



International Business & Trade Law Alert

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This International Business & Trade Law Alert is intended to provide general information for clients or interested individuals and should not be relied upon as legal advice. For further assistance regarding this subject area, or if you require more specific guidance in the event you are the subject of one of these searches, please contact one of the following attorneys:

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New Governmental Policies on Border Searches of Electronic Devices

What Border Officials Can Do With Your Laptop And Cellular Phone

Having your laptop searched or detained by Customs on your way back from a business trip would be a nightmare for most business people. This scenario is quite possible under new governmental policies. In fact, it is becoming so frequent that last August, Customs and Border Protection (“CBP”) and Immigration and Customs Enforcement (“ICE”) both issued their respective new policies on border searches of electronic devices. It was a coordinated effort of CBP and ICE to update and harmonize their border policies to detect an array of illegal activities, including terrorism, cash smuggling, contraband, child pornography, copyright, and export control violations.

With all the technology innovations that allow travelers to carry massive amounts of information in small electronic devices, CBP and ICE are facing an enormous challenge. On the one hand, travelers have a legitimate right to carry their own information on electronic devices. In that respect, there are serious concerns regarding the traveler’s expectation of privacy. On the other hand, the government has a duty to combat illegal activities and to enforce U.S. law at the border. The difficulty is finding the right balance between the government’s duty to enforce the law and the rights of travelers.

The legal basis for ICE and CBP policies is the border search exception to the Fourth Amendment requirement that officers obtain a warrant before searching someone’s property. But, assuming that they have this power, another key issue is exactly what CBP and ICE are allowed to do with one’s laptop. In short, they have authority to search and share information on these devices – with or without “reasonable suspicion¹” of illegality. Detention of the devices and/or information requires probable cause that an illegal activity is or is about to occur. These ICE and CBP policies apply to any item that contains information, such as computers, disks, drives, tapes, mobile phones, Blackberries, cameras, music players, and any other electronic or digital devices.

(Footnotes)

¹ Reasonable suspicion is a legal standard that a person has been, is, or is about to be engaged in criminal activity based on specific facts and inferences. It requires less evidence than probable cause, the usual legal requirement for arrests and warrants. Reasonable suspicion is evaluated using the “reasonable person” standard. *Terry v. Ohio*, 392 U.S. 1 (1968).

Searches

CBP searches may be conducted with or without suspicion of an unlawful activity. To the extent practicable, CBP searches should be conducted in the presence of a supervisor. ICE searches should be conducted by an ICE Special Agent, CBP Officer, or Border Patrol Agent. The searches should be conducted in the presence of, or with the knowledge of, the traveler. Naturally, the guidelines provide for exceptions to the traveler's presence under certain circumstances where national security or operational considerations are an issue. ICE guidelines specifically state that the traveler's consent for the search is not needed.

Detention

CBP detention of a device should not exceed five days, but that period can be extended. ICE detention periods may be longer – up to 30 calendar days or longer – if circumstances warrant. CBP is required to issue a Custody Receipt to the owner of the device (CBP Form 6051D) at the time of detention. ICE will also give the owner of the device documentation regarding its custody. Detention of electronic devices requires probable cause to believe that the device, or its contents, contains evidence of illegality that CBP and ICE are authorized to enforce.

Review of Information: Assistance During Search

If CBP and/or ICE officers have difficulties conducting the search of an electronic device, they may request assistance from other agencies. Technical assistance (e.g., translation of information in a foreign language or encrypted) may be requested with or without individualized suspicion, while subject matter assistance (e.g. determination of the meaning, context, and value of information) requires reasonable suspicion of illegality. Requests for translation, decryption, and subject matter assistance require supervisory approval.

Copying Information

CBP and ICE are authorized to copy the information on an electronic device. CBP searches that yield sensitive information, including medical records, work-related information carried by journalists, or attorney-client privileged information, are entitled to special handling procedures. In such cases, the searching officer should seek advice from CBP associate counsel or assistant chief counsel. Business confidential, privileged, or sensitive information must be protected from unauthorized disclosures. Transmission of the device to another federal agency for assistance is discouraged but not prohibited. Copying information is the preferred method in such cases.

Advice to Business Travelers

Remember, the next time you cross the border with your personal or company laptop or Blackberry, be aware of ICE and CBP officers. If you are stopped for a device search, be patient and allow officers to do their work. More importantly, before you travel, think carefully about the type of information you are carrying on your devices and keep a backup copy of important information at home or in your office. If you suspect that you are carrying sensitive information that may be controlled for export by the government, consult an export control attorney before your trip to make sure a government authorization is not required. If you are carrying your company's laptop, inform your general counsel of any search or detention of company property.

The complete ICE and CBP policies are available at the links below:

Customs Policy on Border Searches of Electronic Devices (August 20, 2009)

http://www.customs.gov/linkhandler/cgov/travel/admissibility/elec_mbsa.ctt/elec_mbsa.pdf

ICE Policy on Border Searches of Electronic Devices (August 18, 2009)

http://www.dhs.gov/xlibrary/assets/ice_border_search_electronic_devices.pdf