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12 UNITED STATES DISTRICT COURT
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15 AMERICAN CIVIL LIBERTIES UNION OF
16 NORTHERN CALIFORNIA,

17 Plaintiff,

18 v.

19 TRANSPORTATION SECURITY
20 ADMINISTRATION,

21 Defendant.

Case No.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

INTRODUCTION

1
2 1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. §552,
3 to enforce the public’s right to information about the federal government’s searches of electronic
4 devices at airports. Government agencies routinely search travelers’ phones, computers, tablets
5 and other devices, which hold within them vast quantities of information—photographs, emails,
6 text and audio messages, address books—that reveal intimate and deeply personal details of an
7 individual’s life.

8 2. The federal government’s searches of electronic devices at airports—along with
9 intrusive questioning, lengthy detentions, and even refusal to allow certain travelers to enter the
10 country—has generated widespread media interest and public concern. Recent statistics
11 demonstrate that the number of these searches have multiplied year after year. Access to
12 information about electronic device searches at airports is necessary to inform meaningful public
13 debate over the scope of government conduct that potentially threatens core civil rights and
14 liberties protected by the Constitution. Federal agencies have published their policies regarding
15 searches of electronic devices at international borders. But the federal government’s policies on
16 searching electronic devices of *domestic* air passengers remains shrouded in secrecy.

17 3. Over two months ago, on December 20, 2017, Plaintiff American Civil Liberties
18 Union of Northern California (“ACLU-NC”), a non-profit civil rights organization, submitted
19 two FOIA requests to Defendant Transportation Security Administration (“TSA”) seeking
20 records about policies, procedures, and protocols regarding the search of airplane passengers’
21 electronic devices; training of relevant personnel related to the search or examination of
22 electronic devices; and equipment used to search, examine, or extract data from electronic
23 devices.

24 4. Since that time, TSA has provided ACLU-NC with *no* records.

25 5. ACLU-NC now brings this action to obtain the information to which it is
26 statutorily entitled.

27 ///

PARTIES

1
2 6. Plaintiff American Civil Liberties Union of Northern California is an affiliate of
3 the American Civil Liberties Union, a national, non-profit, non-partisan organization with the
4 mission of protecting civil liberties from government incursions, safeguarding basic
5 constitutional rights, and advocating for open government. ACLU-NC is established under the
6 laws of the state of California and is headquartered in San Francisco, California. ACLU-NC has
7 over 90,000 members. In support of its mission, ACLU-NC uses its communications department
8 to disseminate to the public information relating to its mission, through its website, newsletters,
9 in-depth reports, and other publications.

10 7. Defendant Transportation Security Administration is an agency within the
11 meaning of 5 U.S.C. §552(f). The agency has its headquarters in Arlington, Virginia, and field
12 offices all over the country, including San Francisco, California.

JURISDICTION

13
14 8. This Court has subject matter jurisdiction and personal jurisdiction over the
15 parties pursuant to 5 U.S.C. §§552(a)(4)(B) and 552(a)(6)(C)(i). This Court also has subject
16 matter jurisdiction over this action pursuant to 28 U.S.C. §§1331 and 1346.

VENUE AND INTRADISTRICT ASSIGNMENT

17
18 9. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C.
19 §§1391(e) and 1402. Plaintiff has its principal place of business in this district.

20 10. Pursuant to Local Rule 3-2(c) and (d), assignment to the San Francisco division is
21 proper because Plaintiff is headquartered in San Francisco.

FACTUAL ALLEGATIONS

**The Federal Government’s Searches of Electronic Devices at Airports and Borders
Are a Matter of Significant Public Interest**

22
23
24 11. Mobile phones, computers, tablets, digital cameras—these electronic devices and
25 others possess the most intimate details of an individual’s life. They are also ubiquitous, carried
26 by millions of passengers who travel in and out of airports in the United States each day. With
27 these devices, passengers take with them photographs of themselves, their families, and their

1 friends; text and audio messages with an array of colleagues and loved ones; emails and
2 archives; social media messages and networks; confidential business and legal information;
3 protected medical records; bank statements; and a wealth of other information that lay bare how
4 and with whom people communicate, work, and live each day.

