UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION, *et al.* Plaintiffs, v. UNITED STATES DEPARTMENT OF JUSTICE Defendant.	No. 08-cv-1157 (JR)

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs hereby move pursuant to Fed. R. Civ. P. 56 for summary judgment. The grounds for this motion are set forth in the memorandum submitted herewith.

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PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, AND IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

In this action under the Freedom of Information Act, plaintiffs seek the disclosure of records regarding the government's tracking of the location of individuals' cellular telephones without a judicial determination of probable cause. Hundreds of millions of Americans now carry cell phones. Such surveillance has been the subject of widespread media attention. The ACLU agrees with the magistrate bench of this Court that federal statutory law does not authorize the government to track cell phones without a showing of probable cause. The ACLU filed its FOIA request to shed light on this controversial and legally dubious surveillance practice.

Specifically at issue in this proceeding are two categories of information: (1) the case names and docket numbers (including court) of criminal prosecutions brought against individuals whom the government had tracked without a prior judicial determination of probable cause, and (2) certain records concerning the government's policies, procedures and practices for cell phone tracking. Defendant has failed adequately to search for responsive material and has failed to

carry its burden of justifying its assertions of exemption regarding certain other records. This Court should order defendant to conduct an adequate search and to release certain documents.

FACTUAL BACKGROUND

Over the past decade, cell phones have gone from being a luxury good to an essential communications device. As of December 2008, 270 million people—87 % of the United States population—carried a wireless electronic communication device. CTIA, *CTIA's Semi-Annual Wireless Industry Survey, available at* http://files.ctia.org/pdf/CTIA_Survey_Year-End_2008_Graphics.pdf (last viewed July 9, 2009). While cell phones are best known as

hereinafter cited as "Exh.") (Mark Eckenweiler, *Current Legal Issues in Wireless Phone Location*) at p. 4.

The government distinguishes between two types of tracking data it can obtain through carriers. The government generally refers to the first type as Cell Site data.[1] It appears that when the government seeks Cell Site data, it asks the carrier to tell it which cell phone tower the target phone is nearest, as well as which portion of the tower the phone is facing.[2] Because the physical location of the towers is known, knowing what tower a phone is nearest gives the phone's approximate location. While sometimes the government requests only the phone's location at the beginning and end of phone calls,[3] at other times the government requests the phone's location during the course of phone calls,[4]

The second type of cell phone tracking information defendant can obtain is Latitude/Longitude or "Lat/Long" data. Exh. 1 at 12. According to defendant, there are two distinct forms of Lat/Long data. *Id.* The first is GPS. FCC rules require GPS to be accurate within 50 meters for 67% of calls and to 150 meters for 95% of calls. *Id.* The second form of Lat/Long Data is "network solution" data, derived by the service provider by triangulating the signal characteristics of the phone relative to one or more towers. *Id.* at 6. FCC rules require accuracy to 100 m for 67% of calls and to 300 m for 95% of calls. *Id.* According to DOJ, Lat/Long Data is generally only available in real time. *Id.* at 10.

Defendant has taken the view that the evidentiary standard it must meet to obtain court orders to track cell phones depends on whether it seeks Cell Site or Lat/Long data. Defendant's Office of Enforcement Operations "recommends invoking Rule 41 [probable cause] to obtain lat-long data" because "[a]nything less presents significant risks of suppression." *Id.* at 15. Defendant argues that it may constitutionally obtain Cell Site data so long as it provides "specific and articulable facts showing that there are reasonable grounds to believe that . . . the records or other information sought, are relevant and material to an ongoing criminal investigation."[7]

Plaintiffs believe that the Fourth Amendment compels the government to obtain a warrant for all cell phone tracking. Law enforcement tracking of individuals "falls within the ambit of the Fourth Amendment when it reveals information that could not have been obtained through visual surveillance." *United States v. Karo,* 468 U.S. 705, 707 (1984). Because cell phone users

typically carry their phones wherever they go, and traverse both public and private spaces as they travel, *Karo* is implicated and the government must obtain a warrant.

