

March 19, 2012

VIA FACSIMILE 202.514.FOIA (3642) AND CERTIFIED MAIL

Freedom of Information Appeal
Melanie Ann Pustay, Director
Office of Information Policy
U.S. Department of Justice
Suite 11050
1425 New York Avenue, N.W.
Washington, D.C. 20530-000

Re: Freedom of Information Act Appeal – FOIPA Request No: 1182490-000

Dear Ms. Pustay,

This letter constitutes an appeal under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and is submitted to the Federal Bureau of Investigation (“FBI”) by the Electronic Privacy Information Center (“EPIC”).

On February 10, 2012, EPIC requested, via facsimile, agency records related to the use of cell site simulator and other cell phone tracking technologies deployed by the FBI to covertly locate and track targets of interest. Specifically, EPIC requested the following:

1. All documents concerning technical specifications of the StingRay device or other cell site simulator technologies.
2. All documents concerning procedural requirements or guidelines for the use of StingRay device or other cell site simulator technologies (e.g. configuration, data retention, data deletion).
3. All contracts and statements of work that relate to StingRay device or other cell site simulator technologies.
4. All memoranda regarding the legal basis for the use of StingRay device or other cell site simulator technologies.
5. All Privacy Impact Assessments or Reports concerning the use or capabilities of StingRay device or other cell site simulator technologies.

See Appendix 1. In addition, EPIC's FOIA Request stated that EPIC was a news media organization and requested a waiver of all fees associated with the request and a desire for expedited processing.

EPIC received a letter acknowledging receipt of this FOIA request on February 16, 2012, but EPIC has not received any other communications from the FBI regarding this FOIA Request.

EPIC Appeals the FBI's Failure to Disclose Records

EPIC hereby appeals the FBI's failure to make a timely determination regarding EPIC's FOIA Request. The Freedom of Information Act requires the agency to make a "determination" regarding a FOIA request within twenty working days.¹ EPIC also requested expedited processing on this request. The Freedom of Information Act requires the FBI to decide whether to grant an expedited processing request and notify the requester of that decision within 10 working days of the request to expedite.²

EPIC's FOIA request and fee waiver were complete, in accordance with FBI regulations, and submitted to the proper office. EPIC's request was written and sent by facsimile.³ The request includes all required information: it specifically mentioned that it was made under FOIA; the facsimile coversheet was marked "FOIA"; the request was addressed to the appropriate FOIA office, based on the current FBI FOIA Home Page; and EPIC has no preference for the format in which the records are returned, so did not specify. Additionally, the request specified EPIC's fee category (news media) and described how the requester believes each of the criteria for fee waiver is met.⁴ Finally, EPIC described the particular records sought "in enough detail to enable Department personnel to locate them with a reasonable amount of effort" including the subject matter of the records.⁵

A "determination" must include at least a list of the documents to which the requester is being denied access and reasons for the withholding. "Denial of this information would in all likelihood be a violation of due process as well as effectively gutting the reasons for applying the exhaustion doctrine in FOIA cases."⁶ An agency's

¹ 5 U.S.C. § 552(a)(6); see also *Wash. Post v. Dep't of Homeland Sec.*, 459 F. Supp. 2d 61, 74 (D.D.C. 2006) (citing *Payne Enters. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1998)) ("FOIA was created to foster public awareness, and failure to process FOIA requests in a timely fashion is 'tantamount to denial.'"). The twenty days begins to run once the request is received. 28 C.F.R. § 16.6(b) ("Ordinarily, a component shall have twenty business days from when a request is received to determine whether to grant or deny the request. Once a component makes a determination to grant a request in whole or in part, it shall notify the requester in writing.") (2011).

² 28 C.F.R. § 16.5(c)(4) (2011).

³ 28 C.F.R. § 16.3.

⁴ *Id.* at § 16.11(b)(6).

⁵ *Id.* at § 16.3(b).

⁶ *Shermco Indus., Inc. v. Sec'y of Air Force*, 452 F. Supp. 306, 317 n 7 (N.D. Texas. 1978) *rev'd on other grounds*, 613 F.2d 1314 (5th Cir. 1980); see also *Oglesby v. Dep't of Army*, 920 F.2d 57, 65 (D.C. Cir. 1990) (citing *Shermco Indus.*, 452 F. Supp. 306).