5 12. The Supreme Court has recognized the significant privacy interests an individual
6 possesses in electronic devices. In a 2014 opinion addressing searches of cell phones, the Court
7 noted that cell phones are “such a pervasive and insistent part of daily life that the proverbial
8 visitor from Mars might conclude they were an important feature of human anatomy.” *Riley v.*
9 *California*, 134 S. Ct. 2473, 2484 (2014). The data contained in cell phones reaches far back in
10 time, “place[s] vast quantities of personal information literally in the hands of individuals,” and
11 collects several pieces of information that “reveal much more in combination than any isolated
12 record.” *Id.* at 2485, 2489. Cell phones are unique not only for containing certain types of data
13 with no physical analogue—such as internet search and browsing history, location data, and
14 apps—but also for serving as a portal to data stored on remote or “cloud” servers. *Id.* at 2489,
15 2491. In light of the privacy concerns posed by searches of cell phones, the Court declined to
16 allow warrantless searches by police incident to an individual’s arrest.

17 13. Federal agencies, such as Defendant TSA, U.S. Customs and Border Protection
18 (“CBP”), and U.S. Immigration and Customs Enforcement (“ICE”), regularly search passengers’
19 electronic devices at airports. Each year, the number of searches by CBP has grown: from 5,000
20 searches in Fiscal Year (FY) 2015, to 25,000 searches in FY 2016, to 30,000 searches in FY
21 2017.

22 14. CBP and ICE have published policies regarding their authority to search and seize
23 electronic devices at the border, including airports. CBP requires passengers to provide their
24 devices unlocked or the password or PIN so that an officer can view data contained on the
25 device. *See* U.S. Customs and Border Protection, CBP Directive No. 3340-049A, Border Search
26 of Electronic Devices, Jan. 4, 2018, <http://bit.ly/2rjmnYj>. CBP policy authorizes both a “basic
27 search” and an “advanced search” of passengers’ devices. In the former, an officer examines

1 only information that is resident upon the device, using external equipment only to gain access to
2 the device if necessary. In the latter, external equipment is used not merely to gain access to the
3 device, but to review, copy, and/or analyze its contents.

4 15. Media accounts highlight the privacy concerns posed by electronic device
5 searches, seizures, and copying of data: a NASA scientist potentially carrying sensitive
6 information on his phone, Loren Grush, “A US-Born NASA Scientist Was Detained at the
7 Border Until He Unlocked His Phone,” Feb. 12, 2017, The Verge, <http://bit.ly/2ooH3r3>; a
8 Canadian photojournalist denied entry to the United States to cover protests when he failed to
9 provide access to his phones, Daniel Victor, “Canadian Journalists Detention at U.S. Border
10 Raises Press Freedom Alarms,” N.Y. Times, Dec. 2, 2016, <http://nyti.ms/2EN1A5q>; a U.S.
11 journalist working for the Wall Street Journal who objected to turning over her cell phones, *id.*; a
12 Muslim-American woman returning from visiting her refugee family overseas, whose phone was
13 searched, Lubana Adi, “My phone was searched at LAX, which apparently is the new normal,”
14 Los Angeles Times, April 7, 2017, <http://lat.ms/2opysbm>; a U.S. citizen asked to unlock his cell
15 phones before he could board a flight from Los Angeles to Saudi Arabia, Daniel Victor, “What
16 Are Your Rights if Border Agents Want to Search Your Phone?,” N.Y. Times, Feb. 14, 2017,
17 <http://nyti.ms/2lj2AE9>.

18 16. These troubling incidents have produced intense public interest in searches of
19 electronic devices at airports by federal agencies, including individual rights in response to such
20 searches. Plaintiff ACLU-NC and other organizations, along with media outlets, have published
21 guidance for citizens and immigrants as they travel domestically and internationally and
22 encounter requests from TSA, CBP or ICE to search their devices. *See* ACLU of Northern
23 California, “Know the Facts and Know Your Rights for Arab, Middle Eastern, Muslim, and
24 South Asian Communities,” May 2017, <http://bit.ly/2CDeOMb>; Electronic Frontier Foundation,
25 “Digital Privacy at the U.S. Border: Protecting the Data on Your Devices, Dec. 2017,
26 <http://bit.ly/2CAwdFu>; Patrick J. Lee, “Can Customs and Border Enforcement Search Your
27 Phone? These Are Your Rights,” ProPublica.org, Mar. 13, 2017, <http://bit.ly/2nJ2Slh>; Daniel

1 Victor, “What Are Your Rights if Border Agents Want to Search Your Phone?,” N.Y. Times,
2 Feb. 14, 2017, <http://nyti.ms/2lj2AE9>.

