- that's
19 in -- you know, like available through the app,
20 the e-mail app; is that true? 01:12

21 A. We're able to view whatever is
22 physically resident on the phone, and if it's
23 resident on the phone, then we have that
24 capability.

25 Q. Let's talk about Topic 9, Policies, 01:12

1 RANDY JAMES HOWE

2 that is subject to this limit?

3 A. I think it's two different things.

4 Q. So the information that is subject to
5 this limit is only information that's -- that's 01:16
6 data essentially taken from the device itself?

7 A. That's information that's physically
8 resident on -- on the device that has law
9 enforcement benefit that's retained on ATS.

10 Q. If somebody wants to simply, you know, 01:17
11 write -- if an officer wants to write down what he
12 or she saw on the device, that's not subject to
13 this -- to this -- to the limit that's set forth
14 here (indicating)?

15 A. I don't believe there's a narrative 01:17
16 portion of what's saved in ATS, but I don't think
17 so. I think it's the information that's retained.

18 Q. Directly from the device?

19 A. That's law enforcement benefit, yes.

20 Q. This sentence -- again, it refers to 01:17
21 other enforcement matters.

22 Can you provide examples of what other
23 enforcement matters would be, aside from
24 immigration and customs?

25 A. We have a vast mission. 01:18

1 RANDY JAMES HOWE

2 Counterterrorism is a part of what we do. So it
3 could be a host of different things.

4 Q. And so in terms of the types of
5 content, it doesn't matter if it's e-mails? 01:18
6 Photos? Contacts? That all -- this applies to
7 all different types of content?

8 A. I guess I'm confused by your question.
9 I apologize.

10 Q. So information -- it could be of any 01:18
11 different kind, correct? It could be images?
12 E-mails? Contacts? Browsing history?

13 A. Anything that is resident on the
14 device. It could be anything, yes.

15 Q. When CBP retains information from 01:19
16 devices, it can do so in one or more systems of
17 records; is that right?

18 A. Yes.

19 Q. So each of those systems of records
20 have their own retention periods? 01:19

21 A. I'd have to refer to what they are,
22 but I'm sure they're pretty -- pretty descriptive
23 in explaining what they are.

24 Q. So does CBP then review information in
25 those systems of records to determine whether -- 01:19

1 RANDY JAMES HOWE

2 hand, the potential violation of law or national
3 security matter. I mean, it's -- it could be
4 quick; it could be lengthy.

5 Q. Let's turn back to the policy at 01:27
6 Paragraph 5.5.1.3, just briefly review that.

7 (Whereupon, the witness reviews the
8 material provided.)

9 THE WITNESS: Okay.

10 BY MR. HANDEYSIDE: 01:28

11 Q. So this policy permits the sharing of
12 information from electronic devices searched at
13 the border with state, local, foreign governments;
14 is that correct?

15 A. That's what it says. 01:28

16 Q. And, in fact, CBP does share
17 information from electronic devices with those
18 other Government entities at times; is that right?

19 A. We do.

20 Q. And it says in accordance with 01:28
21 applicable law and policy.

22 Are there any limits, aside from
23 what's set forth in this policy, on what
24 information retained from devices that CBP
25 searches can be shared with those other agencies? 01:28

1 RANDY JAMES HOWE

2 A. This comes back to what we were
3 talking about before, where if it has law
4 enforcement benefit, it's relevant to a law
5 enforcement concern. 01:29

6 Q. Does the policy impose that limit?

7 A. Does what policy?

8 Q. This policy, the CBP directive,
9 Exhibit 3.

10 A. I think the whole policy is -- feeds 01:29
11 into this, yes.

12 Q. When CBP is deciding what to share,
13 does it have to follow its own internal guidelines
14 about what information can be shared?

15 Does this policy provide those 01:29
16 guidelines?

17 A. I think you certainly have
18 information-sharing policy within DHS, and I'm
19 sure there are policies with other Government
20 agencies we would be governed by, other Federal 01:30
21 agencies.

