



May 2, 2014

*Transmitted via U.S. Mail and Fax*

Commander Jimmy Donn  
Staff Services Unit  
Brevard County Sheriff's Office  
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Fax: (321) 264-5287

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION  
NATIONAL OFFICE  
125 BROAD STREET, 18TH FL.  
NEW YORK, NY 10004-2400  
T/212.549.2500  
WWW.ACLU.ORG

**Re: Public Records Request Regarding Cell Site Simulators**

Dear Commander Donn,

I write in response to your letter of April 22, 2014 (attached as Exhibit A), in which you respond to the ACLU's February 28, 2014, public records request to the Brevard County Sheriff's Department ("BCSO"). The ACLU's request seeks records pertaining to the acquisition and use of cell site simulators, including guidelines and policies concerning their use. While the ACLU appreciates the "careful consideration" given to the request, we find your response to be patently inadequate, as it lacks a basis in law and fact and violates the Florida Public Records Act, § 119.07, Florida Statutes. Accordingly, the ACLU requests that the BCSO immediately process the Request and produce responsive records. *See* § 119.07(1), Fla. Stat.

The importance of faithfully responding to a duly submitted public records request cannot be overstated: it is necessary "in order to preserve our basic freedom." *Bludworth v. Palm Beach Newspapers, Inc.*, 476 So. 2d 775, 779 (Fla. 4th DCA 1985). As courts have repeatedly explained, "the purpose of the Public Records Act 'is to open public records to allow Florida's citizens to discover the actions of their government.'" *Bent v. State*, 46 So. 3d 1047, 1049 (Fla. 4th DCA 2010). For that reason, "[t]he Act is to be liberally construed in favor of open government, and exemptions from disclosure are to be construed narrowly and limited to their stated purpose." *Marino v. Univ. of Fla.*, 107 So. 3d 1231, 1233 (Fla. 1st DCA 2013).<sup>1</sup> The City's response frustrates the purpose of the Act and leaves the public with no information about an area of government conduct that raises serious questions of constitutional law.

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

The BCSO's blanket assertion of exemptions to the Public Records Act is unwarranted. It is tantamount to a refusal to confirm or deny the existence of responsive records, which is not permitted under Florida law. I am aware of only one Florida case where a government agency "refus[ed] to confirm or deny the existence of the records sought by" the requester. *Lorei v. Smith*, 464 So. 2d 1330, 1332 (Fla. 2d DCA 1985) (per curiam). Although the court resolved the case on other grounds, it explicitly disapproved of the agency's response, cautioning that "we do not condone public agency silence when confronted with a chapter 119 request." *Id.* at 1332 n.1. Indeed, the Public Records Act requires public records custodians to "respond to [records] requests in good faith." § 119.07(1)(c). "A good faith response includes making reasonable efforts to determine from other officers or employees within the agency whether such a record exists and, if so, the location at which the record can be accessed." *Id.* Although a statutory exemption may be asserted to withhold specific records or portions of records, *id.* § 119.07(d)-(e), there is no basis for completely refusing to process a request on the basis of broad claims of exemption.

The BCSO's response is also inappropriate because it is wholly conclusory and fails to "state . . . with particularity the reasons for the conclusion that the record is exempt." § 119.07(1)(f), Fla. Stat. It may be that, upon processing the request, the BCSO identifies specific material that is properly covered by the exemptions contained in sections 119.071(2)(d), 119.071(1)(f), 943.053(2), and 943.054. But it is neither logical nor plausible that every responsive record would fall within those exemptions in full, and the BCSO's response letter provides insufficient explanation on this point. For example, invoices, sole source contract justification letters, mutual aid agreements, and policy documents describing legal standards regarding the use of cell site simulators will not compromise surveillance techniques. Nor is it plausible that any and all responsive records would constitute data processing software, criminal justice information, or criminal history information within the meaning of the relevant exemptions. Any portions of the records that fell within these exemptions could be redacted, but those exemptions cannot justify a complete refusal to acknowledge the existence or nonexistence of responsive records.