3 17. CBP claims the authority to conduct warrantless searches of electronic devices at
4 *international* border crossings without probable cause to support the search. That practice is
5 being challenged by the national ACLU, of which Plaintiff ACLU-NC is an affiliate, as violating
6 the First and Fourth Amendments to the Constitution. *See Alasaad v. Duke*, No. 1:17-cv-11730-
7 DJC (D. Mass. filed Sep. 13, 2017).

8 18. Alongside CBP, TSA has also been reported as heightening its screening
9 procedures of *domestic* passengers’ electronic devices. *See, e.g.*, Russ Thomas, “TSA
10 implements new screening procedures in Montana,” KPAX.com, Dec. 14, 2017,
11 <http://bit.ly/2sMepaI>; Joel Hruska, “TSA Will Now Screen All Electronics ‘Larger Than a Cell
12 Phone,’” Extreme Tech, July 26, 2017, <http://bit.ly/2sG2Fq4>.

13 19. TSA has not made publicly available any policies or procedures governing
14 searches of electronic devices, especially those held by passengers engaged in purely domestic
15 air travel. As such, the public is unaware of the legal basis for TSA’s searches of electronic
16 devices of passengers not presenting themselves at the border and flying on a domestic flight.
17 Further, the public is unaware of TSA’s policies and procedures for advanced or forensic
18 searches, in which external equipment is used to search, examine, or extract data from
19 passengers’ electronic devices and SIM cards. And the public has no knowledge of TSA’s
20 policies and procedures relating to seizure of electronic devices, retention or destruction of data
21 resident on those devices, or use of the device to access data held on a “cloud” or elsewhere.

22 20. The information sought in ACLU-NC’s FOIA request would reveal for the first
23 time information concerning TSA’s searches of *domestic* passengers’ electronic devices, and
24 allow members of the public a meaningful opportunity to vet the government’s broad claim of
25 authority to conduct such searches.

26 ///

27 ///

1 **Plaintiff Submitted a FOIA Request to TSA Headquarters But TSA Has Failed to Produce**
2 **Any Records**

3 21. On December 20, 2017, ACLU-NC submitted a FOIA request to the TSA
4 headquarters (“TSA Headquarters”) in Arlington, Virginia seeking information about its searches
5 of passengers’ electronic devices (the “TSA Headquarters Request”). A copy of Plaintiff ACLU-
6 NC’s TSA Headquarters Request request is appended hereto as Exhibit 1.

7 22. In particular, the TSA Headquarters Request seeks records, from January 1, 2012
8 to the present, regarding any of the following:

- 9
- 10 1. Policies, procedures, or protocols regarding the search of passengers’ electronic
11 devices. This includes but is not limited to any policies, procedures, or protocols
12 related to the “enhanced screening of electronic devices” referenced by then-
13 Secretary of Homeland Security John Kelly in June 2017.¹
 - 14 2. Equipment, including but not limited to SIM-card readers and software manufactured
15 by Cellebrite², used to search, examine, or extract data from passengers’ electronic
16 devices and SIM cards at all airports in California. This request seeks records
17 including but not limited to: documentation related to the acquisition, testing, use,
18 maintenance, and location of such equipment; any inventories of the number of each
19 type of equipment.³ This request includes any records in the possession of TSA but
20 generated by third-party service providers.
 - 21 3. Training of transportation security officers or contractors retained to provide security
22 screening services, related to the search or examination of passengers’ electronic
23 devices.

24 23. More than 20 working days have passed since TSA received the TSA
25 Headquarters Request.

26 24. As of the date of the filing of this Complaint, Plaintiff ACLU-NC has not
27 received any response from TSA to the TSA Headquarters Request.

