

Fong, Ivan**From:**

(b)(6); (b)(7)(C)

Sent:

Thursday, August 13, 2009 10:46 AM

To:

(b)(6); (b)(7)(C)

Cc:**Subject:****Attachments:**Rollout and implementation of new policy regarding searches of electronic media at the border
S1 laptop comments.pdf; 08.07.09 - Electronic Media Searches Directives - Signed Memo -
09.0006.144.pdf

As you know the Secretary has now signed an approved the new policy and the roll out of the revised directives and Privacy Impact Assessment. A/S Heyman would like to have a meeting to discuss this roll out and make sure that the new policy and directives are made public and provided to Congress. Policy will be sending out a meeting request. I have provided the documents so that you will have them. If you have any questions please let me know. The meeting will likely be held Monday morning.

Here is the list of approved tasks we will need to coordinate (these I directly from the memos that were approved):

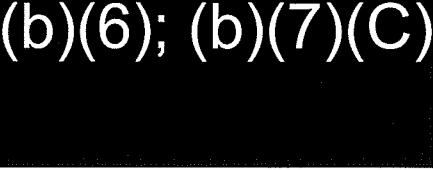
- 1) The directives for CBP and ICE be updated and reissued. These updates primarily address timeframes for completing border searches of documents and electronic media, supervisory oversight, appropriate notice to travelers whose laptops are inspected, mechanisms to ensure that reliable statistics related to the these searches are captured in ICE systems, and an annual auditing process to ensure that these searches are executed and documented in accordance with the new directives. For CBP, the changes clarify data sharing issues with other agencies.
- 2) The PIA be published on the DHS Privacy Office website simultaneously with the issuance of the revised Directives and the CBP tear sheet in order to incorporate the updated guidance.
- 3) CBP begin to use a revised tear sheet to inform all travelers subject to electronic search why this occurred and how the data will be used in a more "plain English" format.
- 4) OPA (lead office), in coordination with OGC, PLCY, IGP and OLA, together with CBP, CRCL, IGP, ICE and PRIV, devise an appropriate public rollout of your decision and the new directives, tear sheet, and the PIA, to include congressional and other stakeholders.
- 5) OLA (lead office) in coordination with the same internal stakeholders devise an appropriate legislative strategy with the objective of avoiding new legislation that restricts CBP and ICE authorities.
- 6) CBP with OGC, PRIV and CRCL review officer training and procedures to ensure that guidance on improper profiling and non-discrimination is understood.
- 7) CRCL conduct a Civil Liberties Impact Assessment (CLIA) within 120 days.
- 8) Direct CFO to identify an appropriate funding source through re-programming and/or future appropriations so that CBP, ICE, and the CIO can develop automated, comprehensive data collection and analytical tools, to facilitate reporting on individuals subject to electronic media searches, the outcomes of those searches, and the ultimate disposition of the data.

(b)(6); (b)(7)(C)



Counterterrorism Policy
Office of Policy
U.S. Department of Homeland Security
Washington, DC 20528

(b)(6); (b)(7)(C)



From: (b)(6); (b)(7)(C)
Sent: Tuesday, September 23, 2008 11:26 AM
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Cc: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)

Subject: RE: Laptops
FYI: Below are the DHS OPA talking points in response to the article.

Talking Points:

- The tragic events of 9/11 required the federal government to reexamine its law enforcement and counterterrorism efforts to ensure that all legally available means are employed to prevent another attack. Many of these efforts focused on the U.S. border. At the same time, with the creation of the Department of Homeland Security in March 2003, CBP became responsible for immigration functions at the border, in addition to its traditional customs mission.
- Updating our policies reflects an effort to be more transparent. The decision of U.S. Customs and Border Protection to change some of the standards in its old policies reflects the realities of the post-9/11 environment, the agency's expanded mission and legal authorities, and developments in the law, including the Homeland Security Act of 2003. Although certain aspects of the policies have changed, the policies have always reflected the notion that officers have the constitutional authority to inspect information presented at the border without individualized suspicion.
- CBP Officers are trained to protect information under strict policies that restrict access to sensitive information, including guarding against the inappropriate handling and disclosure of privileged information such as attorney-client communications, or sensitive business information such as trade secrets. If during an examination, a passenger states that his/her items are privileged as a result of attorney-client privilege, then CBP Officer will notify the supervisor of this situation. If the CBP Officer suspects that the content of such a document may constitute evidence of a crime or otherwise pertain to a determination within the jurisdiction of CBP, the Supervisory CBP Officer will seek advice from the CBP Office of the Chief Counsel or the appropriate United States Attorney's office before conducting a search of the document.
- CBP Officers have the authority and obligation to determine travelers' admissibility to the U.S. In order to determine admissibility, officers ask questions to determine intent of travel. In the course of interviewing travelers, certain questions may be relevant to admissibility determinations that relate to an alien's purpose for entering the United States under visa categories such as R-1 (religious), missionary work under B-1, vocational volunteer work as a B-2, exchange program as a J-1, or seminary study as an F-1.