Further, the BCSO's reliance on "[a]ny non-disclosure agreement or requirement by and between the Brevard County Sheriff's Office and any federal agency that is or may be applicable to this public records request" violates the Public Records Act.<sup>2</sup> As the First District Court of Appeals has explained, "[a] public record cannot be transformed into a private record merely because an agent of the government has promised that it will be kept

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<sup>2</sup> The ACLU additionally notes that any such non-disclosure agreement, if it exists, would be responsive to the ACLU's request. The BCSO must disclose such agreement pursuant to the Public Records Act.

private.” *Nat’l Collegiate Athletic Ass’n v. Associated Press*, 18 So. 3d 1201, 1208 (Fla. 1st DCA 2009). A non-disclosure agreement with another governmental agency or a private party cannot defeat the disclosure requirement of § 119.07 because “[t]he right to examine these records is a right belonging to the public; it cannot be bargained away by a representative of the government.” *Id.* at 1209.<sup>3</sup> “[I]t is clear that the determination as to when public records are to be deemed confidential rests exclusively with the Legislature,” and the BCSO may not circumvent the requirements of the Public Records Act by reference to non-disclosure agreements signed with third parties. Office of the Attorney General, *Government-in-the-Sunshine Manual* 143 (2014).<sup>4</sup>

The documents described in the ACLU’s request are sought in an attempt to determine whether or not the BCSO’s investigation techniques are violating the constitutional rights guaranteed by the United States and Florida constitutions. Police and sheriffs’ departments throughout Florida have determined that they can answer press queries and respond to public records requests about possession and use of cell site simulators by searching for and releasing responsive documents and explaining the need for any specific redactions.<sup>5</sup> There is no reason why the BCSO cannot do the same.

The BCSO is not above the requirements of the Public Records Act. The ACLU respectfully requests that the BCSO process the Request without delay, release nonexempt records, and explain with particularity any

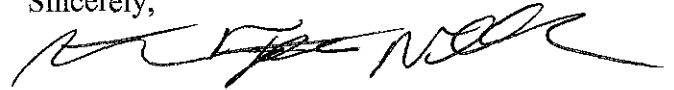
<sup>3</sup> See also *Times Publ’g Co. v. City of St. Petersburg*, 558 So. 2d 487, 494 (Fla. 2d DCA 1990); *Browning v. Walton*, 351 So. 2d 380 (Fla. 4th DCA 1977).

<sup>4</sup> [http://myfloridalegal.com/webfiles.nsf/WF/RMAS-9GNQTW/\\$file/2014SunshineLawManual.pdf](http://myfloridalegal.com/webfiles.nsf/WF/RMAS-9GNQTW/$file/2014SunshineLawManual.pdf).

<sup>5</sup> See, e.g., Jennifer Portman, *TPD Changes Tracking Policy*, Tallahassee Democrat, Apr. 13, 2014, <http://www.tallahassee.com/article/20140413/NEWS01/304130018> (discussing Tallahassee Police Department’s release of list of investigations in which cell site simulators were used); Jennifer Portman, *Is Cellphone Stingray Invasive or Essential?*, Tallahassee Democrat, Mar. 16, 2014, <http://www.tallahassee.com/apps/pbcs.dll/article?AID=2014303170020> (quoting Tallahassee Chief of Police Michael DeLeo and Leon County Sheriff’s Office officials discussing those departments’ use of cell site simulators); John Kelly & Britt Kennerly, *Special Report: Police Agencies Can Grab Data from Your Cellphone*, Florida Today, Dec. 9, 2013, <http://www.floridatoday.com/article/20131208/NEWS01/312080020/Special-Report-Police-agencies-can-grab-data-from-your-cellphone> (citing Miami-Dade Police Department purchasing records showing acquisition of Stingray device and quoting Assistant State Attorney Wayne Holmes of Brevard and Seminole Counties explaining that he has “weighed frequent police requests for . . . Stingray surveillance”); *Cell Tower Dumps Not Used Locally*, Fort Myers News-Press, Dec. 8, 2013, at A6 (reporting that records released by the Florida Department of Law Enforcement show that it has “spent more than \$3 million buying a fleet of Stingrays” that it makes available to local police departments in the state).

redactions or withholdings of records.<sup>6</sup> See *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1079 (Fla. 1984) (“The only delay permitted by the Act is the limited reasonable time allowed the custodian to retrieve the record and delete those portions of the record the custodian asserts are exempt.”). We look forward to your updated response.

Sincerely,



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<sup>6</sup> The ACLU reminds the BCSO of its ongoing responsibility to preserve responsive records, including any which it may claim are exempt from disclosure. § 119.07(1)(h-i), Fla. Stat.