The extent to which United States Attorney's Offices (USAOs) around the country heed DOJ's advice regarding the applicable legal standard is unclear, and it is largely unknown whether courts are accepting or rejecting defendant's position that probable cause is unnecessary. Applications for cell phone tracking are generally filed under seal and, unless a magistrate judge goes out of his or her way to publish an opinion, the court's response to the application is also secret. The net result is that the body of law governing when the government may secretly track an individual's cell phones is itself largely secret. It is a secret law of secret surveillance.

With regard to Lat/Long tracking, there are no publicly available opinions specifically addressing whether this form of cell phone tracking can take place in the absence of a warrant. This FOIA uncovered the fact that the USAOs for the District of New Jersey and Southern District of Florida are obtaining court permission to engage in GPS or similarly precise cell phone tracking without a warrant. Exh. 2 (Letter from W.G. Stewart, II to C. Crump re: the Southern District of Florida (December 31, 2008)) at p.1 and Exh. 3 (Letter from W.G. Stewart, II to C. Crump re: the District of New Jersey (December 31, 2008)) at p.1. Thus, not all USAOs heed defendant's apparently discretionary recommendation to obtain a warrant when seeking Lat/Long data.

With regard to Cell Site data, plaintiffs have been able to identify opinions on the issue in some districts in 12 states, Washington D.C. and Puerto Rico.[8] For the vast majority of the

[8] *See, e.g., In The Matter Of The Application Of The United States Of America For An Order Authorizing The Release Of Prospective Cell Site Information*, 407 F.Supp.2d 134 (D. D.C. 2006); *In re U.S. For An Order Directing A Provider Of Electronic Communication Service To*

country, the legal standard to which the government is held when it seeks to track people through their cell phones is unknown.

According to defendant, magistrate judges in at least twelve districts have rejected the government's position and held that the government needs to show probable cause to engage in Cell Site tracking. Exh. 1 at 9. In 2005, for example, all of the magistrates of this Court signed a joint order stating that they would no longer grant cell phone tracking applications based on less

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Application Of U.S. For An Order Authorizing Use Of A Pen Register With Caller Identification Device Cell Site Location Authority On A Cellular Telephone, 2009 Wl 159187 (S.D.N.Y. 2009); *In re U.S. For An Order*

than probable cause, at least not unless the government came up with a new legal theory. *In re Applications of U.S. for Orders Authorizing Disclosure of Cell Cite Information*, 2005 WL 3658531 (D.D.C. 2005). Courts have also been cognizant of the serious constitutional issues such tracking raises. The court in *In re Application for Pen Register and Trap/Trace Device with Cell Site Location Authority*, 396 F. Supp. 2d 747, 765 (S.D. Tex. 2005) agreed that "permitting surreptitious conversion of a cell phone into a tracking device without probable cause raises serious Fourth Amendment concerns, especially when the phone is monitored in the home or other places where privacy is reasonably expected."

As far as plaintiffs have been able to determine, all but two of the published decisions on cell phone tracking arose at the application stage.[9] The extent to which individuals who are the subjects of cell phone tracking are subsequently prosecuted is unknown. There is no information on how often cell phone tracking allows law enforcement agents to apprehend criminals, in what sorts of circumstances cell phone tracking is an advantageous law enforcement technique, and whether any resulting prosecutions are successful. There is little information about whether motions to suppress evidence obtained through warrantless cell phone tracking have been filed or granted.

Despite a dearth of public information, there has been a high level of public interest in cell phone tracking and the attendant privacy concerns.[10]

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[9] The two that did not are *U.S. v. Bermudez*, 2006 WL 3197181 (S.D. Ind. June 30, 2006); *U.S. v. Suarez-Blanca*, 2008 WL 4200156 (N.D.Ga. April 21, 2008).