22 Q. So what are those -- what do those
23 policies look like? Are they, like, a memorandum
24 of understanding?

25 A. I'm not sure. 01:30

1 RANDY JAMES HOWE

2 Q. And so does CBP then have any control
3 over how long those other Government entities
4 retain information from electronic device searches
5 that CBP shares with them? 01:30

6 MS. EDNEY: Objection. It is
7 outside the scope, if he doesn't know what
8 other agencies do.

9 THE WITNESS: Yeah, I'm not sure.

10 BY MR. HANDEYSIDE: 01:30

11 Q. You're not sure?

12 A. No.

13 Q. Are there standard procedures for how
14 to retain information from the searches of the
15 devices? 01:30

16 A. It's covered in the directive here
17 (indicating).

18 Q. Okay. Let's go back to what I believe
19 we marked as Exhibit 9. It's the pilot program
20 document. 01:31

21 A. Okay.

22 Q. Turn to Page 11, which is Bates marked
23 Defs. 183.

24 MS. EDNEY: 143?

25 MR. HANDEYSIDE: 143, yes. 01:31

1 RANDY JAMES HOWE

2 BY MR. HANDEYSIDE:

3 Q. I think we talked about electronic
4 media reports. That's the form in which CBP
5 retains information from device searches? 01:31

6 A. Yes.

7 Q. Are electronic media reports the same
8 as IOEMs?

9 A. Yeah, it's one and the same.

10 Q. It's one and the same? 01:31

11 And do the report-making requirements
12 set out here apply to both basic and advanced
13 searches?

14 A. Yeah, I think we've talked about that.
15 We do an IOEM or electronic media report on both 01:31
16 advanced and basic.

17 Q. And so these specific protocols on
18 Page Defs. 143 -- they apply to both?

19 A. I don't know. I have to read it.

20 Q. Please. 01:32

21 (Whereupon, the witness reviews the
22 material provided.)

23 THE WITNESS: I think it probably
24 applies to both, sure.

25

1 RANDY JAMES HOWE

2 MS. EDNEY: Only if you know.

3 THE WITNESS: Yeah. If -- if

4 it's what we're asking them to do to help

5 us, yes, to assist us. 01:34

6 BY MR. HANDEYSIDE:

7 Q. So I just want to understand, how does

8 CBP ensure that the copies of the information that

9 that other agency or entity makes are not retained

10 in ways that would not be permissible under this 01:34

11 policy?

12 MS. EDNEY: Objection to the extent

13 it calls for law enforcement privilege

14 information.

15 THE WITNESS: It would be up to the 01:35

16 agency, if they were retaining it, to

17 retain it on their own authority beyond

18 their assistance that they provided us.

19 BY MR. HANDEYSIDE:

20 Q. Does CBP have any means of ensuring 01:35

21 that -- that that -- that they follow -- that

22 they -- that they delete the information when

23 they're supposed to?

24 A. I'm not aware of any formal

25 arrangement, but they're strong Federal partners, 01:35

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2 so we would -- we would rely on them to -- to
3 discard it when they didn't have any use for it.

4 MR. HANDEYSIDE: Let's take a break.

5 MS. EDNEY: Okay. 01:35

6 - - -

7 (Whereupon, a recess was taken from
8 1:35 p.m. to 1:55 p.m.)

9 - - -

10 MR. HANDEYSIDE: Back on the record. 01:55

11 BY MR. HANDEYSIDE:

12 Q. Just revisiting a topic we had been
13 discussing here before the break, the -- when
14 conducting advanced searches, are there times when
15 CBP makes a full copy of all of the contents of 01:55
16 that device in order to conduct the advanced
17 search?

18 A. We know we certainly have the
19 capability of doing that. Our focus is to -- is
20 on the areas that we need to address in order to 01:55
21 complete the inspection, to complete our area of
22 inquiry, so we have the capability of doing that.

23 I don't know if we've -- if we've done
24 that.

25 Q. Let's look at the OIG report again, 01:56

1 RANDY JAMES HOWE

2 Exhibit 4.

3 A. Okay.

4 Q. We looked at this earlier.

5 So, for instance, on Page 981 -- Bates 01:56
6 stamped 981, the bottom paragraph there, During
7 advanced searches, OFO officers connect external
8 equipment to electronic devices and copy
9 information onto a thumb drive.

10 Are you saying that you don't know if 01:57
11 at times they copy all of the information or just
12 some of it?

13 A. I know that our focus is on whatever
14 area we're focusing on, so we have the capability
15 of searching and copying everything on the device. 01:57
16 We focus on the area that we are -- we need to to
17 address, to resolve what we're looking on.

18 We have the capability of copying all.
19 I don't know if we have --

20 Q. Is there anything that you're aware of 01:57
21 that would prohibit officers from copying
22 everything onto a device?

23 A. Not that I'm aware of.

24 Q. And once made, those copies, you know,
25 what -- what then happens to the copied 01:57

1 RANDY JAMES HOWE

2 out, then?