“acknowledgement” of a request “cannot be construed as a ‘determination’ ... if it does not grant or deny the right to appeal.”⁷

Twenty-four working days have elapsed since EPIC’s FOIA request was sent by facsimile. The FBI has made no response of any kind to EPIC’s request for documents, and therefore has not made a “determination.” Because this request was complete, in accordance with regulations, and submitted to the proper office, the FBI’s failure to make a “determination” within the twenty-day window violates the FOIA.

EPIC Renews Its Request for “News Media” Fee Status

At this time, EPIC reiterates and renews all arguments that it should be granted “news media” fee status. EPIC is a non-profit, educational organization that routinely and systematically disseminates information to the public. EPIC is a representative of the news media.⁸

EPIC’s status as a “news media” requester entitles it to receive requested records with only duplication fees assessed. In addition, because disclosure of this information will “contribute significantly to public understanding of the operations or activities of the government,” any duplication fees should be waived.

EPIC Renews Its Request for Expedited Treatment and Requests Expedited Treatment of This Appeal

EPIC reiterates its request for expedited processing of its FOIA Request to the FBI. In addition, this appeal also warrants expedited processing for the same reasons: it is made by “a person primarily engaged in disseminating information . . .” and it pertains to a matter about which there is an “urgency to inform the public about an actual or alleged federal government activity.”⁹

EPIC is “primarily engaged in disseminating information.”¹⁰ There is a particular urgency for the public to obtain information about location tracking, especially in light of the Supreme Court’s recent opinion in *United States v. Jones*, 132 S. Ct. 945 (2012). The use of location tracking technology has become commonplace, and Justice Department officials have described the Supreme Court’s decision to overturn warrantless tracking as a “sea change” in Fourth Amendment law.¹¹ In addition, the use of advanced location

⁷ *Martinez v. FBI*, No. 82-1547 (D.D.C. Oct. 11, 1983) (citing *Shermco Indus., Inc. v. Sec’y of Air Force*, 1452 F. Supp. 306 (N.D. Tex. 1978) and *Marschner v. Dep’t of State*, 470 F. Supp. 196, 199 (D. Conn. 1979)).

⁸ *EPIC v. Dep’t of Defense*, 241 F. Supp. 2d. 5 (D.D.C. 2003).

⁹ 5 U.S.C. § 552(a)(6)(E)(v)(II) (2008); *Al-Fayed v. CIA*, 254 F.3d 300, 306 (D.C. Cir. 2001).

¹⁰ *American Civil Liberties Union v. Dep’t of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004).

¹¹ See Julia Angwin, *FBI Turns Off Thousands of GPS Devices After Supreme Court Ruling*, The Wall Street Journal – Digits Blog (Feb. 25, 2012), <http://blogs.wsj.com/digits/2012/02/25/fbi-turns-off-thousands-of-gps-devices-after-supreme-court-ruling/>.

tracking techniques opens the door to domestic surveillance on an unprecedented scale.¹² The FBI's current legal position that "the [use of cell site simulator technology] did not involve a search or seizure under the Fourth Amendment,"¹³ directly contradicts the Supreme Court's recent opinion in *Jones*. It is important that the public have access to the documents it needs to evaluate the FBI's continuing use of location tracking techniques.

Conclusion

By failing to reply to EPIC's FOIA Request within the required time period, the FBI is in violation of 5 U.S.C. § 552(a)(6). EPIC appeals the FBI's non-responsiveness for EPIC's FOIA Request. EPIC also requests expedited processing for this appeal.

Thank you for your prompt response to this appeal. I anticipate that you will produce responsive documents within 10 working days of this appeal. If you have any questions, please feel free to contact me at (202) 483-1140 x 123 or foia@epic.org.

Sincerely,

Ginger McCall
EPIC Open Government Director

Alan Butler
EPIC Appellate Advocacy Fellow

/enclosures

¹² See, e.g., Patrick Madden, *Cell Phone Tracking, License Plate Readers Raise Privacy Concerns*, WAMU 88.5 Morning Edition, Mar. 1, 2012, available at http://wamu.org/news/morning_edition/12/03/01/cell_phone_tracking_license_plate_readers_raise_privacy_concerns; Melissa Daniels, *Feds Attempt to Search Phones Without Warrants*, MobileMedia (Feb. 15, 2012), <http://www.mobilemedia.com/news/128226.html>.