[10] *See, e.g. Cellphone Data Raises New Questions in Safety vs. Privacy Debate*, Seattle Post-Intelligencer, July 8, 2009, *available at* 2009 WLNR 13063554; Anne Barnard, *Growing Presence in the Courtroom: Cellphone Data as Witness*, New York Times, July 6, 2009, at A16, *available at* 2009 WLNR 12835882; Nancy Remsen, *Free Speech Faces New Challenges From Technology*, Burlington Free Press,

warrantless cell phone tracking, wh

Case names and docket numbers of applications. While Category 5 sought case names and docket numbers of *prosecutions*, this category encompasses case names and docket numbers of *applications*, which defendant has also withheld.

Application for cell phone tracking. Defendant withheld a final application to engage in cell phone tracking. Exh. 4 at Entry 67. Plaintiffs seek the release of the portion of the application stating the legal standard defendant thinks is a

governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

A court may grant summary judgment where the pleadings, affidavits and declarations show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. FRCP 56(c). In considering a motion for summary judgment under FOIA, the Court must conduct a *de novo* review of the exemptions claimed by the government. 5 U.S.C. § 552(a)(4)(B). In the FOIA context, "*de novo* review requires the court to ascertain whether the agency has sustained its burden of demonstrating that the documents requested . . . are exempt from disclosure under the FOIA." *Assassination Archives & Research Ctr. v. Cent. Intelligence Agency*, 334 F.3d 55, 57 (D.C. Cir. 2003) (internal quotation marks omitted).

In a FOIA matter, if a court is to grant summary judgment solely on the basis of information provided by the agency in affidavits or declarations, these documents must satisfy the following requirements: first, they must describe "the documents and the justifications for nondisclosure with reasonably specific detail" and must be non-conclusory; second, they must "demonstrate that the information withheld logically fall within the claimed exemption;" and finally they must not be "controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). Summary judgment is appropriate only where an agency proves it has fully discharged its FOIA obligations. *Moore v. Aspin*, 916 F. Supp 32, 35 (D.D.C. 1996).

Records requested under FOIA must be disclosed unless they fall squarely within one of the statute's exemptions, which "must be narrowly construed." *Rose*, 425 U.S. at 361. An agency's declaration and *Vaughn* index will be deemed adequate only to the extent they provide "reasonable specificity of detail rather than merely conclusory statements, and if they are not

called into question by contradictory evidence in the record or by evidence of agency bad faith." *Gallant v. N.L.R.B.*, 26 F.3d 168, 171 (D.C. Cir. 1994). Even where a FOIA exemption is found to apply, "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." 5 U.S.C. § 552(b).

II. PLAINTIFFS ARE ENTITLED TO THE CATEGORY 5 INFORMATION.

In Category 5 of their FOIA request, plaintiffs sought "[t]he case name, docket number, and court of all criminal prosecutions, current or past, of individuals who were tracked using mobile location data, where the government did not first secure a warrant based on probable cause for such data." Dkt. No. 26-5. Pursuant to defendant's agreement, a list of such case names and docket numbers now exists. That list is what is at issue under Category 5. Defendant claims the information can be withheld

withheld. *Fed. Labor Relations Auth. v. U.S. Dep't of Veterans Affairs*, 958 F.2d 503, 509-10 (2d Cir. 1992).

1. Disclosure Of The Requested Information Would Not Invade Any Legitimate Privacy Interest.

Defendant argues that its list of case names and docket numbers is properly withheld

involve substantial privacy concerns." *Id.* Defendant is well aware of this, as it regularly holds press conferences and issues press releases naming the defendants when it files criminal cases.[15]

Concluding that the interest in disclosure outweighs the privacy interest here makes sense given the purpose of Exemption 7(C), which is not to protect against the disclosure of all records that may have any impact on the privacy interest of an individuals, but only against the disclosure of records where disclosure may result in an "*unwarranted* invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C) (emphasis added). Here, the government can hardly argue that the association with criminal activity is unwarranted. By definition, the government believes beyond a reasonable doubt that these individuals are not only associated with criminal activity, but are perpetrators of it.