From: (b)(6); (b)(7)(C)
Sent: Tuesday, September 23, 2008 11:20 AM
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Cc: (b)(6); (b)(7)(C)
FERREIRA, JOANNE; HOLLINGER, LYNN S

Subject: RE: Laptops

(b)(6); (b)(7)(A) can you get (b)(6); (b)(7)(C) or someone available.

(b)(6); (b)(7)(C)

Congressional Liaison Officer
US Customs and Border Protection

(b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)

Sent: Tuesday, September 23, 2008 11:18 AM

To: (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

Cc: (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

Subject: RE: Laptops

10-4.

Just talked to (b)(6); (b)(7)(C) - she is lead and will take existing language and provide something shortly.

If someone from OGC could respond to or call her to ensure we have closed the loop on what exactly was provided to the reporter, it would be most helpful.

Thanks!

(b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)

Sent: Tuesday, September 23, 2008 11:15 AM

To: (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

Cc: (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

Subject: RE: Laptops

Ok, here's what I want to do.

I was just informed that DHS Public Affairs, CBP Counsel, and CBP OFO have been working with this writer for almost three weeks providing her with written responses to questions she was asking. If that is true, (which if so, I am waaaaaay unhappy to just now be finding out about it) then we should already have copies of everything we gave her.

I would like to take all that information and put it into a rebuttal to give to the Hill. I would also like to put the numbers out there from 8/1 to 8/13 (the 17,000,000,000 processed, 376,000 secondaryed, and only 40 laptops looked at...or whatever the numbers are) and combat this head-on.

(b)(6); (b)(7)(C)

Congressional Liaison Officer
US Customs and Border Protection

(b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)

Sent: Tuesday, September 23, 2008 10:51 AM

To: (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

Cc: (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

Subject: RE: Laptops

(b)(6); (b)(7)(C)

— let's discuss. I don't disagree with you but this is Nakashima... not sure how effective returning the salvo will be.

We have plenty of existing language to rebut. The question is what form the rebuttal should take, who would submit, etc. in which case the content would be dictated by LTE vs. OpEd form.

However...

This is not the first article she's written on this – and is not likely to be the last – negative interest will only wane if and when we are transparent and forthright with this particular policy, and do a better job of outreach with affected groups. If we don't have a history of openness and outreach with the business traveler/academic groups on this issue, I'm not sure a point-by-point rebuttal to the Post is the most effective approach.

(b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)

Sent: Tuesday, September 23, 2008 10:36 AM

To: (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

Cc: (b)(6); (b)(7)(C)

Subject: FW: Laptops

Importance: High

We need a response (point by point rebuttal) for the Was Post article. Don't know who should lead (Counsel, Public Affairs, OFO, even OCA), but we need to get it out asap.

(b)(6); (b)(7)(C)

Congressional Liaison Officer
US Customs and Border Protection

(b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)

Sent: Tuesday, September 23, 2008 10:29 AM

To: (b)(6); (b)(7)(C)

Cc: (b)(6); (b)(7)(C)

Subject: RE: Laptops

We'll await your responses, (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

— it's not sharing with (b)(6); (b)(7)(C) — we're the investigative arm of CBP. (b)(6); (b)(7)(C) is completely differentiated from any other agency from which assistance is sought.

I'm sure she'll win a Pulitzer for her ability to completely screw up the facts.