¹³ Affidavit of Supervisory Special Agent Bradley S. Morrison, *US v. Rigmaiden*, No. 08-cr—00814 at *3 (D. Ariz. Oct. 27, 2011).

Appendix 1

EPIC's February 10, 2012 FOIA Request to the FBI

February 10, 2012

VIA FACSIMILE (540) 868-4977

David M. Hardy
Chief, Record/Information Dissemination Section, Records Management Division
170 Marcel Drive
Winchester, VA 22602-4843
(540) 868-4500 (Telephone)
(540) 868-4997 (Fax)

Re: Freedom of Information Act Request and Request for Expedited Processing

Dear Mr. Hardy:

This letter constitutes a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and is submitted on behalf of the Electronic Privacy Information Center (“EPIC”). As detailed below, EPIC seeks agency records concerning cell site simulator and other cell phone tracking technologies deployed by the Federal Bureau of Investigation (“FBI”) to covertly locate, target, and track targets of interest.

Factual Background

On July 23, 2008 Daniel David Rigmaiden was indicted on various counts of conspiracy, wire fraud, and identity theft by U.S. Attorneys in Phoenix, Arizona.¹ Rigmaiden was located after “federal agents used a stingray to track a mobile device to an apartment building.”² A StingRay is a device that can triangulate the source of a cellular signal by acting “like a fake cell phone tower” and measuring the signal strength of an identified device from several locations.³

Defendant Rigmaiden has submitted various discovery motions seeking information about the investigatory techniques used to locate him.⁴ In opposition to one such motion, the Department of Justice submitted a memorandum, dated October 27, 2011, by the FBI’s Supervisory Special agent who stated that all data from stingray-type devices are deleted because the devices may tend to pick up information “from all

¹ *United States v. Rigmaiden*, CR 08-814-PHX-DGC, 2010 WL 3463723 (D. Ariz. Aug. 27, 2010).

² Jennifer Valentino-Devries, *Feds Shift Tracking Defense*, THE WALL STREET JOURNAL, Nov. 3, 2011, available at <http://online.wsj.com/article/SB10001424052970204621904577014363024341028.html>.

³ *Department of Justice Neuters Fourth Amendment with StingRay Ruling*, TECHANDFILM, Nov. 6, 2011, available at <http://techandfilm.wordpress.com/2011/11/06/department-of-justice-neuters-forth-amendment-with-stingray-ruling/>.

⁴ *Id.*

wireless devices in the immediate area of the FBI device that subscribe to a particular provider ... including those of innocent, non-target devices.”⁵

In support of its October 27, 2011 memorandum, the U.S. Attorneys submitted the affidavit of supervisory special agent Bradley S. Morrison.⁶ Agent Morrison is the Unit Chief of the Tracking Technology Unit (TTU), Traditional Technology Section, Operational Technology Division in Quantico, Virginia.⁷ As such, Agent Morrison is responsible for the “development, procurement and deployment of technical assets and capabilities to covertly locate, tag and track targets of interest in support of all FBI investigative, intelligence collection and operational programs.”⁸ Agent Morrison’s affidavit stated that:

FBI policy requires that at the conclusion of a location operation, FBI technical personnel are to purge all data stored in the [tracking device]. During a local operation, the electronic serial numbers (ESNs) (or their equivalent) from all wireless devices in the immediate area of the FBI device that subscribe to a particular provider may be incidentally recorded, including those of innocent, non-target devices.⁹

As the court documents submitted by the Government in *US v. Rigmaiden* make clear, the FBI currently uses “cell site simulator” technologies such as StingRay to “locate, tag and track.”¹⁰ These devices were procured from third party vendors, which would require contracts and/or statements of work. The devices presumably have related technical documents and descriptions of operational requirements. Given the potential impact on “innocent, non-target devices,” and the requirements of the E-Government Act of 2002, the agency is obligated to conduct a Privacy Impact Assessment (“PIA”) before using these devices . As the Department of Justice PIA Official Guidance book describes:

Section 208 of the E-Government Act of 2002 requires all federal agencies to conduct a PIA before developing or procuring information technology that collects, maintains, or disseminates information that is in identifiable form or before initiating a new collection of information that will be collected, maintained, or disseminated using information technology and that includes any information in identifiable form in certain circumstances involving the public.¹¹

⁵ Affidavit of Supervisory Special Agent Bradley S. Morrison, *US v. Rigmaiden*, No. 08-cr—00814 at *3 (D. Ariz. Oct. 27, 2011).