The requested information reveals no more than the fact of a criminal prosecution against a person, which is already a matter of public record. "The interests in privacy fade when the information involved already appears on the public record." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494-495 (1975). Although plaintiffs cannot know for certain that each of the case names

analysis “must include consideration of any intere

v. Cent. Intelligence Agency, 453 F. Supp. 2d 137, 153 (D. D.C. 2006); *Palacio v. U.S. Dep't of Justice*, Civil Action No. 00-1564, U.S. Dist. LEXIS 2198 at *20 (D.D.C. Feb. 11, 2002). For such individuals, who were never charged with any crime, association with criminal activity

throughout the country and a computerized summary located in a single clearinghouse of information." *Reporters Comm.*, 489 U.S. at 764. Plaintiffs here do not seek any government compilation of information about any individual. They seek only the names (e.g., "United States v. David Addington") and docket numbers (e.g., "09-cr-9999 (D.D.C.)") of criminal prosecutions subsequent to warrantless cell phone tracking. This is not the sort of compilation of hard-to-find information about an individual that concerned the Court in *Reporters Committee*.

Defendant's second case involved a pro se federal inmate's request for information about a federal magistrate judge who had previously served as an Assistant United States Attorney, including a list of every case prosecuted by the magistrate as an AUSA. *Harrison v. Executive Office For United States Attorneys*, 377 F. Supp. 2d 141 (D. D.C. 2005). The court noted that the plaintiff had identified no public interest in disclosure and on that basis upheld the government's invocation of Exemption 7(C), citing without elaboration a string of FOIA cases none of which involved case names or docket numbers. Judge Lamberth's decision in *Harrison* may have been motivated by the identity of the requester and the creepy nature of his request. In any event, to the extent that it is relevant here, *Harrison* merely demonstrates that a very minimal privacy interest may satisfy the balancing test when the public interest is nonexistent.

2. The Public Has A Strong Interest In Learning About Prosecutions Resulting From Cell Phone Tracking.

The other side of the balancing test is the public interest in disclosure. *Davis v. DOJ*, 968 F.2d, 1276, 1281 (D.C. Cir. 1992). Defendant asserts "there is no relevant public interest." Dkt. No. 26-2 (Def.'s Br.) at 20. Quite the opposite is true.

There is a substantial public interest in understanding to what extent and to what end the government is engaged in cell phone tracking, to what extent these surveillance activities lead to prosecutions, and to what extent these prosecutions are successful. Currently the public has no

idea who is prosecuted as a result of cell phone tracking, or for what kinds of crimes. The case

A. Plaintiffs Are Entitled To The Case Names And Docket Numbers In the Applications.

Defendant has withheld the case names and docket numbers (with court) in draft and final applications for surveillance.

Exh. 4 at Entry 67. Plaintiffs do not challenge the withholding of (1) the name and cell phone numbers related to an investigative interest to the government, (2) the names and business affiliates of three third parties, or (3) the name of an FBI special agent.[16] However, it is highly likely that this application also states the legal standard pursuant to which defendant seeks cell phone tracking authority in the district in which it was filed. Defendant has provided no justification for withholding this portion of the application and proposed order.

Nor could it. None of the three exemptions asserted by defendant (Exemptions 6, 7(C), and 7(A)) justifies withholding legal arguments. As discussed above, Exemptions 6 and 7(C) protect information that impacts personal privacy. Disclosing the portion of the application consisting of legal argument will not reveal any personally identifying information.