3 A. It's just the recordation of the event
4 in -- in IOEM. So not actually copying the
5 device, saving it in TECS, no. 01:59

6 Q. Not in TECS?

7 A. No.

8 Q. Okay.

9 In ATS? Is it physically uploaded
10 from the device into ATS? 01:59

11 A. Only pertinent information that's law
12 enforcement purpose.

13 Q. Okay. And then what happens to the
14 information that's on the -- on the device that --
15 from which the information was uploaded? 01:59

16 A. If there's no law enforcement benefit,
17 then it's destroyed or deleted.

18 Q. And what about if there is that
19 benefit? Is it retained on that device as well?

20 A. No. 01:59

21 Q. So the whole -- all of it is deleted?

22 A. Yes.

23 Q. Is there a time period in which
24 that -- that decision has to be made about whether
25 something has law enforcement benefit or not? 02:00

1 RANDY JAMES HOWE

2 or months on end?

3 A. Specifics, no.

4 Q. Are you aware that that's happened?

5 A. I'm not sure. Maybe. I don't know. 02:16

6 Q. Okay. For detentions of devices that
7 extend for weeks or months, what kinds of
8 circumstances would justify a detention of that --
9 of that duration?

10 MS. EDNEY: Objection: asking for a 02:16
11 hypothetical.

12 BY MR. HANDEYSIDE:

13 Q. Does the policy prohibit the detention
14 of devices for weeks or months on end?

15 A. I think the guidelines are pretty 02:16
16 clear and the timelines for supervisory review and
17 approval, five-, 15- and seven-day increments, and
18 that will continue until we're satisfied that the
19 border search or -- has been completed and
20 resolved. 02:16

21 Q. So the policy provides for detention
22 of a device for periods that can extend weeks
23 or months; is that correct?

24 A. Five-, 15- and seven-day increments,
25 that's what the directive says. 02:17

1 RANDY JAMES HOWE

2 Q. So those seven-day -- is there an
3 ultimate time limit on how long those increments
4 can continue?

5 A. I think it's a definite -- I guess I'm 02:17
6 confused by this 21-day reference in 5.4.1.2, but
7 it seems to be indefinite.

8 Q. What are the kinds of circumstances
9 that could -- that could justify a detention
10 with -- with multiple extensions, lasting weeks 02:17
11 or months?

12 MS. EDNEY: Objection: it calls for
13 law enforcement sensitive information,
14 also asking for a hypothetical.

15 THE WITNESS: It could be just 02:17
16 simply to gain access to the device.
17 There could be some specialized technical
18 reason why we can't gain access in order
19 for us to ensure that the border search is
20 completed. It might be as simple as we 02:18
21 might just -- through technical
22 difficulties just can't gain access. That
23 might be one. Asking for specialized
24 assistance from other agencies. It may
25 take a long period of time to interpret 02:18

1 RANDY JAMES HOWE

2 any other reasons why an officer can hold open an
3 EMR for a period beyond the time immediately
4 surrounding that inspection?

5 A. I can't think of a reason why. 02:50

6 Q. Okay. So in order to calculate the
7 number of searches that have happened in a time
8 period, CBP just looks at the number of EMRs,
9 correct?

10 A. That's what it says. 02:50

11 Q. What I'm wondering is, is it safe to
12 say given what the OIG found, the number of border
13 searches of electronic devices that CBP has
14 calculated is going to be low, given that the OIG
15 found that there were times when officers did not 02:50
16 complete the EMRs according to policy?

17 A. What's the question?

18 Q. The number -- the total number of --
19 of device searches that CBP has calculated will
20 exclude any searches for which officers didn't 02:51
21 complete EMRs; is that right?

22 A. I think the audit period from
23 April '16 to July '17 occurred during a time
24 period where we knew that it was time for us to
25 update our policy, and it's -- it was in the 02:51

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works, obviously, before it was implemented in January of '18, and CBP acknowledges that there were portions of the '09 directive that needed to be updated. And not only that, the EMR -- -MR 02:51 system needed to be updated and refreshed, so there were instances where supervisors provided approval but it wasn't recorded properly. And narratives were incomplete.

So we've addressed many of the things 02:52 that were highlighted in this report through this new directive.

Q. Okay. So the number of searches that CBP calculated that occurred during that period, April 2016 to July 2017, doesn't include 02:52 devices -- device searches that occurred for which there wasn't an EMR created; is that right?

A. Restate your question.

Q. So as we've said -- as I think you've said, sometimes officers didn't fill out the EMR 02:52 according to policy; is that right?

