

March 8, 2022

The Honorable Joseph V. Cuffari
Inspector General
Department of Homeland Security
245 Murray Lane SW
Washington, DC 20528-0305

Dear Dr. Cuffari:

I recently learned that Homeland Security Investigations (HSI), a law enforcement component of the Department of Homeland Security (DHS), was operating an indiscriminate and bulk surveillance program that swept up millions of financial records about Americans. After my staff contacted HSI about the program in January 2022, HSI immediately terminated the program. I write to request that you thoroughly investigate the program to determine whether HSI's surveillance of Americans was consistent with DHS policy, statutory law, and the United States Constitution.

In January 2022, my staff contacted DHS to request a briefing regarding HSI's use of a customs summons to collect a massive trove of ordinary Americans' financial records. That briefing occurred on February 18, 2022 and, according to HSI, was the first time anyone in Congress had been told about the program. Senior officials from HSI admitted that, since 2019, the organization had used its customs summons authority under 19 U.S.C. § 1509 — a type of administrative subpoena — to conduct bulk surveillance of Americans' financial records. HSI told my staff that it used custom summonses to obtain approximately six million records about money transfers above \$500, to or from Arizona, California, New Mexico, Texas and Mexico. HSI obtained these records using a total of eight customs summonses, which it sent to Western Union and Maxitransfers Corporation (Maxi), demanding records for a six-month period following the order.

The surveillance program which utilized HSI's customs summons authority is part of a larger effort by the Arizona Attorney General (AG). In 2006, the Arizona AG attempted to obtain similar bulk transaction data by issuing administrative subpoenas to Western Union. A state court of appeals concluded that the subpoenas exceeded the AG's authority and raised Fourth Amendment questions. However, in February 2010, the AG included, as part of a settlement with Western Union resolving money laundering allegations, a requirement that Western Union turn over bulk transaction data and drop its challenge to the AG's subpoenas. In January 2014, the Arizona AG and Western Union reached another settlement about money laundering. The settlement agreement created the Transaction Record Analysis Center (TRAC), a non-profit organization that would facilitate law enforcement access to the bulk data and extended bulk data collection for five years.

Thus, between February 2010 and July 2019, Western Union provided millions of records about its customers' financial transactions to the Arizona AG and TRAC pursuant to the settlement agreement. The data included all records of money transfers above \$500, to or from Arizona, California, New Mexico, Texas and Mexico. In the years following the initial settlement with Western Union, dozens of other money transfer businesses also provided TRAC with similar bulk transaction data, on a voluntary basis. TRAC, in turn, provided access to this data to hundreds of federal, state, and local law enforcement agencies, who are able to query and use this data without any kind of court supervision.

According to HSI, when the settlement agreement between Western Union and the Arizona AG expired in 2019, Western Union cooperated with TRAC and HSI's office in Phoenix to continue contributing records in bulk. Under this arrangement, HSI issued a series of customs summonses to Western Union, each directing the company to transmit records of money transfers directly to TRAC for the next six months. In 2021, HSI started issuing similar customs summonses to Maxi.

HSI's use of its customs authority in this manner is highly problematic for several reasons.

First, DHS has already been made aware of the limits of its customs summons authority. In 2017, your office documented how Customs and Border Protection's Office of Professional Responsibility (CBP OPR) misused the same authority in an attempt to identify a Twitter user who exercised their First Amendment right to criticize the agency. Your office concluded that CBP OPR "may have exceeded the scope of its authority" and that it "regularly" issued customs summonses in violation of agency policy. Your office also explained that the customs summons authority is limited to investigations related to the collection and examination of records related to the importation of merchandise, including the assessment of customs duties. CBP OPR policy, your office emphasized, explicitly precluded using customs summonses in drug-smuggling investigations, but at least that one-fifth of the summonses issued by CBP OPR violated this policy.

Based on your recommendations, CBP committed to a set of reforms, including updating its operating procedures, providing training on proper use of summonses, instituting a review process through which OPR summonses must be approved by counsel and the Assistant Commissioner, and undertaking an agency-wide review of the use of summonses. Had DHS implemented these reforms across the Department, HSI might have been better equipped to identify the serious legal concerns raised by its own use of the same authority for prospective bulk collection of financial transactions.