Exemption 7(A) permits withholding of law enforcement records where disclosure could reasonably be expected to "interfere with law enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). "[T]o withhold documents pursuant to Exemption 7(A), an agency must show that they were compiled for law enforcement purposes and that their disclosure (1) could reasonably be expected to interfere with (2) enforcement proceedings that are (3) pending or reasonably anticipated." *Mapother v. U.S. Dep't of Justice*, 3 F.3d 1533, 1540 (D.C. Cir. 1993) (emphasis omitted). Defendant has not explained how releasing the portion of the application and order setting out the legal standard could imperil an ongoing investigation. The portion plaintiffs seek should be released.

C. Plaintiffs Are Entitled To The Withheld Portions Of The Template Applications

Finally, plaintiffs also seek portions of template applications and orders that defendant

[16] Although defendant initially asserted in its *Vaughn* that Exemption 5 is applicable to this document, defendant has subsequently withdrawn that claim. Exh. 5 (Letter from V. Desai to C. Crump, dated July 20, 2009) at 1.

has withheld pursuant to Exemption 2, 7(E), or both.[17] As plaintiffs understand defendant's use of the term "template," these documents are model applications that Assistant United States Attorneys fill out when they want to track individuals' cell phones.

1. Defendant Improperly Withheld Portions Of Template Orders Pursuant To Exemption 2.

Defendant has withheld portions of documents 2, 69, and 71 pursuant to Exemption 2 on the ground that they relate to internal agency practices and contain information that, if released, could risk circumvention of the law by providing details of how to avoid detection. Dkt. No. 26-2 (Def.'s Br.) at 8.

Exemption 2 provides that the FOIA does not apply to matters that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). Despite the use of the word "solely," the D.C. Circuit has interpreted Exemption 2 to cover documents that are "predominantly internal." *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1074 (D.C. Cir. 1981). The D.C. Circuit has explained that records are not "predominantly internal" if they affect the public or another agency. *Crooker*, 670 F.2d at 1073. "The word 'internal' in Exemption 2 plainly limits the exemption to those rules and practices that affect the internal workings of an agency." *Id*. The templates at issue here have significant external effects on members of the public because they are used to advocate the tracking of individuals' cell phones. They are therefore not "predominantly internal" and Exemption 2 is inapplicable.

Even if the templates were deemed "predominantly internal," defendant would still not be able to withhold the records. To qualify for Exemption 2, the documents must also be either "trivial administrative matters of no genuine public interest," *Schiller v. NLRB*, 964 F.2d 1205,

[17] Defendant asserts Exemption 2 to withhold documents 2, 69, and 71, and asserts Exemption 7(E) to withhold these documents as well as 2, 3, 26, 27, 28, 29, 32, 33, 34, 68, 69, 70 and 71.

"risk circumvention of the law by providing details of how to avoid detection, thereby negatively impacting the effectiveness of this technique." Exh. 4 at Entry 69. Again, plaintiffs and this Court are left to guess as to whether the exemption applies, which is improper. *Washington Post Co.*, 863 F.2d at 101. If defendant is merely redacting information related to the fact that law enforcement may request a carrier continue service beyond the contract date, the release of this information would not create a significant risk of circumvention because it is too obvious. To the extent the redacted information makes some other point, defendant's *Vaughn* index is inadequately informative.

With respect to Document 71, the *Vaughn* asserts that information regarding "the geographic range for pinpointing a target's cell phone… could risk circumvention of the law by providing details of how to avoid detection." Exh. 4 at Entry 71. That cell phones permit law enforcement to identify the location of the cell phone user is public knowledge. *See supra* pp. 6-7. Defendant therefore must establish that knowledge by investigative targets of some aspect of the precision which is obtainable would facilitate circumvention. Defendant does not explain how that could be true. The millions of people who have used GPS devices know that they locate themselves with considerable precision ("turn left *now*").