And if they didn't fill out the EMR according to policy, that search wasn't included in the calculation of the number of -- of device searches that took place in that period; is that 02:53

1 RANDY JAMES HOWE

2 A. We did.

3 Q. So I'm just wondering, CBP has a
4 method for tabulating the number of searches of
5 electronic devices that have happened in any given 02:54
6 period. And to do so, it relies on the electronic
7 media reports; is that right?

8 A. Correct.

9 Q. To the extent that officers didn't
10 fill out an electronic media report for a 02:55
11 particular search, those searches won't be
12 included in the final count of the number of
13 searches that occurred; is that right?

14 A. I'm not sure. That's a technical
15 question. One would think that's accurate -- 02:55

16 Q. Okay.

17 A. -- but, again, our directive is --
18 addressed it. That's why we came out with the new
19 directive with very clear-cut guidance and the
20 expectations of our officers and our supervisors, 02:55
21 and that's why our -- our electronic media
22 reporting properly formats it in a way that we
23 record things according to policy.

24 Q. Okay. And the -- the -- the revision
25 in response to some of the findings in this 02:55

1 RANDY JAMES HOWE
2 called "forensic searches" within the jurisdiction
3 of the Ninth Circuit; is that right?

4 MS. EDNEY: Objection: vague.

5 THE WITNESS: You just restated the 02:59
6 same thing twice, didn't you?

7 We need reasonable suspicion to do
8 an advanced search, yes.

9 BY MR. HANDEYSIDE:

10 Q. And that's been the case for some 02:59
11 time. That predates the current policy as long as
12 those searches are occurring in the jurisdiction
13 of the Ninth Circuit; is that right?

14 A. That's correct.

15 MR. HANDEYSIDE: I'll ask the court 02:59
16 reporter to mark this as 13.

17 - - -

18 (CBP Deposition Exhibit Number 13,
19 Memorandum, Bates stamped
20 Defs. 0129 through Defs. 0130, 02:59
21 marked for identification, as of
22 this date.)

23 - - -

24 THE WITNESS: Thank you.

25

1 RANDY JAMES HOWE

2 A. I do.

3 Q. And what is it?

4 A. It's a package to my boss's memo with
5 instructions to the field with the same 03:00
6 information.

7 Q. Indeed the information appears similar
8 in both of these.

9 Is it accurate to say that CBP issued
10 this memorandum from Todd Owen and this muster 03:00
11 dated --

12 A. Yes.

13 Q. -- 2015 in order to comply with the
14 decision of the Ninth Circuit in the Cotterman
15 case? 03:01

16 MS. EDNEY: Objection: asking for a
17 legal conclusion.

18 THE WITNESS: That's the instruction
19 here (indicating).

20 BY MR. HANDEYSIDE: 03:01

21 Q. Okay. And CBP also has written
22 guidance on what constitutes reasonable suspicion
23 of conduct in violation of the laws it
24 administers; isn't that right?

25 A. I think we talked about that earlier. 03:01

1 RANDY JAMES HOWE

2 It's covered in the directive.

3 Q. Aside from what's in the directive --
4 in the directive, are you aware of other guidance
5 that CBP has as to what constitutes reasonable 03:01
6 suspicion?

7 Let's do this --

8 A. Yeah.

9 Q. -- let's just get another exhibit
10 entered. 03:01

11 MR. HANDEYSIDE: Mark this as
12 CBP Deposition Exhibit 15.

13 - - -

14 (CBP Deposition Exhibit Number 15,
15 Personal Search Handbook, Bates 03:01
16 stamped Defs. 1057 through
17 Defs. 1128, marked for
18 identification, as of this date.)

19 - - -

20 THE WITNESS: Thanks. 03:02

21 BY MR. HANDEYSIDE:

22 Q. I imagine you're familiar with this.

23 A. I am.

24 Q. This is CBP's personal search
25 handbook. It was produced in this litigation. 03:02

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RANDY JAMES HOWE

Starting at Bates stamped

Defs. 1057 -- just to be clear, are CBP officers trained on what constitutes reasonable suspicion?

A. I believe they are. 03:02

What page number is that?

Q. We can turn to Page 1067.

A. 1067.

They talk about facts, essentially.

Q. So this page sets out a definition and some guidance on what constitutes and what can be considered in determining if there's reasonable suspicion. 03:02

Is this kind of reasonable suspicion the same reasonable suspicion that CBP used when it issued this -- the Owen memorandum and this muster in order to comply with the requirements in the Ninth Circuit? 03:03

MS. EDNEY: Objection to the extent it's asking for a legal conclusion. He's not a lawyer. 03:03

THE WITNESS: The definition of a "reasonable suspicion" is one or more articulable facts for both.

