

Analysis of Excerpts from Asian Law Caucus - Electronic Frontier Foundation 2008 FOIA Release¹

A. Lowered Privacy Standards for Examination of Travelers' Documents and Papers

At least four versions of a policy guidance regarding the examination and copying of documents by Customs' agents have been released:

- (1) Customs Directive 334-006, Review, Copying and Seizure of Documents, June 12, 1986 [180]
- (2) Customs Directive 3340-006A, Procedures for Examining Documents and Papers, February 4, 2000 (superseded Directive 334-006) [176]
- (3) Interim Procedures for Border Search/Examination of Documents, Papers, and Electronic Information issued in July 2007² and authored by CBP Office of Chief Counsel and DHS Office of General Counsel; described as clarifying several paragraphs of CBP Directive 3340-021B ("Responding to Potential Terrorists Seeking Entry into the United States") [598]
- (4) Policy regarding Border Search of Information, July 16, 2008 (not provided in FOIA request but publicly released) [hereinafter "2008 Policy"]

The 2008 Policy differs from Customs Directive 3340-006A in several important respects:

- Customs Directive 3340-006A provided that officers could *glance* at documents to see if they were merchandise, but that reasonable suspicion was required for officers to *read* documents. [177] By contrast, the 2008 Policy, does not instruct officers to initially "glance" at documents and does not require any suspicion to read documents; rather, an officer can "review and analyze" documents in a traveler's possession without any individualized suspicion. [2008 Policy, page 1]
- Customs Directive 3340-006A tells officers that as a general rule, personal correspondence should not be read [177]; this statement does not appear in the July 16, 2008 policy. Notably, the 2007 Interim Procedures contained a footnote stating that "officers may read correspondence that appears to bear upon a determination under the laws enforced or administered by CBP," [598] but even this qualification was omitted in the 2008 Policy.
- Customs Directive 3340-006A states that unless there is consent from the traveler, probable cause to believe a document is subject to seizure is required before a document can be copied [178]; the July 16, 2008 policy permits CBP to detain documents *or copies* for a "reasonable period of time to perform a thorough border search," and requires no individualized suspicion for making photocopies. [2008 Policy, page 2] This standard is even more relaxed than in the 2007 Interim Procedures, which stated that apart from situations in which officers copied documents to obtain technical assistance, officers could copy documents and information from electronic devices only where there was reasonable suspicion that the information related to terrorist activities or other unlawful conduct. [598-99]
- Customs Directive 3340-006A requires that before an officer seeks translation assistance from another agency, there be reasonable suspicion that a document falls into a category that would allow it to be read [178-179]; the July 16, 2008 policy requires no individualized suspicion for seeking translation assistance. [2008 Policy, page 2]

¹ Unless otherwise noted, all page citations in this document refer to the page number appearing on the top of the documents released by US Customs and Border Protection, numbered 1 through 661.

² A memo from the Assistant Commissioner, Office of Field Operations, for Directors of Field Operations attached to the interim guidance is stamped July 5, 2007, and a CBP e-mail refers to the interim procedures as being issued July 5, 2007 [657]. Another CBP document states that the guidance was disseminated on July 26, 2007 [650].

- The July 16, 2008 policy includes guidelines for sharing documents and information with other agencies; the policy permits other agencies to keep Customs' materials on their own legal authority. [2008 Policy, page 3-4] Customs Directive 3340-006A did not contain any such guidelines, although after the promulgation of the original directive, 334-006, a federal court enjoined Customs from providing materials to any other agency unless the other agency agreed to comply with Customs' policy regarding such materials and to return the materials to Customs in accordance with Customs' policy. *See Heidi v. U.S. Customs Service*, 681 F. Supp. 1445, 1453 (C.D. Cal. 1988)

CBP appears to still be using Customs Directive 2210-001A, dated July 27, 2001, on "Restrictions on Importation of Seditious Matter." The directive states that only materials that are "directed to inciting or producing imminent lawless action and [are] likely to incite or produce such action" may be prohibited (the *Brandenburg* standard). [184]