Defendant's only other discussion of why application of High 2 is appropriate is contained in the Finnegan Declaration. Dkt. No. 26-7 at ¶¶ 59, 60. Ms. Finnegan writes:

> Specifically, EOUSA has asserted Exemption (b)(2)(high) in conjunction with Exemption (b)(7)(E) to protect the details associated with the geographic and physical limitations of a caller identificat

Finnegan Decl. at ¶ 59. However, defendant fails to indicate which document (2, 69, or 71) contains which of the five pieces of information that defendant claims will lead to circumvention. This Court should not grant summary judgment until defendant specifies which types of information are featured in each of the documents under dispute, and plaintiffs have an opportunity to respond.

2. Defendant Improperly Withheld Responsive Records Pursuant to Exemption 7(E).

Defendant claims that Exemption 7(E) permits it to withhold portions of the template applications. Exh. 4 (*Vaughn* Index) at Entries 2, 3, 26-29, 32-34, and 68-71 (the portions of these documents released by defendant are attached to the Sahl Decl. as Exhibits 6-18). Exemption 7(E) allows agencies to withhold information "compiled for law enforcement purposes, but only to the extent th

Defendant uses the same boilerplate, conclusory language regarding circumvention here that it used in asserting Exemption (b)(2). *Compare* Finnegan Decl. at ¶ 104 (regarding Exemption 7(E): "The possession of this information by individuals involved in criminal activity would allow them to take evasive actions in order to avoid detection, to destroy or tamper with evidence, and to coordinate false exculpatories.") *with Id.* at ¶ 60 (regarding Exemption 2: "The release of these techniques would equip lawbreakers with information that would allow them to take evasive actions in order to avoid detection, to destroy or tamper with evidence, and to coordinate false exculpatories.").

Furthermore, the Finnegan Declaration lists 13 types of information that are withheld pursuant to Exemption 7(E), Finnegan Decl. at ¶ 102, and explains that it is withholding information from 30 different documents pursuant to Exemption 7(E), *id.*, but never explains which of the 13 types of information are contained in which of the 30 documents. Plaintiffs seek some of the 30 documents but not others. Rather than accept this improper kitchen sink approach to exemption analysis, this Court should either deny defendant's exemption claims or require defendant to indicate, on a document-by-document basis, what information is withheld and why the withheld information poses a risk of circumvention.

Defendant's *Vaughn* does not help matters because, with respect to its withholdings pursuant to Exemption 7(E), defendant does not even allege that there is a substantial risk of circumvention. *See, e.g*, Exh. 4 at Entry 3 ("Withheld portions of pages 1-5 of the Order and pages 2-8 of the Application to protect the details of techniques and procedures for law enforcement investigations and prosecutions that relate to information/cellular phone technology, that are not generally known to the public and the methods of obtaining cell phone use

D. Defendant Failed To Conduct An Adequate Search For Certain Category 1 Documents.

Defendant's *Vaughn* index raises serious questions regarding the adequacy of defendant's search for Category 1 records, and precludes summary judgment for defendant. Defendant's search has been demonstrably inadequate with respect to the following records which were neither released nor listed in defendant's *Vaughn* index: a) the final versions of numerous "draft" applications and orders (Documents 19-24, 30, 31, 35, 36, 48, 65, and 66); and b) the Hodor and Kischer declarations, which are referred to in defendant's *Vaughn* Index at Entries 26-28. Exh. 4. at Entries 19-24, 26-28, 30, 31, 35, 36, 48, 65, and 66.

"It is elementary that an agency responding to a FOIA request must conduct[] a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (internal quotation marks omitted). In assessing the reasonableness of an agency's search, a court may look to "positive indications of overlooked materials." *Founding Church of Scientology of D.C., Inc. v. Nat'l Sec. Agency*, 610 F.2d 824, 837 (D.C. Cir. 1979).