1 RANDY JAMES HOWE

2 BY MR. HANDEYSIDE:

3 Q. So that's the same if it's in the
4 personal search context or if it's in the device
5 search context? 03:03

6 A. Reasonable suspicion is reasonable
7 suspicion.

8 Q. Okay. And are CBP officers accustomed
9 to applying the reasonable suspicion standard for
10 these purposes? 03:03

11 A. For which purposes?

12 Q. For conducting personal searches or
13 for conducting device searches where that standard
14 is necessary.

15 A. Yes. 03:04

16 Q. Has CBP had any difficulty applying
17 that standard in order to conduct some personal
18 searches or to conduct some device searches?

19 MS. EDNEY: Objection: vague.

20 THE WITNESS: I don't know -- I 03:04
21 don't know what your question is.

22 BY MR. HANDEYSIDE:

23 Q. Have CBP officers had difficulty
24 determining whether reasonable suspicion exists?

25 A. I don't know what you mean by 03:04

1 RANDY JAMES HOWE

2 "difficulty."

3 Q. Have issues emerged within the CBP
4 workforce in applying the reasonable suspicion
5 standard in order to conduct these kinds of 03:04
6 searches?

7 A. Either you do or you don't. You
8 either have the reasonable suspicion or you don't.

9 Q. Okay. Relatively straightforward?

10 A. I think so. 03:04

11 Q. CBP also sometimes applies a probable
12 cause standard for -- for the seizure and
13 retention of an electronic device; is that
14 correct?

15 A. Correct. 03:05

16 Q. And, similarly, CBP has written
17 guidance on what constitutes probable cause?

18 A. Yes.

19 Q. If you could turn to Exhibit 15, Bates
20 stamped 1109. 03:05

21 Is this CBP's definition of "probable
22 cause"?

23 A. Yes.

24 Q. And are CBP officers trained on what
25 constitutes probable cause? 03:05

1 RANDY JAMES HOWE

2 A. Yes.

3 Q. What does that training entail?

4 A. They learn that at the foundation of
5 their training at our Field Operations Academy, 03:06
6 how to establish reasonable suspicion, personal
7 search -- I'm sorry -- probable cause. It's all
8 part of the -- rudimentary part of their training,
9 and also on the personal search.

10 Q. Okay. Is there a specific training 03:06
11 module that's -- that's focused on these
12 thresholds: reasonable suspicion, probable cause?

13 A. I'm sure there is, yes.

14 Q. And are there written materials
15 that -- that address those requirements? 03:06

16 A. Yes.

17 Q. And CBP also obtains warrants under
18 some circumstances; is that right?

19 A. Very -- yeah, we have the authority,
20 very infrequently applied. 03:06

21 Q. And are -- do you know which specific
22 circumstances might entail CBP officers obtaining
23 warrants?

24 MS. EDNEY: Objection: outside the
25 scope. 03:07

1 RANDY JAMES HOWE

2 THE WITNESS: It's all in the
3 personal search, but if you -- if you --

4 BY MR. HANDEYSIDE:

5 Q. Okay. Just quickly -- I've noted a 03:07
6 few -- let's look at Defs. 1076.

7 Are prolonged detentions for medical
8 examinations one circumstance in which CBP may
9 seek a warrant?

10 A. The policy outlines a procedure where 03:07
11 it may be needed, correct.

12 Q. Okay. And let's look at 1095.

13 Are involuntary X-rays another
14 situation in which CBP may seek a warrant?

15 A. Again, we have the authority to do 03:08
16 that if -- and it's -- it's provided for in our
17 policy.

18 Q. And does CBP sometimes actually do --
19 actually does seek warrants for involuntary
20 X-rays? 03:08

21 MS. EDNEY: Objection: asking a
22 hypothetical.

23 BY MR. HANDEYSIDE:

24 Q. I'm asking if they do sometimes, not
25 hypothetically. 03:08

1 RANDY JAMES HOWE

2 A. Yeah, I think we have that authority,
3 but in preparing for this deposition, I haven't
4 been able to identify one instance where we've got
5 a Court order for either: involuntary X-ray or -- 03:08

6 Q. Okay.

7 A. -- yeah, so you said earlier that
8 prolonged detentions, you needed a Court order.
9 Didn't you say that earlier?
10 I think that may be an error. 03:09

11 Q. Prolonged detentions for medical
12 exams.

13 A. So an involuntary X-ray or an
14 involuntary body cavity are the two situations
15 where we would need a Court order, not for a 03:09
16 prolonged detention. A prolonged detention is
17 just supervisory approval and reasonable
18 suspicion.

