1300 Pennsylvania Avenue, NW
Washington, DC 20229

U.S. Customs and Border Protection

*Commissioner*

JAN 24 2023

The Honorable Ron Wyden
United States Senate
Washington, DC 20510

Dear Senator Wyden:

Thank you for your September 15, 2022, letter to U.S. Customs and Border Protection (CBP) regarding CBP's practices related to searches of phones and other electronic devices at the border.

Border searches of electronic devices have long been critical to protecting border security, and are essential to enforcing the customs, immigration, and other laws CBP is authorized to enforce and administer. These border searches help detect terrorism and other national security related matters, human and bulk cash smuggling, contraband, and child pornography. Searches can also reveal information about financial and commercial crimes relating to copyright, trademark, and export control violations. Device searches at the border are often integral to determining an individual's intentions upon entry to the United States and thus provide additional information relevant to admissibility under U.S. immigration laws.

CBP conducts border searches of electronic devices in accordance with statutory and regulatory authorities, as well as applicable judicial precedent. CBP's broad authority to conduct border searches is well-established, and courts have rejected a categorical exception to the border search doctrine for electronic devices. Nevertheless, as a policy matter, CBP has imposed certain requirements, above and beyond prevailing constitutional and legal requirements, to ensure the authority for border search of electronic devices is exercised judiciously, responsibly, and consistent with the public trust. These policies and procedures are outlined within CBP's *Directive on Border Search of Electronic Devices* which provides public guidance and standard operating procedures for searching, reviewing, retaining, and sharing information contained in electronic media. The directive governs any inbound or outbound search that is conducted at the physical border, functional equivalent of the border or the extended border, consistent with law and Agency policy. CBP regularly conducts reviews of its policies and procedures and is currently conducting a review of the policies and procedures outlined within this directive, with consideration of adding additional privacy and civil liberty protections.

In developing national policy, CBP carefully considers mission requirements in concert with applicable federal circuit court decisions, ensuring adherence to precedential decisions in the jurisdiction in which they apply. As you know, some courts of appeals have reached different conclusions about the exact contours of the border-search exception as applied to electronic devices, but every court of appeals to consider the question has recognized that the border-search doctrine permits warrantless searches of electronic devices at the border. As the Supreme Court has recognized, "searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." *United States v. Flores-Montano*, 541 U.S. 149, 152-53 (2004) (quoting *United States v. Ramsey*, 431 U.S. 606, 616 (1977)).

Border searches of electronic devices may include searches of information stored on the device when it is presented for inspection or during its detention by CBP for an inbound or outbound border inspection. The border search will include an examination of only the information that is resident upon the device. CBP officers may not intentionally use the device to access information that is solely stored remotely.

Pursuant to the CBP Directive, CBP may retain copies of information obtained from a border search of an electronic device: (1) if there is probable cause to believe the information contains evidence of a violation of law that CBP is authorized to enforce or administer, or (2) if the information relates to immigration, customs, or other enforcement matters. Prior to 2017, CBP generally was not retaining this information. After publishing a public Privacy Impact Assessment in 2017 that provided transparency to the public and assessed privacy risks, CBP began retaining information from border searches of electronic devices obtained during encounters with individuals who are of a significant law enforcement, counterterrorism, or other national security interest in the Automated Targeting System (ATS), a Privacy-Act compliant system of records. This retention assists CBP in carrying out its critical border security mission.

As outlined in the corresponding Privacy Impact Assessments, retention of information from electronic devices will vary depending on the authority to collect the information and the source system's retention policies. For information collected by the Office of Field Operations under border search authority, the information is being retained in ATS, generally not to exceed 15 years, as reflected in the ATS System of Records Notice. CBP acknowledges the need to regularly review its policies and procedures, including the appropriate retention timeframe for information obtained from border searches of electronic devices. Given that the retention of this data set is relatively new to CBP, this review was recently initiated. CBP will consider the appropriate balance of privacy safeguards and operational mission requirements in this assessment.

ATS users must undergo annual security and data privacy training and obtain approval from CBP management and the ATS system owner before gaining access to ATS for official purposes. Data may only be accessed using the CBP network with encrypted passwords and user sign-on functionality. Further, ATS performs extensive auditing that records the search activities for all users. Access to information in ATS from the border search of an electronic device is further restricted by user profiles to those CBP personnel who have a need-to-know the information for

their official government duties. Those uses include identifying individuals and cargo that require additional scrutiny when crossing the border, and other law enforcement, national security, and counterterrorism purposes. For example, CBP may use ATS to identify known or suspected international narcotics smugglers. In accordance with CBP's Standards of Conduct, "Employees must safeguard all sensitive information against unauthorized access, disclosure, alteration, or loss. Unauthorized access of these systems, and use of these systems for unofficial purposes, including 'browsing' (querying the systems for information for other than official reasons) is prohibited." CBP is considering whether additional safeguards are appropriate.

CBP publicly reports the total number of border searches of electronic devices, along with other enforcement statistics on CBP.gov. In Fiscal Year 2021, CBP processed more than 179 million travelers at U.S. ports of entry. During that same period, CBP conducted 37,450 border searches of electronic devices, representing less than 0.02 percent of international travelers. Additional information on electronic device searches could be made available in-person in the proper secure setting. CBP is currently reviewing whether additional information specific to border searches of electronic devices may be made publicly available on a routine basis without negative impacts to law enforcement operations and national security.

CBP works diligently to protect the rights of individuals against unreasonable search and seizure – and to ensure privacy protections – while also accomplishing its national security and border enforcement missions. CBP remains committed to providing as much notice and transparency regarding its border searches of electronic devices as possible. This includes providing signage in all inspection areas that vehicles, and other conveyances, persons, baggage, packages, or other containers are subject to detention and search, as well as posting information on cbp.gov regarding border searches of electronic devices. Additionally, CBP has created a tear sheet to provide travelers regarding the search of their electronic devices which notifies the individual of the purpose and authority for such search, how the individual may obtain more information on reporting concerns about their search, and how the individual may seek redress from the Agency if they feel aggrieved by a search. As CBP discussed with your staff in July, in accordance with continuous efforts to review policy and procedures, CBP has conducted a review of the tear sheet's contents and will be deploying an updated version. Additionally, while current policy does not specifically outline that the tear sheet must be provided at the beginning of the inspection, CBP intends to update procedural guidance requiring that the tear sheet be provided at the beginning of the inspection, as appropriate.

In conducting border searches, CBP officers strictly adhere to all constitutional and statutory requirements, including those that are applicable to privileged, personal, or business confidential information. CBP has strict oversight policies and procedures that implement these constitutional and statutory safeguards. Further information on Department of Homeland Security and CBP privacy policy can be found at www.dhs.gov/privacy.

As noted above, CBP constantly evaluates its policies, procedures, and publicly available information to ensure the proper balance of privacy safeguards, transparency, and operational mission requirements. This includes ongoing review of materials provided to the public, such as the tear sheet.

Should you need additional assistance, please do not hesitate to contact me, or have a member of your staff contact Stephanie A. Talton, Deputy Assistant Commissioner for the Office of Congressional Affairs, at 202-344-1760.

Sincerely,

Troy A. Miller
Acting Commissioner