(b)(6); (b)(7)(C)

ELD/OPLA/ICE

(b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)

Sent: Tuesday, September 23, 2008 10:25 AM

To: (b)(6); (b)(7)(C)

Cc: (b)(6); (b)(7)(C)

Subject: RE: Laptops

We will work on a rebuttal. Initial response is that it is a BS article.

(b)(6); (b)(7)(C)

Congressional Liaison Officer
US Customs and Border Protection

(b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)

Sent: Tuesday, September 23, 2008 10:14 AM

To: (b)(6); (b)(7)(C)

Subject: Laptops

(b)(6); (b)(7)(C)

Is CBP preparing a point by point rebuttal? I'm getting questions from the Hill to the effect of, "Is this story true?"

I will need an answer from CBP soon.

I see three issues that we assuredly need an to answer for and in an unclassified way:

1. Did CBP change its policy as indicated by the news story?
2. Is/Did CBP target 1st Amendment exercise (religious)?
 - a. I don't think so, but need to know as that is how these people are approaching this issue, which is at a nexus of National Security/Sovereignty and 1st Amendment-Constitutional (Civil Rights and Privacy) law.
3. How are we to talk about the decision to share information to ICE or other agencies?

Thanks,

(b)(6); (b)(7)(C)

Director, Office of Legislative Affairs
U.S. Department of Homeland Security

(b)(6); (b)(7)(C)

Expanded Powers to Search Travelers at Border Detailed

By Ellen Nakashima
Washington Post Staff Writer
Tuesday, September 23, 2008; A02

The U.S. government has quietly recast policies that affect the way information is gathered from U.S. citizens and others crossing the border and what is done with it, including relaxing a two-decade-old policy that placed a high bar on federal agents copying travelers' personal material, according to newly released documents.

The policy changes, civil liberties advocates say, also raise concerns about the guidelines under which border officers may share data copied from laptop computers and cellphones with other agencies and the types of questions they are allowed to ask American citizens.

In July, the Department of Homeland Security disclosed policies that showed that federal agents may copy books, documents, and the data on laptops and other electronic devices without suspecting a traveler of wrongdoing. But what DHS did not disclose was that since 1986 and until last year, the government generally required a higher standard: Federal agents needed probable cause that a law was being broken before they could copy material a traveler was bringing into the country.

The changes are part of a broader trend across the government to harness technology in the fight against terrorism. But they are taking place largely without public input or review, critics said, raising concerns that federal border agents are acting without proper guidelines or oversight and that policies are being adopted that do not adequately protect travelers' civil liberties when they are being questioned or their belongings searched.

"For 20 years the government has at least implicitly recognized there were some First Amendment restrictions on reading and copying documents," said Shirin Sinnar, a staff attorney with the Asian Law Caucus, which along with the Electronic Frontier Foundation sued the government under the Freedom of Information Act for disclosure of border search policies. "It's disturbing now that the government has jettisoned that policy in favor of one that violates First Amendment rights."

DHS spokeswoman Amy Kudwa said the updating of policies reflects an effort to be more transparent. In an e-mail, she wrote that the decision of U.S. Customs and Border Protection (CBP) "to change some of the standards in its old policies reflects the realities of the post-9/11 environment, the agency's expanded mission and legal authorities, and developments in the law, including the Homeland Security Act of 2003. Although certain aspects of the policies have changed, the policies have always reflected the notion that officers have the constitutional authority to inspect information presented at the border" without requiring suspicion of a particular traveler.

The 1986 policy was issued after a lawsuit was filed by a group of activists returning from Nicaragua who had their diaries, datebooks and other personal papers seized and photocopied by customs officers and shared with the FBI. The government argued that the customs agency had the right to enforce a law against importing subversive literature.

"Essentially they were using that as a pretext to do intelligence gathering on critics of our policies on Nicaragua," said David D. Cole, a Georgetown University law professor who was then a lawyer at the Center for Constitutional Rights, representing the activists suing the government in *Heidy v. U.S. Customs Service*.

To set guidelines on document searches, the agency issued the 1986 directive that made clear that its officers "as a general rule . . . should not read personal correspondence." But, the policy noted, officers had the authority to scan material for evidence of violation of laws pertaining to copyright, sedition and contraband. With reasonable suspicion of a violation, they could detain the material. With probable cause of a violation, they could seize and copy it.