⁶ *Id.* at *1.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* (“As the Unit Chief of the TTU, I am responsible for the development, procurement and deployment of technical assets and capabilities to covertly *locate, tag, and track* targets of interest in support of all FBI investigative, intelligence collection and operational programs.”).

¹¹ OFFICE OF PRIVACY AND CIVIL LIBERTIES, UNITED STATES DEPARTMENT OF JUSTICE, PRIVACY IMPACT ASSESSMENTS – OFFICIAL GUIDANCE (Revised August 2010), *available at* http://www.justice.gov/opcl/pia_manual.pdf.

Because the “[Government’s] position continues to be that, as a factual matter, the [aircard tracking] operation did not involve a search or seizure under the Fourth Amendment,”¹² and because Special Agent Morrison insists that the equipment qualifies as “a pen register/trap and trace device, as defined in 18 U.S.C. §§ 3127(3) and (4),”¹³ it is likely that the FBI or another office has issued a legal basis memorandum regarding the use of cell site simulator technology.

Documents Requested

EPIC requests copies of the following agency records in possession of the ____:

1. All documents concerning technical specifications of the StingRay device or other cell site simulator technologies.
2. All documents concerning procedural requirements or guidelines for the use of StingRay device or other cell site simulator technologies (e.g. configuration, data retention, data deletion).
3. All contracts and statements of work that relate to StingRay device or other cell site simulator technologies.
4. All memoranda regarding the legal basis for the use of StingRay device or other cell site simulator technologies.
5. All Privacy Impact Assessments or Reports concerning the use or capabilities of StingRay device or other cell site simulator technologies.

Request for Expedited Processing

This request warrants expedited processing because it is made by “a person primarily engaged in disseminating information ...” and it pertains to a matter about which there is an “urgency to inform the public about an actual or alleged federal government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II) (2008); *Al-Fayed v. CIA*, 254 F.3d 300, 306 (D.C. Cir. 2001).

EPIC is “primarily engaged in disseminating information.” *American Civil Liberties Union v. Department of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004).

There is a particular urgency for the public to obtain information about location tracking technology, given the heated debate surrounding the recent US Supreme Court decision, *US v. Jones*, holding unanimously that the use of a GPS Tracking Device was a Fourth Amendment search requiring a warrant. *United States v. Jones*, 565 U.S. ____ (2012). The public’s interest in and desire for information about the Government’s

¹² Government Memorandum re Motion for Discovery, *US v. Rigmaiden*, No. 08-cr—00814 at *1 n.1 (D.Ariz Oct. 27, 2011).

¹³ Affidavit of Supervisory Special Agent Bradley S. Morrison, *US v. Rigmaiden*, No. 08-cr—00814 at *3 (D. Ariz. Oct. 27, 2011).

tracking activities is reflected in the sheer volume of news coverage that *Jones* and related cases have received in the last six months. For examples, see *EPIC: US v. Jones*.¹⁴

Request for “News Media” Fee Status

EPIC is a “representative of the news media” for fee waiver purposes. *EPIC v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003). Based on our status as a “news media” requester, we are entitled to receive the requested record with only duplication fees assessed. Further, because disclosure of this information will “contribute significantly to public understanding of the operations or activities of the government,” any duplication fees should be waived.

Thank you for your consideration of this request. As provided in 6 C.F.R. § 5.5(d)(4), I will anticipate your determination on our request for expedited processing within ten (10) calendar days.

Respectfully Submitted,

Alan Butler
EPIC Appellate Advocacy Fellow

Ginger McCall
Director, EPIC Open Government Project

¹⁴ Available at <http://epic.org/amicus/jones/>.