**EXHIBIT A**



# SHERIFF WAYNE IVEY

# BREVARD COUNTY SHERIFF'S OFFICE

Staff Services Unit \* 700 Park Avenue \* Titusville, Florida 32780-4095 \* (321) 264-5216 \* Fax (321) 264-5287

**Brevard County Jail Complex**  
860 Camp Road  
Cocoa, FL 32927  
(321) 690-1500  
(321) 635-7800 fax

**Canaveral Precinct**  
111 Polk Avenue  
Cape Canaveral, FL 32920  
(321) 868-1113  
(321) 784-8340 fax

**East Precinct**  
2575 N. Courtenay Pkwy.  
Merritt Island, FL 32953  
(321) 454-6652  
(321) 454-6631 fax

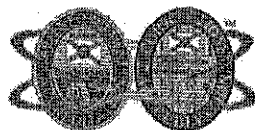
**Investigative Services**  
340 Gus Hipp Boulevard  
Rockledge, FL 32955  
(321) 633-8499  
(321) 633-8403 fax

**North Precinct**  
750 Park Avenue  
Titusville, FL 32780  
(321) 264-5208  
(321) 264-5359 fax

**Operational Services**  
2575 N. Courtenay Pkwy.  
Merritt Island, FL 32953  
(321) 454-6643  
(321) 454-6642 fax

**South Precinct**  
1515 Sarno Road, Bldg B.  
Melbourne, FL 32935  
(321) 253-6658  
(321) 253-6666 fax

**West Precinct**  
2725 Judge Fran Jamieson Way, Bldg. E  
Viera, FL 32940  
(321) 633-2123  
(321) 833-1965 fax



April 22, 2014

Mr. Nathan F. Wessler  
c/o American Civil Liberties Union Foundation  
125 Broad Street, 18<sup>th</sup> Floor  
New York, NY 10004-2400

Re: Chapter 119 Public Records Request of February 28<sup>th</sup>, 2014

Dear Mr. Wessler,

Brevard County Sheriff Wayne Ivey acknowledges receipt of your correspondence of February 28<sup>th</sup>, 2014, which makes a request for public records pursuant to Chapter 119, Florida Statutes. The request generally seeks public records "regarding use of cell site simulators by Brevard County Sheriff's Office" and specifically identifies ten categories of possible public records that are requested.

The Sheriff's Office has carefully analyzed and evaluated the specific requests for records made in the letter; has reviewed the materials and arguments cited in the February 28<sup>th</sup> letter; and is also cognizant of the pending multiple similar requests that the ACLU has made to other law enforcement agencies in Florida. This office is aware of and respects the public debate over this and similar issues, and has given careful consideration to the policies and values expressed by both sides of the debate. That being said, it is the position of the Brevard County Sheriff that the following exemptions are applicable to the public records request of February 28<sup>th</sup>, and must be respectfully asserted in response to the records requested by the February 28<sup>th</sup> letter:

- Section 119.071(2)(d) - Any information revealing surveillance techniques or procedures or personnel is exempt from Section 119.07(1) and Article I, section 24(a) of the Florida Constitution. Any comprehensive inventory of state and local law enforcement resources compiled pursuant to part 1, chapter 23, and any comprehensive policies and plans compiled by a criminal justice agency pertaining to the mobilization, deployment, or tactical operations involved in responding to an emergency.

- Section 119.071(f) – Data processing software obtained by an agency under a licensing agreement that prohibits its disclosure and which software is a trade secret, as defined in Section 812.081, and agency-produced data processing software that is sensitive are exempt from Section 119.07(1) and Article 1, section 24(a) of the Florida Constitution.
- Sections 943.053(2) and 943.054 regarding criminal history and criminal justice information.
- Any non-disclosure agreement or requirement by and between the Brevard County Sheriff's Office and any federal agency that is or may be applicable to this public records request.

By assertion of these exemptions and objections, the Brevard County Sheriff's Office does not waive any other exemption or objection to the February 28<sup>th</sup> public records request that could be asserted, and the specifics of any further exemption or defense will be provided to you promptly by an amended response. If you believe there is any defect in the form or substance of this response or in the manner which these exemptions are asserted herein, please advise, and if necessary an amended response will be made.

Please call or contact my office at your convenience with any questions, or if further discussion is desired regarding this matter.

Sincerely,



Commander Jimmy Donn  
Staff Services Unit  
(321) 264-5216