In July 2007, the government dropped the requirement that there be reasonable suspicion to review material but specified that the review had to take place in connection with laws enforced by CBP, according to a copy of a policy the groups obtained.

Then, this July, the government issued its broadest policy to date regarding information searches at the border, allowing documents and electronic devices to be detained for an unspecified period. Moreover, they may now be copied without any suspicion of wrongdoing, the lowest legal standard.

"The tragic events of 9/11 required the federal government to reexamine its law enforcement and counterterrorism efforts to ensure that all legally available means are employed to prevent another attack," Kudwa said.

But Marcia Hofmann, staff attorney for the Electronic Frontier Foundation, said that laptop computers may contain "a massive amount of private information such as personal e-mails, financial data or confidential business records" and that the government should not violate travelers' constitutional rights in the name of national security.

There is apparently wide interest among other government agencies in CBP's ability to collect information, according to a July 11, 2007, e-mail obtained by the groups. The e-mail originated from the agency's New York field office. "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," said the writer, whose name was redacted.

The Heidy decision barred customs officers from sharing information they suspected was seditious with other federal agencies unless the agencies abided by CBP's restrictions on data retention. But the July policy allows the agency to share data obtained at the border if there is suspicion that a law enforced by it is being violated.

Cole said the government's search authority at the border is very broad, "so it is important that it not be turned into a loophole by which other law enforcement agencies, which are not permitted to conduct searches without probable cause or reasonable suspicion, are able to avoid the constitutional limits on their authority."

Customs officers are trained to know under what circumstances sensitive law enforcement information may be shared and with whom, DHS spokesman Russ Knocke said.

Over the past several years, the Asian Law Caucus and other civil liberties groups have reported a surge in complaints from travelers who have been questioned about their religious practices and political leanings. Many of the travelers say they have had their laptops or phones searched.

Yasir Qadhi, a 33-year-old Houston native who studied in Saudi Arabia from 1995 to 2005 and is pursuing a doctorate in Islamic studies at Yale University, said he is questioned every time he reenters the United States. He said he is routinely asked which mosques he has prayed in, what charities he donates to, what lectures he has delivered, what the lectures are titled. If he has notes, he said, they are photocopied.

In March 2006, when driving home to New Haven, Conn., from Toronto, he said, he was detained with his wife and three children at the border for 5 1/2 hours. The agents, he said, asked about religion, and, noting his Saudi studies, asked him for classmates' names and whom he corresponded with in the United States.

They also detained his cellphone.

Then, this spring, an agent in the FBI's New Haven field office asked him to come by. Qadhi said the agent cited the March 2006 stop and said, "We went through your personal diary in your phone, and we discovered these numbers on there, and we want to know your relationship with these specific individuals."

Qadhi said: "And they went through each one of them."

Knocke said he could not comment on an individual case. He said customs officers do not racially profile in any way but have the authority to "take and consider evidence concerning the privilege" of any person to enter the United States.





Nathan A. Sales, former DHS deputy assistant secretary for policy development, said that "in some instances, you can imagine it would be appropriate to ask questions" such as those asked of Qadhi. "But when you do, you're playing with fire."

Sales, a George Mason University law professor, said: "If you want to ask questions about a person's churchgoing or charitable contributions, you need to take steps to ensure it doesn't stray from legitimate questions to harassment. You need to have a clearly established policy that these sorts of questions are only asked in certain circumstances, and only when we have some indication to believe that a particular mosque or a particular charity might have some sort of terrorist tie."

Qadhi said he feels "frustrated" by a system that he thinks will never tell him what list he is on so that he can get off it. "I'm treated like a second-class citizen, and there's absolutely nothing I can do," he said. "This is simply not the America I grew up in."

Staff researcher Julie Tate contributed to this report.

