Office of the District Attorney
Alameda County
Nancy E. O'Malley, District Attorney

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November 12, 2015

Tessa D'Arcangelew
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ACLU of Northern California
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Re: Draft Policy for the Use of Cell-Site Simulator Technology

Tessa and Matt:

Thank you for your email dated November 6, 2015, and for your thorough review of our draft policy. I have discussed your recommendations with members of my office and believe that several of your proposals are appropriate and will be included in a revised policy. We did have concerns about certain other suggestions. Accordingly, I would like to take this opportunity to share my thoughts with you in these regards.

1. Including Strict Limitations on Use of the Stingray

You have suggested that, in addition to describing those limited situations where the Cell-Site Simulator would be used, our policy should also specify those situations where it will *not* be used. We believe that such an undertaking would require us to speculate on a potentially unlimited number of situations. In the section entitled "Basic Uses," we set out the acceptable uses of this technology. They are limited to: 1) Locating cellular devices whose unique identifiers are known to law enforcement; and 2) Helping locate victims and render aid in the wake of a natural disaster or emergency. Our policy also states that such technology "will only be deployed in a fraction of cases in which the technology is best suited to achieve specific public safety objectives."

You have suggested further limitation on our use of the cell-site simulator to only criminal investigations of "serious or violent felonies" and only emergencies involving "risk of death or serious injury." We cannot agree with such limitations. For example, a sex offender who fails to register their address with law enforcement may, in many situations, only be charged with or convicted of a misdemeanor under Penal Code section 290.018. However, public safety may require that we know where that person resides. This technology could facilitate that.

Similarly, one can debate when a person is "at risk of death or serious injury." There was a recent news story out of Pennsylvania about 88 year-old Lilian Margolis. Ms. Margolis became

confused while driving home to her senior living center. She was discovered some 72 miles away, nearly 21 hours later, through law enforcement's use of a cell phone tracker. Was Ms. Margolis "at risk of death or serious injury?" We can debate that, and reasonable minds could differ. But, such a debate should not delay us from using this technology to find persons in similar situations – hopefully before death or serious injury are the only alternatives.

Your letter expresses concern about possible disruption of cell service to citizens if the cell-site simulator is deployed during a natural disaster or an emergency. We investigated that, and here is what we learned. While the Stingray is attempting to locate a targeted device, it has the potential to disrupt other cellular devices in the vicinity for between 5 and 15 seconds – just long enough to determine that it is not the targeted device and reject that device's attempt to communicate with the cell-simulator. The Stingray has a built-in default that will not disrupt service if someone is either on the phone with or attempting to dial 911. Accordingly, we feel any possible disruption is sufficiently minimized.

2. Regarding Ambiguity in How the Stingray Will be Used

You correctly point out an ambiguity in our draft policy regarding how the Stingray would be used. In addition to the two uses discussed above, you note that Section IV of our draft policy includes what could be viewed as a third possible use, to wit: "to determine the currently unknown identifiers of the target device." You suggest possibly amending the allowable uses section of our policy to include this third potential use or eliminating this reference. This is not one of our anticipated uses of the cell-site simulator. Accordingly, we are accepting your suggestion and eliminating this reference from Section IV of our policy.

3. The Legal Process Before and After Using the Stingray

Your letter references the California Electronic Communications Privacy Act ("CalECPA") and suggests that our policy might be supplemented in light of that recent legislation, including additional sections on how a warrant might be obtained in emergency situations, the process for obtaining information from cellular providers, and processes for notifying affected individuals. As you know, CalECPA was only recently passed by the legislature and signed by Governor Brown. It does not go into effect until January 1, 2016. Many of the CalECPA requirements are still being reviewed by law enforcement officials around the State. I know this because my office provides the training for those same officials and has done so for many years through the publication of our California Criminal Investigations manual and through our video trainings for P.O.S.T. – The Commission on Peace Officer Standards and Training. There is still much to be decided about how CalECPA will be implemented and what the legal process will ultimately look like. I do not believe it would be wise to attempt that analysis now for inclusion in our policy. We have agreed that we will never deploy the cell-site simulator without a warrant. Our policy states this. We have also agreed within the policy to comply with all state and federal laws governing the use of this technology. That statement covers the requirements of CalECPA and whatever other laws may be promulgated in this area.

4. Annual Reporting to Promote Transparency

You suggest that, in order to promote transparency, our office should amend the policy to include a requirement that the District Attorney provide annual reports to the Board of Supervisors reflecting the total number of times the cell-site simulator was deployed in Alameda County. We certainly value transparency, but we must balance the need for disclosure against the unique needs presented in each case to protect the integrity of the investigation. We feel that the best method of balancing these interests is to create a document for public disclosure under the California Public Records Act ("CPRA"). The CPRA and the cases construing it provide established guidelines for promoting public disclosure while shielding necessarily confidential aspects of individual investigations.

5. Amendments to Protect Civil Liberties

You have provided several, specific, edits to the draft policy that, in the opinion of the ACLU, will help protect civil liberties. These are included in section 6 of your letter. We accept each of these suggested changes and have incorporated them into the policy.

6. Enforceability

Your letter suggests that the policy should include provisions to ensure that it is enforceable. I assure you that I have no intention of creating a policy that we would not enforce. All policies of the District Attorney's Office are enforced. Any employee who misused this technology or used it in violation of the proposed policy would be disciplined. I do not believe it necessary to state exactly what possible discipline would be imposed, as all of these options are already spelled out in the General Directives and Standing Orders of the District Attorney's office.

Your letter also suggests a possible consequence for any law enforcement partner who is found to have abused the policy, including termination of cooperation. This is certainly a possible and likely outcome in the event of misuse. However, as we discussed, such agencies will never have unfettered access to this technology or its data. The purpose of vesting responsibility for this technology with the District Attorney's Office is to ensure that we will be there, whenever it is used, to ensure that the policy is followed in each and every regard. Such vigilance is integral to the policy and to any cooperative uses by our law enforcement partners.

For these reasons, we do not believe that the policy requires an additional section to enumerate possible consequences for misuse.

7. Future Amendments

Finally, your letter suggests that the policy should include a provision governing the process for future amendments. As you note, the draft policy states that "this Policy will be amended to reflect the current state of the law." You are requesting that, to ensure informed public debate,

any proposed amendments to the policy should have some public participation. We agree. In fact, our reading of S.B 741 would require us to seek Board approval for any changes to the policy following its initial approval by the Board. We have included a sentence clarifying this fact in the policy.

Enclosed please find the revised version of our policy, incorporating your comments and suggestions as indicated above. We hope that you will support our request for approval of this revised policy by our Board of Supervisors on November 17. Thank you, once again, for your participation and analysis in this regard. I appreciate it.

Very truly yours,

Nancy E. O'Malley

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District Attorney