28 ¹ <https://www.dhs.gov/news/2017/06/28/remarks-council-new-american-security-conference>

29 ² Examples of such devices include, but are not limited to, a Universal Forensic Extraction
30 Device (UFED) manufactured by Cellebrite. E.g.,
31 <https://www.cellebrite.com/en/press/cellebrite-introduces-ufed-touch2-platform/>.

32 ³ According to the Government Accountability Office, TSA possesses ““acquisition
33 documentation for passenger and baggage screening technologies,” including memorandums and
34 “information regarding the number of each technology deployed in airports nationwide.”
35 <http://www.gao.gov/assets/680/674297.pdf> at 28.

1 25. As of the date of the filing of this Complaint, Plaintiff ACLU-NC has not
2 received a determination from TSA of whether TSA will comply with the TSA Headquarters
3 Request.

4 26. As of the date of the filing of this Complaint, Plaintiff ACLU-NC has not
5 received any documents from TSA that are responsive to the TSA Headquarters Request or any
6 correspondence indicating when TSA might provide any documents.

7 27. Plaintiff ACLU-NC has exhausted all applicable administrative remedies.

8 28. TSA has wrongfully withheld the requested records from Plaintiff ACLU-NC.

9 **Plaintiff Submitted a FOIA Request to TSA's San Francisco Field Office But TSA Has**
10 **Failed to Produce Any Records**

11 29. On December 20, 2017, Plaintiff ACLU-NC submitted a FOIA request to the
12 TSA field office in San Francisco, California (the "TSA Field Office") seeking information
13 about its searches of passengers' electronic devices (the "TSA Field Office Request"). A copy of
14 Plaintiff ACLU-NC's TSA Field Office Request is appended hereto as Exhibit 2.

15 30. In particular, the TSA Field Office Request seeks records, from January 1, 2012
16 to the present, regarding any of the following:

- 17
- 18 1. Policies, procedures, or protocols regarding the search of passengers' electronic
19 devices. This includes but is not limited to any policies, procedures, or protocols
20 related to the "enhanced screening of electronic devices" referenced by then-
21 Secretary of Homeland Security John Kelly in June 2017.⁴
 - 22 2. Equipment, including but not limited to SIM-card readers and software manufactured
23 by Cellebrite⁵, used to search, examine, or extract data from passengers' electronic
24 devices and SIM cards at the San Francisco International Airport. This request seeks
25 records including but not limited to: documentation related to the acquisition, testing,
26 use, maintenance, and location of such equipment; any inventories of the number of
27 each type of equipment.⁶ This request includes any records in the possession of the
TSA San Francisco Field Office but generated by Covenant Aviation Security.

24 _____
25 ⁴ [https://www.dhs.gov/news/2017/06/28/remarks-council-new-american-security-conference.](https://www.dhs.gov/news/2017/06/28/remarks-council-new-american-security-conference)

25 ⁵ Examples of such devices include, but are not limited to, the UFED Touch Platform
26 manufactured by Cellebrite: [https://www.cellebrite.com/en/press/cellebrite-introduces-ufed-
touch2-platform/](https://www.cellebrite.com/en/press/cellebrite-introduces-ufed-touch2-platform/).

27 ⁶ According to the Government Accountability Office, TSA possesses "acquisition
documentation for passenger and baggage screening technologies," including memorandums and

- 1 3. Logs referencing the use or maintenance of any equipment used to search, examine,
2 or extract data from passengers' electronic devices at the San Francisco International
3 Airport.
- 4 4. All communications between SFO and TSA referencing the replacement,
5 supplementation, or relocation of any piece of Transportation Security Equipment
6 ("TSE") at SFO.⁷
- 7 5. Training of transportation security officers or contractors retained to provide security
8 screening services, related to the search or examination of passengers' electronic
9 devices.

10 31. By letter dated January 4, 2018, TSA acknowledged receipt of the TSA Field
11 Office Request, assigned it an "unperfected case number," and requested additional information
12 about Plaintiff's request. TSA also determined that the TSA Field Office Request met the
13 "unusual circumstances" criteria of FOIA, and stated that it would not be able to complete the
14 processing of the request within 30 working days (20 working days plus 10 additional working
15 days). A copy of this letter is appended hereto as Exhibit 3.