From (b)(6); (b)(7)(C) **Date** Monday, May 18, 2009 10:02:41 AM
To (b)(6); (b)(7)(C)
Cc (b)(6); (b)(7)(C)
Subject RE: Laptop Paper

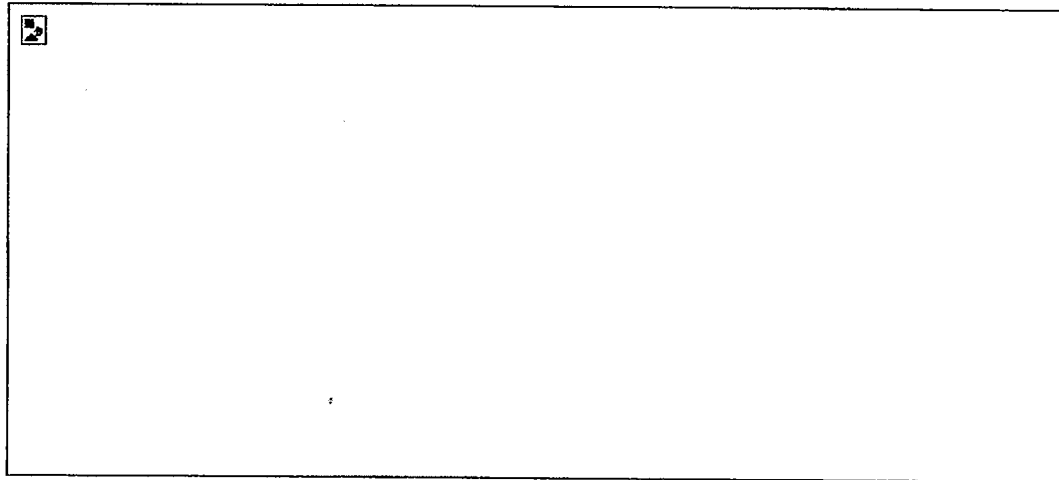
 
 

(b)(6); (b)(7)(C)

Here are more current numbers if you wish to incorporate them.

FY09 Year to Date: Oct 1 2008 – May 5 2009

Total Number of Travelers Screened (Air/Land/Sea): **144.4 million**
Number of Secondary Searches of Travelers Screened: **3.1 million / (2.2%)**



For instance, from **October 1, 2008, to May 5, 2009**, U.S. Customs and Border Protection (CBP) encountered more than **144.4 million** travelers at U.S. ports of entry. Of these travelers, approximately **3.1 million (2.2% of the 144.4 million travelers)** were referred to secondary inspection; however, only **696 (0.022% of the 3.1 million travelers)**

(b)(6); (b)(7)(C)
Tactical Operations
U.S. Customs and Border Protection
Department of Homeland Security
(b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Monday, May 18, 2009 9:13 AM
To: (b)(6); (b)(7)(C)
Subject: FW: Laptop Paper

(b)(6); (b)(7)(C)

Director, Tactical Operations
Office of Field Operations
Customs and Border Protection

(b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)

Sent: Monday, May 18, 2009 8:22 AM

To: (b)(6); (b)(7)(C)

Subject: RE: Laptop Paper

(b)(6); (b)(7)(C)

the paper is below. I do not believe that CBP has much to do aside from the stats. Mr. Barth did say that he will send out a revised draft later today so we will likely get at least one more chance to comment. (b)(6); (b)(7)(C)

non-responsive; (b)(5)

non-responsive; (b)(5)



non-responsive; (b)(5)



non-responsive; (b)(5)



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From: (b)(6); (b)(7)(C)

Sent: Monday, May 18, 2009 7:49 AM

To: (b)(6); (b)(7)(C)

Subject: Laptop Paper

(b)(6); (b)(7)(C)

I'm having significant problems with my email right now. I'm on webmail right now which is not user friendly by any means. Can I get a copy of the current version of the laptop paper? Did we need to add anything more to the paper besides the statistics? I believe we sent those over Friday afternoon.

(b)(6); (b)(7)(C)

Fong, Ivan

From: AHERN, JAYSON P (Acting Commissioner) (b)(6); (b)(7)(C)
Sent: Friday, August 14, 2009 6:06 PM
To: Heyman, David; Heyman, David; Fong, Ivan
Cc: (b)(6); (b)(7)(C)
Subject: RE: Rollout and implementation of new policy regarding searches of electronic media at the border

David:

Thanks for the call and as we discussed, let's try to wrap up all the remaining issues by Tuesday so we can put this to bed.

Have a good weekend.