19 Q. Okay. If we turn to Page 1076. The
20 paragraph above Section q there, you know, says, 03:09
21 The ICE duty agent and/or the CBP prosecution
22 officer shall advise the U.S. Attorney's Office of
23 the detention. If the AUSA believes that probable
24 cause has been established, the ICE duty agent
25 and/or the CBP prosecution officer will work with 03:09

1 RANDY JAMES HOWE

2 A. I don't know.

3 Q. CBP also obtains warrants for some
4 searches of international mail; is that right?

5 A. They're required to, correct. 03:13

6 MR. HANDEYSIDE: I'll ask the court
7 reporter to mark this as CBP Deposition
8 Exhibit 16.

9 - - -

10 (CBP Deposition Exhibit Number 16, 03:13
11 International Mail Operations and
12 Enforcement Handbook, marked for
13 identification, as of this date.)

14 - - -

15 BY MR. HANDEYSIDE: 03:13

16 Q. Are you familiar with this document?

17 A. I am.

18 Q. What is it?

19 A. It's an International Mail Operations
20 Enforcement Handbook, some guidance for the U.S. 03:13
21 Customs Service, but I guess it's still binding on
22 how to handle letter class mail.

23 Q. That was my next question. It's still
24 in force?

25 A. Yes. 03:14

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1 RANDY JAMES HOWE

2 Q. And the second page there, in the
3 middle paragraph under Letter Class Mail
4 Screening -- I'm sorry -- the paragraph below
5 that, the handbook states, Except in cases where 03:14
6 the sender or the addressee has given written
7 consent, a search warrant shall be obtained before
8 any correspondence is read, seized, or referred to
9 another agency.

10 Is that right? 03:14

11 A. That's what it says.

12 Q. So CBP obtains warrants when they want
13 to access written correspondence that's being sent
14 internationally?

15 A. That's what's provided for in policy, 03:14
16 but if we have reason to believe that in that
17 letter class mail there's some type of contraband
18 or -- or concern, we don't need a warrant to open
19 it to gain access to the contraband. And to read
20 it, we would. 03:15

21 Q. Okay. So if there's no indication
22 that the letter includes any contraband, even to
23 open it, the policy requires that CBP obtain a
24 warrant; is that right?

25 A. That's what the policy is. 03:15

1 RANDY JAMES HOWE

2 BY MR. HANDEYSIDE:

3 Q. I think you just identified the
4 requirement as if it's solely correspondence and
5 there's no indication that there's merchandise in 03:17
6 there, CBP can't open it without a warrant?

7 MS. EDNEY: I'm going to object that
8 you're asking him to -- to talk about a
9 statute, that he's not an attorney, and
10 he -- I don't know if he's recently -- 03:17

11 THE WITNESS: I've never read this
12 before, but based on what I see here, it's
13 pretty clear.

14 BY MR. HANDEYSIDE:

15 Q. Okay. So your understanding of the 03:17
16 requirements for accessing international mail, if
17 CBP opens it on belief that there's merchandise in
18 there, CBP officers can't read the -- read any
19 correspondence without a warrant?

20 A. If reasonable suspicion believes 03:17
21 there's contraband in the letter class mail, we
22 can open it, seize the contraband. In order to --
23 to read it, the letter, if there's -- if there is
24 indeed a letter -- often it's just a vessel for
25 the contraband -- we would need a warrant. 03:17

1 RANDY JAMES HOWE

2 Q. And -- and, again, if there's no basis
3 for opening it on suspicion that there's
4 merchandise or contraband in there, you have to
5 get a warrant just to open it? 03:18

6 A. That's what the policy is -- the
7 policy, yes.

8 Q. Are -- are only some CBP officers
9 deployed in monitoring or processing international
10 mail? 03:18

11 Is that something that only some CBP
12 officers do, or is that a function that most
13 line-level officers do?

14 A. There are officers that work in
15 seaports, and they work in seaports. There are 03:18
16 officers that work in land borders; they work at
17 land borders. There are officers that work in
18 airports, and they work in airports. There's
19 people -- officers who work in mail facilities;
20 they work in mail facilities. 03:18

21 Q. So the ones that work in the mail
22 facilities, they handle the international mail?

23 A. That's where they work.

24 Q. Right?

25 What about -- is -- is this issue one 03:18

1 RANDY JAMES HOWE

2 BY MR. HANDEYSIDE:

3 Q. Here's my question -- here's my
4 question: So CBP has to get a warrant to open
5 international mail if he wants to read the mail? 03:24

6 I think we've established that.

7 MS. EDNEY: I'm going to object that
8 that's very generalized. We're talking
9 about at the border.

10 Ask him the direct question. 03:25

11 BY MR. HANDEYSIDE:

12 Q. So if CBP has to get a warrant to read
13 international mail -- I just want to be sure.

14 CBP has to get a warrant if it's -- if
15 it's international mail, but a similar 03:25
16 correspondence, if encountered on an individual's
17 electronic device, can be -- can be read without
18 any suspicion at all; is that right?