B. Questioning of Travelers

On September 7, 2006, CBP issued a directive entitled "Responding to Potential Terrorists Seeking Entry into the United States" (3340-021B) whose stated purpose was to provide standard operating procedures for responding to "known or suspected" terrorists attempting to enter the United States. [135] The 25-page policy replaced an earlier directive of the same name dated February 23, 2004 (3340-021A). [160] The document was heavily redacted in the version provided. One section, 6.9, addresses secondary inspection procedures for suspect persons and their traveling companions. It requires officers to conduct "an intensive secondary inspection, document review, questioning, and examination to identify known or suspected terrorists or terrorist instruments." It calls for questioning individuals on certain subjects and using certain techniques, but the specifics are redacted. [147] Other sections direct officers to copy documents in accordance with CBP directive 3340-006A. [135]

- Note that many individuals who have complained about intrusive border searches and questioning say they began experiencing such searches and questioning in the last one to three years. The disclosure of these directives raises the question whether the rise in complaints regarding border searches and questioning stemmed from these new policies.

There does not appear to be any policy constraining CBP officers from questioning individuals about religious practices or political views; no such policy was provided despite the specific request made by ALC and EFF for "Policies and procedures on the questioning of travelers regarding political views, religious practices, and other activities potentially covered by the First Amendment."

Standard operating procedures for the inspection of travelers heading to the continental United States from San Juan, Puerto Rico state that U.S. citizens have a "constitutional right not to respond to the questions asked" but that the government (CBP) has the right to ask certain questions. The examination of U.S. citizens should be "minimal, brief and without coercive intrusion" but if a passenger refuses to answer the question, further questioning will be initiated if "articulable facts" can be identified. CBP officers can continue questioning only when they have articulable facts that the person is not a U.S. citizen. (These policies might be different from those governing the inspection of travelers entering the United States from areas other than U.S. territories). [535-536]

A December 12, 2007 port of Buffalo memo on "Muslims performing Hajj" (the annual religious pilgrimage) provided guidance on what to expect from Hajj travelers. The memo stated that travelers coming from the pilgrimage should be processed according to the same guidelines as any other travelers, and that "no extraordinary or special enforcement measures have been or should be initiated based solely on the fact that a traveler is returning from a pilgrimage to Mecca." However, the document did warn that "the large influx of travelers during this time period may be used as cover by extremists and/or terrorists to enter the United States," and contains some redacted information

presumably describing how officers should respond to that fact. It also states that all existing directives and policies that apply to *specific nationalities* remain in effect. [191]

C. Records from the Tucson Field Office on the Inspection and Collection of Data on “High Interest” Subjects

Multiple documents from the Tucson Field Office describe changes in the inspection procedures for “high interest” subjects.

- An undated memo from the Director of Field Operations of the Tucson Field Office to the Executive Director of National Targeting and Security at the Office of Field Operations, presumably issued after June 2004, describes a database developed within that office to gather and disseminate intelligence on possible terrorists and persons of interest. The memo also makes reference to a new national database being developed to track persons of interest and suspected terrorists on a national level. [549-550]
- The same memo describes “Level 1” and “Level 2” interview forms used in the Tucson Field Office for interviewing high-interest subjects; the memo states that when suspicions of potential terrorist ties remain after a Level 1 interview is completed, more in-depth questions are asked using the Level 2 form. The Level 1 interview form advises: “If Subject refuses to answer questions or is uncooperative, proceed to Level 2.” [552]

A memo from the Director of Field Operations of the Tucson Field Office to Port Directors within the Tucson Field Office, stamped June 7, 2005, discusses standard operating procedures for processing terrorists. [575] The memo states that:

- In the months following September 11, 2001, a specialist unit of the Tucson Field Office implemented procedures for interviewing persons of interest and collecting data on those encounters in a database, in response to the “reality” that “interviews [were] being conducted by any CBP officer in Secondary and that those officers had little written guidance or formal training in targeting suspected terrorists or effectively interviewing them.” [575]
- In the “last year,” headquarters had taken significant steps to correct those deficiencies, including the publication of a particular directive, the establishment of certain teams at the ports, the requirement that particular officers conduct interviews of suspected terrorists, and the implementation of training courses specifically on effective interviews of suspected terrorists (the specifics are redacted) [575]
- The Tucson database was to serve as a “model” for the national database [575]
- “Persons of interest” would now be referred to as “suspected terrorists”
- June 2005 counterterrorism procedures for the Tucson Field Office are attached to that memo, based on the program established by CBP directive 3340-021A; they state that for secondary inspections of potential terrorists, the Person of Interest questionnaire previously used in that office, including the Level 1 and Level 2 interview forms, would be replaced by a Worksheet/Checklist in conjunction with CBP directive 3340-021A [577]
- The June 2005 counterterrorism procedures state that officers should conduct a “vigorous interview” and “thoroughly question” individuals, collecting at a minimum the information indicated on the checklist. The checklist includes biographical data, travel documents, contacts, “systems checks” (likely watchlist/database name checks), and travel history, and includes a check box for officers to indicate whether links to terrorism are confirmed or suspicions remain after the interview [578]

D. Use of Device to Perform Image Searches of Computers and Thumb Drives

A standard operating procedure issued on May 17, 2007 from the CBP Port of Anchorage discusses data image searches, specifically establishing a standard procedure for using a particular device – the name of the device is redacted – to perform image searches of computers and thumb drives. [624]

E. Right to Notification Once Detained by Customs

A December 20, 2004 memo from the Assistant Commissioner of the Office of Field Operations increased the amount of time before which individuals detained for CBP processing would be given the opportunity to have an officer notify someone of their delay. Previously, based on an October 8, 2004 memo, a person detained two hours for CBP processing could have the officer contact someone on his or her behalf. [481] The December 2004 memo increased that time to three hours. This requirement only applies to individuals referred to “CBP hard secondary” for immigration proceedings such as refusal of entry, expedited removal, withdrawal of application for admission, etc., and not “soft secondary” processing such as immigrant visas, NSEERS, etc. [481]

F. Sharing of Information Collected by Customs with Other Agencies

An e-mail sent on July 11, 2007, possibly from the Director of Field Operations in New York, indicates the great level of interest from other law enforcement agencies in CBP’s ability to collect information from travelers. “As we all know, CBP’s data collection capabilities have been widely discussed in the law enforcement community and we have been asked by many various agencies to copy and transmit documentation being carried by travelers for legitimate law enforcement reasons.” Interestingly, the July 16, 2008 Policy regarding Border Search of Information portrays the transmission of documents from CBP to other agencies as stemming from CBP’s need for technical assistance, whereas this e-mail acknowledges the interest originating in other law enforcement agencies in CBP’s ability to gather information that other agencies might not be able to obtain on their own legal authority. [619]

G. CBP Instructions to Field Offices Regarding Copying of Electronic Information Following Media Attention to Searches of Electronic Devices

Media attention to CBP's procedures for copying electronic media attracted significant agency attention in February 2008. An e-mail to CBP Port Directors sent on February 8, 2008 states that "the lawsuit filed against CBP in San Francisco has made all the newspapers," and that officers should follow the guidance disseminated by the field office in November. [654] A second e-mail to Port Directors sent February 12, 2008 states that "the examination of electronic has become a very HOT topic in DC (all the way to the White House)" and that the Director of Field Operations wants Port Directors to establish two procedures: searches of electronic media would require supervisory approval, and detention of electronic media would require approval by the port director. [659]

An e-mail from the Director of San Juan Field Operations to all CBP supervisors and managers notes that "CBP has come under intense scrutiny for using its border search authority to copy the electronic media of incoming passengers," and notifies supervisors and managers that permission to copy electronic media must be granted by a port director or chief, and that CBP locations should report to the Director of Field Operations instances in which electronic media is being copied. [648]