Second, HSI abused its customs summons authority to engage in bulk surveillance. According to HSI, the agency obtained approximately 6,211,000 records using just eight customs summonses, six of which it issued to Western Union for records between July 2019 and Jan 2022, and two of which it issued to Maxi for records between July 2021 and June 2022. However, the customs summons authority only permits the government to seek records that are "relevant" to an investigation. HSI should have known that this authority could not be used to conduct bulk surveillance, particularly after the Department of Justice Inspector General harshly criticized the Drug Enforcement Administration in 2019 for using subpoenas to conduct a bulk surveillance program involving records of international phone calls.

Third, the HSI customs summons directed the recipients to transmit the records directly to TRAC, a non-profit organization working under a state government. This arrangement raises serious questions, both about whether the customs summons authority can be used to direct a recipient to submit records to a non-governmental entity and the consequences of doing so. Moreover, HSI essentially outsourced the data processing and hosting of a bulk surveillance database to an organization outside the control of the federal government. That raises additional questions about whether there were adequate security and privacy protections in place, consistent with DHS and HSI policies.

Fourth, HSI adopted this highly questionable interpretation of its customs summons authority without seeking approval from the DHS Office of General Counsel, the DHS Office for Civil Rights and Civil Liberties, the ICE Office of the Principal Legal Advisor at agency headquarters, or the ICE Office of Information Governance and Privacy. While HSI told my staff that the Special Agent in Charge of HSI Phoenix spoke to the HSI Assistant Director of Investigative Programs and with an attorney in the field office before issuing the first summons, no one sought legal guidance from HSI or DHS headquarters and HSI never wrote or published a Privacy Impact Assessment analyzing this program. Indeed, HSI officials acknowledged that they only alerted DHS privacy officials after my office contacted HSI to request a briefing about the program in January 2022.

Fifth, the fact that HSI employees in Phoenix, AZ continued to send out these highly problematic bulk summonses, every six months, without oversight by HSI and DHS headquarters indicates a weakness in the central supervision of this surveillance tool. Moreover, the fact that just one request for a briefing from a Senate office prompted HSI to immediately halt the flow of data suggests that the internal oversight system within DHS and HSI failed.

Sixth, the TRAC surveillance database, to which HSI has contributed data, has enabled hundreds of law enforcement agencies to have unfettered access, without any supervision by the courts, to the financial transactions of millions of people. Notably, dozens of money transfer companies are, according to HSI, sharing bulk data with TRAC on a purely voluntary basis. According to HSI, Western Union actually asked for the bulk subpoena of its customers' records. If this characterization is true, these companies utterly failed to protect the privacy of their already at-risk customer base. These money transfer businesses are disproportionately used by low-income, minority, and immigrant communities. Many users of these services are unbanked, and therefore unable to send money using electronic checking or international bank wire transfers, which are often cheaper. Moreover, money transfer businesses are not subject to the same protections as bank-based transactions under the Right to Financial Privacy Act.

I support legitimate efforts by federal law enforcement to crackdown on illegal imports of fentanyl and other opioids, and closing the loopholes used to launder illegal income and avoid federal taxes, and I have led Congressional efforts on both fronts. Law-enforcement agencies have ample authority to subpoena financial information about individual or specific transactions they believe are related to illicit activity. Instead of squandering resources collecting millions of transactions from people merely because they live or transact with individuals in a handful of

Southwestern states or have relatives in Mexico, HSI and other agencies should focus their resources on individuals actually suspected of breaking the law.

Given the many serious issues raised by this troubling program, I request that you investigate the program's origins, how the program operated, and whether the program was consistent with agency policy, statutory law, and the Constitution. I also request that you investigate whether HSI is operating any similar programs and whether DHS has established adequate policies and procedures for its customs summons authority, the purported legal basis for the program. Finally, I also request that you investigate whether HSI has ensured that its operations are subject to congressional oversight.

Thank you for your attention to this important matter. If you have any questions about this request, please contact Chris Soghoian in my office.

Sincerely,



Ron Wyden
United States Senator

CC:

The Honorable Lina Khan, Chair, Federal Trade Commission.
The Honorable Rohit Chopra, Director, Consumer Financial Protection Bureau
The Honorable Sharon Bradford Franklin, Chair, Privacy and Civil Liberties Oversight Board