19 A. I think that's accurate, what you
20 said. But, again, our concern is generally on the 03:25
21 contraband that's reasonably -- reasonably suspect
22 to be in that -- that first-class letter mail, and
23 we would open that letter or that -- that envelope
24 to get at the narcotics.

25 Actually following through with -- 03:25

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with a warrant, I have unable to -- to document that we've done that. And we might work with other agencies, like ICE, HSI, and they may -- they may pursue that, but it's not something that at that stage we're that concerned about.

03:26

We've intercepted and interdicted the contraband, and often what we will -- what we found is those letters are just a vessel or a sham to get the contraband in.

03:26

So there's nothing there of value.

Q. Okay. So when CBP decides it needs to get a warrant for one purpose or the other, be it in the context of international mail or in the context of screening travelers at the border, what are the procedures that CBP follows when it does so?

03:26

A. Again, it's not something we regularly do. And I'm unable to document us doing that recently, but I'm sure we would be working with other law enforcement entities, such as HSI under ICE, and working with them to prepare the documentation to justify a warrant. But we haven't had that necessity.

03:27

Q. Are the procedures that officers are

03:27

1 RANDY JAMES HOWE

2 to follow in those situations -- are they written
3 down?

4 A. They must be. There's some training.

5 Q. Where would they be written down? 03:27

6 A. I'm not sure. Again, it's practically
7 not done.

8 Q. And who did you consult in preparing
9 for today's deposition to determine if warrants
10 have been sought by CBP officers in the context we 03:27
11 just discussed?

12 A. Entities here at our headquarters here
13 in Washington.

14 Q. Which entities?

15 A. Container -- CCS -- what's the acronym 03:28
16 for? -- there's an acronym that handles -- there's
17 an office that handles that type of activity.

18 Q. There's an office that handles
19 oversights of obtaining warrants?

20 A. No, international mail facilities and 03:28
21 our mail facilities.

22 Q. Does that entity have procedures in
23 place, presumably written procedures, for
24 obtaining warrants in those circumstances?

25 A. Oversight from -- from that office; 03:28

1 RANDY JAMES HOWE

2 specific to obtaining warrants?

3 A. I think I just have to check with --
4 with a few different offices -- I'm not sure who
5 officer training involved -- but maybe just to see 03:58
6 if we do have formal modules that do address it.

7 Q. Given that this was one of the topics,
8 we'd appreciate a follow-up on that topic.

9 Before the break, we were talking
10 about obtaining warrants, and I just want to 03:58
11 clarify something.

12 Does CBP sometimes obtain warrants to
13 search electronic devices?

14 A. I guess I'm confused.

15 I don't think so. 03:58

16 Q. Well, let's -- the reason I'm asking
17 is, if you look at the device search policy,
18 Exhibit 3, at Page 2, the top paragraph there, the
19 sentence there that -- kind of towards the bottom
20 of that top paragraph that starts after the 03:58
21 parenthetical says, This directive does not limit
22 CBP's authority to conduct other lawful searches
23 of electronic devices, such as those performed
24 pursuant to a warrant.

25 And I'm wondering if you're aware of 03:59

1 RANDY JAMES HOWE

2 instances in which CBP does perform electronic
3 device searches pursuant to a warrant.

4 A. I'm not aware.

5 Q. Is there any information or system -- 03:59

6 A. Okay.

7 Yes -- I'm thinking CBP outside of

8 Office of Field Operations, so other entities,

9 other components: Border Patrol, Air and Marine.

10 There may be instances where they're functioning 03:59

11 outside the -- the border environment where they

12 may need a warrant, but that's not within OFO.

13 Q. I see.

14 And do those offices have procedures

15 in place, then, for obtaining warrants to search 03:59

16 electronic devices?