Jay

Jayson P. Ahern
 Acting Commissioner
 U.S. Customs and Border Protection
 Department of Homeland Security
 (b)(6); (b)(7)(C)

From: Heyman, David (b)(6); (b)(7)(C)
Sent: Friday, August 14, 2009 5:54 PM
To: AHERN, JAYSON P (Acting Commissioner); Heyman, David; Fong, Ivan
Cc: (b)(6); (b)(7)(C)
Subject: RE: Rollout and implementation of new policy regarding searches of electronic media at the border

Jay,

Just tried to reach you. Short story: Memo signed by S1 says to take a number of steps for rolling this out. PIA is one of them, informing Congress is another, etc. She wants this coordinated. (b)(6); (b)(7)(C) are working on doing this early next week.

Am here if you want to discuss.

David

From: AHERN, JAYSON P (Acting Commissioner) (b)(6); (b)(7)(C)
Sent: Friday, August 14, 2009 5:20 PM
To: Heyman, David; Fong, Ivan
Cc: (b)(6); (b)(7)(C)
Subject: RE: Rollout and implementation of new policy regarding searches of electronic media at the border

You are right David...I am anxious. Please help me understand what the PIA has to do my signing out the policy.

Jayson P. Ahern
 Acting Commissioner
 U.S. Customs and Border Protection
 Department of Homeland Security
 (b)(6); (b)(7)(C)

From: Heyman, David (b)(6); (b)(7)(C)
Sent: Friday, August 14, 2009 3:46 PM
To: AHERN, JAYSON P (Acting Commissioner); Fong, Ivan

Cc: (b)(6); (b)(7)(C)

Subject: Re: Rollout and implementation of new policy regarding searches of electronic media at the border

I know your chomping at the bit on this. Let me just check on where the privacy impact assessment is. We need to make sure they have completed before we go forward. I believe they expect this to be done and ready to go next Friday.

David

From: AHERN, JAYSON P (Acting Commissioner)

To: Fong, Ivan

Cc: Heyman, David

Sent: Fri Aug 14 15:24:12 2009

Subject: RE: Rollout and implementation of new policy regarding searches of electronic media at the border
Ivan...thanks. That is my view and preference.

David...any issue?

Thanks

Jay

Jayson P. Ahern
Acting Commissioner
U.S. Customs and Border Protection
Department of Homeland Security

(b)(6); (b)(7)(C)

From: Fong, Ivan (b)(6); (b)(7)(C)

Sent: Friday, August 14, 2009 3:16 PM

To: AHERN, JAYSON P (Acting Commissioner)

Cc: Heyman, David

Subject: RE: Rollout and implementation of new policy regarding searches of electronic media at the border

Jay – I will let David answer from a coordination perspective (since it is his meeting), but from my perspective, you have authority to sign the Directive given S1's approval of the decision memo.

Ivan

From: AHERN, JAYSON P (Acting Commissioner) (b)(6); (b)(7)(C)

Sent: Friday, August 14, 2009 3:12 PM

To: Fong, Ivan; Heyman, David

Subject: FW: Rollout and implementation of new policy regarding searches of electronic media at the border

Ivan/David:

I understand this mtg is not yet scheduled. As such, I would like to clarify that it would be fine for me to sign our CBP Directive since it has not changed (at least to my knowledge) since we had the conference call back in the end of July prior to submitting to S1.

Pls advise.

Thx, JA

Jayson P. Ahern
Acting Commissioner
U.S. Customs and Border Protection

Department of Homeland Security

(b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)

Sent: Thursday, August 13, 2009 10:46 AM

To: (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

cc: (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

Subject: Rollout and implementation of new policy regarding searches of electronic media at the border

As you know the Secretary has now signed an approved the new policy and the roll out of the revised directives and Privacy Impact Assessment. A/S Heyman would like to have a meeting to discuss this roll out and make sure that the new policy and directives are made public and provided to Congress. Policy will be sending out a meeting request. I have provided the documents so that you will have them. If you have any questions please let me know. The meeting will likely be held Monday morning.

Here is the list of approved tasks we will need to coordinate (these I directly from the memos that were approved):

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- 6) CBP with OGC, PRIV and CRCL review officer training and procedures to ensure that guidance on improper profiling and non-discrimination is understood.
- 7) CRCL conduct a Civil Liberties Impact Assessment (CLIA) within 120 days.
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(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

Counterterrorism Policy
Office of Policy
U.S. Department of Homeland Security
Washington, DC 20528

(b)(6); (b)(7)(C)