The adequacy of defendant's search is in issue in this case because of the following "positive indications of overlooked materials":

1. Final Versions Of Withheld "D

This Court should reject defendant's argument. In listing the draft versions of these documents on its *Vaughn* index, defendant has conceded that they are responsive to plaintiffs' request. Defendant must either search for these documents or explain to this Court why this search would constitute an undue burden. *Nation Magazine*, 71 F.3d at 892. "If the reasonableness of a search is questioned, the burden is on the agency to provide sufficient explanation why a search .... would be unreasonably burdensome." *People for Am. Way Found. v. U.S. Dep't of Justice*, 451 F.Supp.2d 6, 12 (D.D.C. 2006) (ellipsis in original; internal quotation omitted).

The case law makes clear that, wherever the threshold for imposing an undue burden may lie, the search necessary to retrieve these documents would not approach it. *See, e.g., Pub. Citizen, Inc. v. U.S. Dep't of Educ.*, 292 F.Supp.2d 1, 6-7 (D.D.C.2003) (finding reasonable a search of 25,000 files for data irregularly kept in the agency's database); *Nation Magazine*, 937 F.Supp. at 42 (finding reasonable a search for a single memorandum among unindexed chronological files). Instances in which courts have found that searches would be legitimately unduly burdensome are sharply distinguishable. *See, e.g., People for Am. Way Found*., 451 F.Supp.2d at 13 (finding unduly burdensome a manual search of 44,000 files) *Nation Magazine*, 71 F.3d at 891-92 (finding unduly burdensome a search of 23 years of unindexed files); *Am. Fed'n of Gov't Employees, Local 2782 v. U.S. Dep't of Commerce*, 907 F.2d 203, 208-09 (D.C.Cir.1990) (finding unduly burdensome a request to locate "every chronological office file and correspondent file, internal and external, for every branch office [and] staff office ...."). As a matter of common sense, it would take defendant less time to look through 13 files to retrieve the final versions of documents it has already identified than it will take defendant to brief its refusal to do so.

2. The Hodor and Kischer Declarations

Certain documents released by defendant refer to the "Hodor" and "Kischer" declarations, but neither of those declarations was released or listed on defendant's *Vaughn* index. Exh. 4 at Entries 26-28. These declarations appear to be components of application packages that Assistant United States Attorneys submit to courts when seeking to track cell phones. In response to plaintiffs' inquiry, defendant has located the declarations and is determining "whether they are responsive to Plai

Vaughn index and supplemental legal memorandum with respect to any that are withheld. If not found, defendant should be ordered to submit an affidavit setting forth why the search was adequate.

3. With regard to the Hodor and Kischer declarations, this Court should order that defendants to disclose them in full or file a supplemental

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PLAINTFFS' STATEMENT OF UNDISPUTED AND DISPUTED MATERIAL FACTS

Pursuant to Local Civil Rules 7(h) and 56.1, plaintiffs submit the following statement of undisputed and disputed material facts.

Response to Defendant's Statement of Material Facts

Paragraphs numbered 1- 7 and 9 accurately state undisputed facts.

Paragraphs 8 and 10 are not statements of fact but legal opinions or conclusions about the issues before the Court, and are disputed.

Plaintiffs' Statement of Undisputed Material Facts

Plaintiffs submit the following additional material facts as to which plaintiffs contend there is no genuine issue or dispute.

1. As of December 2008, 270 million people—87 % of the United States population—carried a wireless electronic communication device. CTIA, *CTIA's Semi-Annual Wireless Industry Survey*, *available at* http://files.ctia.org/pdf/CTIA_Survey_Year-End_2008_Graphics.pdf (last viewed July 9, 2009).

2. Cell phone carriers (i.e. Verizon, T-Mobile, etc.) are technically capable of tracking cell phones. DOJ, *Electronic Surviellance Manual* (2005) at 41, *available at* http://www.usdoj.gov/criminal/foia/docs/elec-sur-manual.pdf (last viewed July 13, 2009).