17 A. I don't know firsthand, but those

18 components do have that authority, and they do --

19 sometimes their mission brings them away from the

20 border, so I would assume that they have training. 03:59

21 Q. Okay. Going back to our discussion of

22 envelopes that are being sent through

23 international mail, if an envelope contains, say,

24 a thumb drive on which there's correspondence,

25 does CBP need a warrant in order to access the 04:00

1 RANDY JAMES HOWE

2 BY MR. HANDEYSIDE:

3 Q. Okay. Just a couple more here.

4 During the course of conducting an
5 advanced search of an electronic device, CBP is 04:10
6 able to retrieve information that the user may
7 have deleted; is that correct?

8 A. Anything that's physically resident on
9 the device, we have access to. So if that
10 includes deleted files and it's physically on the 04:10
11 device, then we would have access to it.

12 Q. Okay. And that's consistent with
13 CBP's policy?

14 A. We can refer to the directive again,
15 but I think it specifies that anything that's 04:10
16 physically resident on the device, we would have
17 access to.

18 Q. Okay. Just to clarify, Exhibit 15,
19 the personal search handbook --

20 A. Yeah. 04:11

21 Q. -- this is still operative?

22 A. It hasn't been changed, no.

23 Q. It says July 2004.

24 This is the operative guidance for
25 personal searches? 04:11

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1 ERRATA

2 WITNESS: RANDY JAMES HOWE

3 DATE: March 6, 2019

4 CAPTION: Alasaad, et al. v. Nielsen, et al.

5 PAGE LINE REASON FOR CHANGE:
 6 49 7 Change to: "CBP is not generally enforcing federal income tax at the border. Customs officers have the authority to collect Customs duties, taxes, fees, interest, and other charges, see 19 CFR 22.1, and are federal law enforcement officers authorized to enforce federal law in accordance with 19 USC § 1589a. Revision for clarification/accuracy.

7 PAGE LINE REASON FOR CHANGE:
 8 80 8 Change to: "By definition, an alien lawfully admitted for permanent residence in the United States is not regarded as seeking an admission into the United States for purposes of the immigration laws unless he or she meets one of the criteria set forth in 8 U.S.C. § 1101(a)(13)(C)." In accordance with 8 U.S.C. 1101(a)(13)(C), there are certain circumstances in which a lawful permanent resident is treated as an arriving alien seeking admission and subject to the grounds of inadmissibility. See Matter of Pena, 26 I&N Dec. 613 (BIA 2015). Revision for clarification/accuracy.

9 PAGE LINE REASON FOR CHANGE:
 10 _____ _____
 11 PAGE LINE REASON FOR CHANGE:
 12 136 4 "technical" to "tactical"; transcription error

13 PAGE LINE REASON FOR CHANGE:
 14 141 14 "ordinance" to "or advanced"; transcription error

15 PAGE LINE REASON FOR CHANGE:
 16 214 23 Delete "advanced"; Revision for clarification/accuracy

17 PAGE LINE REASON FOR CHANGE:
 18 224 5 "a definite" to "indefinite"; transcription error

19 PAGE LINE REASON FOR CHANGE:
 20 241 12 Add "or national security concern." Revision for clarification/accuracy.

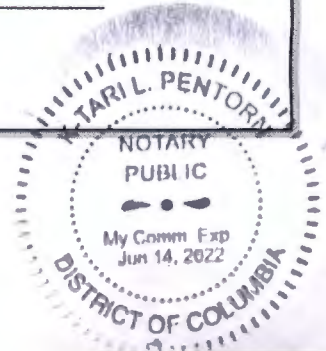
21 PAGE LINE REASON FOR CHANGE:
 22 243 2 Include at end of response: "...the traveler. The form that is provided to the traveler is the 6051D form and a copy of that form is retained by CBP." Revision for clarification/accuracy.

23
24 4/15/19
DATE

25
Randy James Howe
RANDY JAMES HOWE

DISTRICT OF COLUMBIA: 88
 SUBSCRIBED AND SWORN TO BEFORE ME THIS 15th DAY OF April, 2019
 TransPerfect Legal Solutions
 400-8845 - Depo@TransPerfect.com

NOTARY PUBLIC
 My Commission Expires June 14, 2022



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ACKNOWLEDGMENT OF WITNESS

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I, RANDY J. Howe, do

hereby certify that I have read the foregoing pages, 1 to 299, and that the same is a correct transcription of the answers given by me to the questions therein propounded, except for the corrections or changes in form or substance, if any, noted in the attached errata sheet.

4/15/19

DATE

Randy J. Howe

SIGNATURE

Subscribed and sworn to before me this 15th day of April, 2019.

My Commission expires:

June 14, 2022

K. Tari Pentorn

Notary Public