16 32. By letter dated January 19, 2018, Plaintiff responded to TSA's request for further
17 information on the following items contained in the TSA Field Office Request. A copy of this
18 letter is appended hereto as Exhibit 4.

19 Item 2: This request seeks all records in the possession of the TSA San Francisco Field
20 Office, regardless of the author of the document, related to (1) the acquisition, testing,
21 use, maintenance, and location of equipment used to search, examine, or extract data
22 from passengers' electronic devices and SIM cards and (2) any inventories of the number
23 of each type of such equipment.

24 Item 3: This request seeks all use or maintenance logs related to the search, examination,
25 or extraction of data from passengers' electronic devices. Any applicable exemption
26 from disclosure under FOIA does not alleviate the agency of its duty to search for
27 responsive records. Rather, the proper procedure is to search for and identify the records,
and then to assert an applicable FOIA exemption.

Item 4: This request seeks all communications between SFO and TSA about TSE with a
nexus to the search of, examination of, or extraction of data from passengers' electronic
devices at SFO.

28 _____
29 "information regarding the number of each technology deployed in airports nationwide."
30 <http://www.gao.gov/assets/680/674297.pdf> at 28.

31 ⁷ According to a TSA 2015 report to Congress, "If TSA has identified the need to replace,
32 supplement, or relocate a piece of TSE," TSA "informs the airport of the decision through a
33 memo and follow-on communication as needed."

34 <https://www.fbo.gov/utills/view?id=62bf59d0ee09e6681071db6c5b15d803> at 17. This request
35 seeks any such memos, as well as follow-up communications.

1 33. By letter dated January 25, 2018, TSA notified Plaintiff of a “perfected case
2 number” for the TSA Field Office Request and stated that no additional information was needed
3 at that time. A copy of this letter is appended hereto as Exhibit 5.

4 34. More than 30 working days have passed since TSA received the TSA Field Office
5 Request.

6 35. More than 30 working days have passed since TSA notified Plaintiff on January
7 25, 2018 of a “perfected case number” and that no further information was needed from Plaintiff
8 at that time.

9 36. As of the date of the filing of this Complaint, Plaintiff has not received a
10 determination from TSA of whether TSA will comply with the TSA Field Office Request.

11 37. As of the date of the filing of this Complaint, Plaintiff has not received any
12 documents from TSA that are responsive to the TSA Field Office Request or any correspondence
13 indicating when TSA might provide any documents.

14 38. Plaintiff has exhausted all applicable administrative remedies.

15 39. TSA has wrongfully withheld the requested records from Plaintiff.

16 **FIRST CLAIM FOR RELIEF**
17 **Violation of Freedom of Information Act For**
18 **Wrongful Withholding Of Agency Records**

19 40. Plaintiff incorporates the above paragraphs as if fully set forth herein.

20 41. Defendant TSA has wrongfully withheld agency records requested by Plaintiff
21 under FOIA and has failed to comply with the statutory time for the processing of FOIA
22 requests.

23 42. Plaintiff has exhausted the applicable administrative remedies with respect to
24 TSA’s wrongful withholding of the requested records.

25 43. Plaintiff is entitled to injunctive relief with respect to the release and disclosure of
26 the requested documents because Defendant TSA continues to improperly withhold agency
27 records in violation of FOIA. Plaintiff will suffer irreparable injury from, and have no adequate
legal remedy for, TSA’s illegal withholding of government documents pertaining to the subject

1 of Plaintiff's FOIA request.

2 **PRAYER FOR RELIEF**

3 WHEREFORE, Plaintiff prays that this Court:

4 A. Order Defendant TSA to promptly process and release all responsive records;

5 B. Declare that Defendant TSA's failure to disclose the records requested by
6 Plaintiff is unlawful;

7 C. Award Plaintiff its litigation costs and reasonable attorney's fees incurred in this
8 action;

9 D. Grant such other relief as the Court may deem just and proper.

10
11 Dated: March 12, 2018

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN CALIFORNIA

12
13 By: /s/ Vasudha Talla

Vasudha Talla
Linda Lye

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15 Attorneys for Plaintiffs
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