3. In order to provide service to cellular telephones, providers have the technical capability to collect information such as the cell tower nearest to a particular phone, the portion of the tower facing the phone, and often the signal strength of the phone. *Id.*

4. If a cell phone has GPS capability—GPS is a device which communicates with a network of satellites, generating information about the location of the phone—the carrier may also be able to collect information about the phone's location via GPS. Exh. 1, Mark Eckenweiler, Associate Director, Office Of Enforcement Operations, *Current Legal Issues In Wireless Phone Location* (undated) (hereinafter Eckenweiler Presentation), at 4.

5. The government distinguishes between two types of tracking data it can obtain through carriers. The government generally refers to the first type as Cell Site data. S*ee, e.g., In Re Application Of The United States Of America For An Order For Disclosure Of Telecommunications Records And Authorizing The Use Of A Pen Register And Trap And Trace*, 405 F.Supp.2d 435 (S.D.N.Y. 2005).

6. When the government seeks Cell Site data, it asks the carrier to tell it which cell phone tower the target phone is nearest, as well as which portion of the tower the phone is facing. *See, e.g., In the Matter of the Application of the United States of*

America for an Order Authorizing the Disclosure of Prospective Cell Site Information, 412 F. Supp.2d 947 (E.D. Wis. 2006).

7. Sometimes the government requests only the phone's location at the beginning and end of phone calls. S*ee, e.g.*, *In Re Application Of The United States Of America For An Order For Disclosure Of Telecommunications Records And Authorizing The Use Of A Pen Register And Trap And Trace*, 405 F. Supp. 2d 435 (S.D.N.Y. 2005),

8. At other times the government requests the phone's location during the course of phone calls. S*ee, e.g.*, *In The Matter Of An Application Of The United States For An Order (1) Authorizing The Use Of A Pen Register And A Trap And Trace Device And (2) Authorizing Release Of Subscriber Information And/Or Cell Site Information*, 396 F.Supp.2d 294, 295 (E.D.N.Y. 2005).

9. In still other cases, the government requests the phone's location whenever it is turned on. *See, e.g.*, *In The Matter Of The Application Of The United States Of America For An Order Authorizing The Installation And Use Of A Pen Register And A Caller Identification System On Telephone Numbers [Sealed] And [Sealed] And The Production Of Real Time Cell Site Information*, 402 F. Supp.2d 597 (D. Md. 2005).

10. The precision of Cell Site data depends on how closely grouped the towers are in a given area. Exh.1 (Eckenweiler Presentation) at p.4.

11. Cell tower service radius ranges from 200 meters to 30 km. *Id.*

12. Defendant can obtain both historical and real-time Cell Site data. *Id.*

13. The second type of cell phone tracking information defendant can obtain is Latitude/Longitude or "Lat/Long" data. *Id.* at 12.

14. There are two distinct forms of Lat/Long data. *Id.*

15. The first is GPS. FCC rules require GPS to be accurate within 50 meters for 67% of calls and to 150 meters for 95% of calls. *Id.*

16. The second form of Lat/Long Data is "network solution" data, derived from triangulation. *Id.* at 6.

17. This data is acquired by the service provider by measuring the signal characteristics of the phone relative to one or more towers. *Id.*

18. FCC rules require accuracy to 100 m for 67% of calls and to 300 m for 95% of calls. *Id.*

19. Lat/Long Data is generally only available in real time. *Id.* at 10.

20. For Lat/Long data, defendant's Office of Enforcement Operations "recommends invoking Rule 41 [probable cause] to obtain lat-long data" because "[a]nything less presents significant risks of suppression." *Id.* at 15.

21. The USAOs for the District of New Jersey and Southern District of Florida are obtaining court permission to engage in GPS or similarly precise cell phone tracking without a warrant. Exh. 2 at p.1 and Exh. 3 at p.1 (letters dated December 31, 2008 from W. G. Stewart, II, to C. Crump).

22. Magistrate judges in at least twelve districts have rejected the government's position and held that the government needs to show probable cause to engage in Cell Site tracking. Exh. 1 (Eckenweiler Presentation) at 9.

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