

# United States Senate

WASHINGTON, DC 20510

August 1, 2017

The Honorable Jeff Sessions  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

Dear Attorney General Sessions:

In September, 2015, the Department of Justice (DOJ) adopted policy guidance governing federal law enforcement's use of surveillance technology known as cell site simulators, also referred to as "IMSI catchers" or "stingrays." These devices are intended to track the location of cell phones and other communications devices. Although the Department of Justice has used stingrays for more than two decades, until recently information about these devices and how they are used has been largely shrouded in secrecy. We write to seek more information regarding the Department's efforts to ensure that courts are adequately informed when federal prosecutors seek warrants for the use of stingrays, including how these devices adversely affect the general public.

The Department has an affirmative obligation to fully inform the court about surveillance technologies they are seeking permission to use. This obligation has been recognized both by courts and by the executive branch.<sup>1</sup> The Department of Homeland Security's stingray policy, for example, explicitly notes that "[i]n all circumstances, candor to the court is of paramount importance."<sup>2</sup>

We are concerned that the Department may not be adequately disclosing to courts important details about how stingrays work and their impact on innocent Americans. Specifically, the attached February 2017 FBI stingray application suggests that courts approving stingray surveillance orders may not realize the extent to which this technology may invade the privacy of Americans, including that stingrays send probing signals into the homes of everyone in the

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<sup>1</sup> See *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1178 (9th Cir. 2010) (en banc) (Kozinski, J. concurring) ("A lack of candor in . . . the warrant application must bear heavily against the government in the calculus of any subsequent motion to return or suppress the seized data."); see also *State v. Andrews*, 227 Md. App. 350, 134 A.3d 324, 338–39 (2016) ("To undertake the Fourth Amendment analysis . . . it is self-evident that the court must understand *why* and *how* the search is to be conducted. . . . A [stingray] nondisclosure agreement that prevents law enforcement from providing details sufficient to assure the court that a novel method of conducting a search is a reasonable intrusion made in a proper manner and 'justified by the circumstances,' obstructs the court's ability to make the necessary constitutional appraisal").

<sup>2</sup> U.S. DEP'T OF HOMELAND SEC., DEPARTMENT POLICY REGARDING THE USE OF CELL-SITE SIMULATOR TECHNOLOGY, POLICY DIRECTIVE 047-02 at 6 (Oct. 19, 2015), <https://www.dhs.gov/sites/default/files/publications/Department%20Policy%20Regarding%20the%20Use%20of%20Cell-Site%20Simulator%20Technology.pdf>.

targeted location, may disrupt cellular networks, and may even prevent individuals in the vicinity from being able to call 911.<sup>3</sup>

The FBI's February 2017 warrant application states that a stingray may "send a signal to the Target device . . . even if it is located inside a house, apartment, or other building," but the application does not make clear that the stingray will send probing electronic signals into the homes of everyone who lives in the same neighborhood as the target. Courts reviewing stingray applications may incorrectly believe that stingrays merely incidentally receive signals from nearby cell phones, when in fact, the devices are far more invasive.

Likewise, although the February 2017 warrant application acknowledges that the FBI's stingray "may interrupt cellular service of phones or other cellular devices within its immediate vicinity," the FBI states that "[a]ny service disruption to non-target devices will be brief and temporary." There is evidence contradicting this claim.<sup>4</sup> Canadian federal law enforcement, which also use stingrays, thoroughly tested the device and discovered that was capable of jamming 911 and other non-emergency calls.<sup>5</sup> As a result, Canadian law enforcement directed its officers to weigh the law enforcement benefits of the technology "against the importance of having a reliable 911 system."

If the disruptive impact of stingrays is in fact greater than the "brief and temporary" disruption described by the FBI in warrant applications, courts should be made aware of this information in order to appropriately balance the needs of law enforcement against the public safety harms.

The courts play a vital, independent role in our democracy. If the courts are to be able to supervise law enforcement's use of surveillance technology, they must be fully informed about how it works, how it may invade Americans' privacy, and what impact it has on third parties. To ensure that courts are provided the necessary information they need to oversee law enforcement's use of surveillance technology and to ensure that the rights of surveillance targets and innocent bystanders are not violated, we request that you reexamine Department policy and require a complete description of the technology, how it functions, and the impact it has on cellular networks.

We also request that you answer the following questions by August 25, 2017.

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<sup>3</sup> Application for a Search Warrant, at 6–7, February 3, 2017, <https://www.documentcloud.org/documents/3473863-Stingray-Warrant-App.html#document/p6/a339603>.

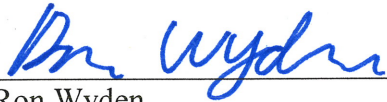
<sup>4</sup> *In re Baltimore City Police Department, Baltimore, Maryland, Complaint for Relief Against Unauthorized Radio Operation and Willful Interference with Cellular Communications and Petition for an Enforcement Advisory on Use of Cell Site Simulators by State and Local Government Agencies* (FCC Aug. 16, 2016), <https://assets.documentcloud.org/documents/3013988/CS-Simulators-Complaint-FINAL.pdf> (In August of 2016, several civil rights groups filed a complaint with the Federal Communications Commission, in which they stated that stingrays "disrupt normal operation of the cellular phone network, preventing those within their reach from placing cellular phone calls normally. Disruption of the network extends to emergency calls.").

<sup>5</sup> Royal Canadian Mounted Police, Memorandum from OIC Technical Investigation Services to Criminal Operations Officers, re: Mobile Device Identifier (January 5, 2011), <https://www.aclu.org/legal-document/royal-canadian-mounted-police-cell-site-simulator-memo-2011> (filed as exhibit in *R. v Mirarchi*, Case No. 500-10-006048-159 (Can. C.A. Qc) (Appellant's Factum Vol. III at 903-12)).

1. The FBI's warrant applications describe the interference caused by a cell site simulator as brief and temporary. Has the FBI tested all of the cell site simulators it uses and measured the interference caused to nearby phones? Please provide us with a copy of all testing reports or other documentation related to device and network interference caused by cell site simulators.
2. Do you disagree with the assessment of Canadian federal law enforcement that cell site simulators can disrupt calls, including to 911?

If you have any questions about this request, please contact Anderson Heiman with the Finance Committee Staff at (202) 224-4515.

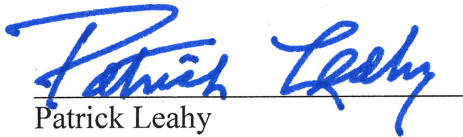
Sincerely,



Ron Wyden  
United States Senator



Mike Lee  
United States Senator



Patrick Leahy  
United States Senator



Al Franken  
United States Senator