



International Business & Trade Law Alert

A Corporate Department Publication

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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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Border Searches of Electronic Devices What and Who are Border Officials Searching? And What Can You Do to Protect Your Rights?

More information has been released concerning the implementation of Customs and Border Protection (“CBP”) policies on border searches of electronic devices issued last August.¹

Facts and Numbers

In August 2009, the American Civil Liberties Union (ACLU) filed a lawsuit demanding that CBP release details of its policy on border searches of electronic devices.² As a result of the lawsuit, in 2010 CBP released a number of documents regarding its policy enforcement. According to the ACLU:

- In nine months, CBP officials searched over 1,500 electronic devices belonging to travelers.
- Laptops are not the only targeted devices — cellular phones were the most commonly searched and seized devices between October 2008 and June 2009. Other types of devices included digital cameras, thumb drives, hard drives, and DVDs.
- Between July 2008 and June 2009, CBP transferred electronic files found on travelers’ devices to third-party agencies almost 300 times. More than 80 percent of the transfers involved CBP making copies of travelers’ files.

The CBP policy authorizes the search of all files, including financial documents and web browsing history, on travelers’ laptops and electronic devices “absent individualized suspicion.” However, the ACLU argues that border agents should be required to establish suspicion that a traveler is breaking the law before they can search electronic devices. The Association of Corporate Travel Executives, a nonprofit group that represents 2,500 members worldwide, also objects to the searches.

(Footnotes)

¹ This is a follow up to PWMA’s alert on “New Governmental Policies on Border Searches of Electronic Devices,” available at www.porterwright.com.

² CBP First Production of Documents (January 2010), available at <http://www.aclu.org/national-security/customs-and-border-protection-cbp-first-production-documents>.

According to CBP, border searches have been helpful in limiting the movement of individuals who support terrorism and threaten national security.³ Border searches have identified illegal immigrants and some individuals possessing child pornography. During some of the searches, CBP also found violent jihadist material, information about cyanide and nuclear material, video clips of improvised explosive devices being exploded, pictures of Al-Qaida officials, and other illegal materials.

Who is More Likely to be Searched?

The standard CBP publication⁴ provided to owners of detained devices explains the reasons why CBP may choose to inspect certain travelers' electronic devices. The reasons include: (1) travelers with documents and visas that are incomplete or improper; (2) travelers with previous violations of CBP laws; (3) a traveler whose name matches a person of interest in one of the government's enforcement databases; and (4) some travelers who will be selected at random.

At the Senate Judiciary Committee's hearing on the oversight of the Department of Homeland Security (DHS), held on April 2, 2008, then DHS Secretary Michael Chertoff stated that, "U.S. citizens are not treated differently based upon their ethnic background, but their individualized behavior could be a basis for singling them out, or if they matched a physical description it could be a basis for singling them out." At another hearing in 2008, then CBP Deputy Commissioner, Jayson P. Ahern indicated that the fact that an individual travels frequently to countries associated with significant terrorist activity, narcotics smuggling, or sexual exploitation of minors, may give CBP officers reason to question them.⁵

Privacy Protection: What Can CBP Do? What Can You Do?

CBP claims that its officers strictly adhere to all constitutional and statutory requirements regarding privacy and civil liberties protection, including the Trade Secret Act.⁶ The act prohibits federal employees from disclosing, without lawful authority, business confidential information to which they obtain access as part of their official duties.

An owner of an electronic device may file a complaint with the DHS Office for Civil Rights and Civil Liberties ("Office") alleging a violation of an individual's civil rights or civil liberties by a DHS employee during a device search and/or detention.⁷ The Office reviews and assesses complaints in areas such as: (1) treatment; (2) abuse of authority; (3) conditions of detention; (4) discrimination; and (5) due process.

Complaints filed with the Office are forwarded to the Office of the Inspector General, and may be forwarded to other Department components or to other government agencies, such as the Department of Justice.

Detention and Seizure Cases: What Can CBP Do? What Can You Do?

CBP must have probable cause of illegality to detain your device, but searches can be made with or without individualized suspicion. In detention cases, the owner is entitled to a receipt (CBP Form 6051-D) that details what items are being detained and the contact information at CBP. You must provide CBP your contact information to facilitate the return of your property. You may ask the CBP officer who decided to detain your device for his or her name, contact telephone number, and the reason for the detention.

For a device to be retained by CBP after inspection, CBP must be able to demonstrate that the device contains evidence of a crime, contraband, a violation of CBP laws, or other restricted items or prohibited information. In

(Footnotes)

³ "Laptop Searches and Other Violations of Privacy Faced By Americans Returning from Overseas Travel," statement by Jayson P. Ahern, Deputy Commissioner, CBP, DHS, before the Senate Committee on the Judiciary Constitution Subcommittee, June 25, 2008.

⁴ U.S. Customs and Border Protection, Inspection of Electronic Devices, CPB Pub. 0204-0909 (undated).

⁵ "Laptop Searches and Other Violations of Privacy Faced By Americans Returning from Overseas Travel," statement by Jayson P. Ahern, Deputy Commissioner, CBP, Department of Homeland Security, before the Senate Committee on the Judiciary Constitution Subcommittee, June 25, 2008.

⁶ 18 U.S.C. § 1905.

⁷ 6 U.S.C. § 345 and 42 U.S.C. § 2000ee-1

such cases, the owner may file an administrative petition for relief before the local CBP Fines, Penalties and Forfeiture Office.⁸ If the violation relates to export control laws (e.g., prohibited export of certain information — technical data), the case will be referred to other agencies also in charge of export control enforcement, such as the Department of Commerce or the Department of State.

The Return of Your Detained Device

Unless there is evidence of a crime, contraband, or other restricted item or prohibited information, your device should be returned to you within a reasonable time upon completion of the examination. CBP will notify the owner of the device concerning the pick-up address. If it is impractical for the owner to pick up the device, CBP will ship the device at its own expense.⁹

Advice to Travelers

To avoid a search when you travel, have all of your identification, tickets, and visa information ready — make sure all of the information is valid and accurate. If your device is selected to be searched, be patient and allow the officers to do their work. If CBP decides to detain your device, you are entitled to a receipt on a CBP form. Review the description of your item carefully and ask it to be corrected if you notice any inconsistency on the CBP form. You may ask for an explanation of the reason for the detention and for the officers' contact information. CBP regulations also permit you to seek administrative remedy against the inspection/detention by filing a petition for relief against seizure or forfeiture of your device. As always, 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 are carrying your company's laptop, make sure to inform your general counsel or other responsible official of any search or detention of company property.

(Footnotes)

⁸ 19 C.F.R. Part 171, Part 162.

⁹ U.S. Customs and Border Protection, Inspection of Electronic Devices, CPB Pub. 0204-0909 (undated).