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Congress of the United States
House of Representatives
Washington, DC 20515-4905
February 24, 2016

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Mr. James B. Comey
Director, Federal Bureau of Investigation
935 Pennsylvania Avenue, NW
Washington, D.C. 20535

Dear Director Comey:

A February 1, 2016, article in the *Milwaukee Journal Sentinel* highlighted the Milwaukee Police Department's use of cell-site simulators, also known as Stingrays.¹ The Fourth Amendment implications of this technology are currently being debated by state legislatures, and courts are weighing the legal arguments. We will watch closely as those debates unfold, but in the meantime, we are writing to raise serious reservations regarding the Federal Bureau of Investigations (FBI) use of nondisclosure agreements (NDA) to prevent state and local police from discussing the use of Stingray technology.

The NDA the Milwaukee Police Department signed reads:

In order to ensure that such wireless collection equipment/technology continues to be available for use by the law enforcement community, the equipment/technology and any information related to its functions, operation, and use shall be protected from potential compromise by precluding disclosure of this information to the public in any manner including but not limited to: in press releases, in court documents, during judicial hearings, or during other public forums or proceedings.²

The FBI's stated reason for secrecy was that disclosing the existence of the capabilities may allow "the subject of investigation wherein this equipment/technology is used to employ countermeasures to avoid detection by law enforcement."³ But certainly not lost on the FBI was the fact that secrecy shields the technology from debate and inevitable controversy. Courts could not review its constitutionality. The public could not debate the merits and costs of the technology and what limitations might be appropriate. While this type of secrecy may be appropriate in the national security context, it is entirely inappropriate in the context of law enforcement where citizens have the constitutional right to challenge the government's evidence against them.

We are not prejudging the outcome of the debate over the use of Stingray technology, but we categorically denounce the use of nondisclosure agreements that limit the ability of the public and of courts to debate the merits of the technology and to implement limits they may deem appropriate.

¹ Bruce Vielmetti, *Groups decry Milwaukee police's warrantless use of 'Stingray' tracking*, Milwaukee Journal Sentinel, (February 1, 2016), available at <http://www.jsonline.com/news/crime/groups-decry-milwaukee-polices-warrantless-use-of-stingray-tracking-b99660842z1-367246261.html>

² Letter, Amy S. Hess, Asst. Dir. FBI, to Capt. David Salazar, Milwaukee P.D. (August 13, 2013), available at <https://www.documentcloud.org/documents/2190206-milwaukee-pd-fbi-nda-13aug2013.html>.

³ *Id.*

The overlap between intelligence and law enforcement also raises national security concerns. If the technology is so important for national security that it must be kept secret, then its use for routine law enforcement was inappropriate. Either the technology should have been kept secret as a vital national security tool or it should have been made public so that it could be used by law enforcement. Instead, the Bureau tried to have it both ways and the foreseeable result was exactly what happened – the secrecy of the technology has been compromised, serious privacy questions have been raised, and countless criminal convictions are in jeopardy.

Worse, local jurisdictions are now subject to increasing litigation over the secretive use of the cell-site simulators.⁴ The lawsuits will inevitably divert time and resources that could have been spent protecting and serving our communities to legal battles that could have been averted. It could also put in jeopardy hard fought convictions.

We are aware that the FBI has, to some degree, retreated from its use of NDAs regarding cell-site simulators. The Bureau even argued that the agreements do not prevent police from disclosing to courts that they used such equipment:

The NDA should not be construed to prevent a law enforcement officer from disclosing to the court or a prosecutor the fact that this technology was used in a particular case. Defendants have a legal right to challenge the use of electronic surveillance devices, and not disclosing their use could inappropriately and adversely affect a defendant's right to challenge the use of the equipment.⁵

This, however, is at odds with the explicit language of the NDA which precludes disclosure to the public in any manner “including but not limited to: in press releases, in court documents, during judicial hearings, or during other public forums or proceedings.” The agreement, in fact, goes much further and states that the Milwaukee Police Department should seek FBI permission before responding to court ordered disclosures and should be prepared to dismiss cases at the FBI's request if necessary to protect against disclosure.

We are also aware that the Department of Justice has issued new guidance on federal use of cell-site simulators. It is not, however, clear that the FBI has rescinded the NDAs it signed with state and local police around the country. The FBI's failure to do so subverts justice and subjects state and local law enforcement to needless litigation.

We appreciate a prompt response to the following questions:

- Does the FBI consider state and local law enforcement to be bound by the NDAs related to the use of cell-site simulators?
- Has the FBI ever requested that a law enforcement agency dismiss a case to maintain the secrecy of law enforcement technology?
- How many NDAs has the FBI signed with state and local law enforcement agencies regarding cell-site simulators?
- Are there other technologies for which the FBI demands state and local law enforcement sign an NDA?
- Does the FBI continue to believe that NDAs are appropriate?

⁴ See, e.g., <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-stingray-challenge-20150904-story.html>

⁵ See, e.g., Eric Boehm, *FBI Flip-Flops on Disclosing Cellphone Surveillance Technology*, NewsMax (May 22, 2015), available at <http://www.newsmax.com/t/newsmax/article/646429>

- Would the FBI ever condone perjury to Congress or judges to protect the existence of technology?

Please respond to the above questions by March 25, 2016.

Sincerely,

A handwritten signature in blue ink that reads "F. James Sensenbrenner, Jr." in a cursive style.

F. James Sensenbrenner, Jr.
Member of Congress

A handwritten signature in blue ink that reads "Sheila Jackson Lee" in a cursive style.

Sheila Jackson Lee
Member of Congress