

FOR OFFICIAL USE ONLY**BORDER SEARCH OF DOCUMENTS AND ELECTRONIC DEVICES BY DHS****Talking Points**

- At the border (or its functional equivalent), CBP and ICE have broad authority to conduct routine searches of persons and things upon their entry into or exit out of the country without first obtaining a warrant and without suspicion.
- In general, CBP and ICE do not distinguish between the search of documents and electronic devices and the search of any other items crossing our borders. Federal courts, including the U.S. Court of Appeals for the Ninth Circuit, have concluded that searching documents, including those in electronic form, is well within the broad border search exception exercised by CBP and ICE.
- The exercise of this plenary authority has been a critical component to ensuring national security at U.S. borders. To impose a different inspectional standard for any particular class of merchandise may unnecessarily undermine homeland security.
- With respect to the scope of the issue, for CBP, the examination of electronic devices occurs in an extremely small percentage of border crossings. For instance, from October 1, 2008, to March 31, 2009, CBP encountered more than 119.5 million travelers at U.S. ports of entry. Of these travelers, approximately 2.6 million (2.2% of the 119.5 million travelers) were referred to secondary inspection; however, only 579 (0.022% of the 2.6 million travelers) were subject to any type of laptop inspection, which does not necessarily involve an in-depth search of the device. An examination may constitute a cursory preview of the contents of the device or may be a more thorough analysis.
- Officers may detain documents and electronic devices, or copies thereof, for a reasonable period of time to perform a thorough border search and to ensure compliance with all laws enforced by CBP and ICE. The search may take place on-site or at an off-site location. Information that is not subject to seizure or retention, or relevant to a criminal investigation or to immigration status, is returned or destroyed as appropriate.
- CBP and ICE enforce numerous laws that concern material that may be in paper or electronic form, such as 18 U.S.C. § 2252 (regarding transporting child pornography), 19 U.S.C. § 1305 (prohibition on importation of materials including obscene material), and trademark and copyright laws.
- The examination process for subjects traveling with diplomatic status has not changed.
- CBP and ICE are vigilant about protecting sensitive information such as medical and business information. CBP and ICE abide by all laws regarding disclosure of personal information, including the Privacy Act, 5 U.S.C. § 552a and the Trade Secrets Act, 18 U.S.C. § 1905. CBP and ICE have strict policies and procedures that implement these constitutional and statutory safeguards. Finally, CBP and ICE have required training programs relating to these concepts on a yearly basis.

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- **Legislative Efforts to Restrict Border Search Authority:** Various pieces of legislation were introduced in the 110th Congress (H.R. 6869 from Rep. Sanchez, H.R. 6702 from Rep. Engel, H.R. 6588 from Rep. Lofgren, S. 3612 from Sens. Feingold and Cantwell) and at least two have been reintroduced in the current Congress (H.R. 239 from Rep. Engel and H.R. 1736 from Rep. Sanchez). Some of these pieces of legislation contain a reasonable suspicion requirement for border searches of electronic devices. A reasonable suspicion requirement – a threshold not always reached in the course of a typically brief border encounter – would significantly undermine counter-terrorism efforts, contraband interdiction, and other national and homeland security interests at the border.
- **CBP and ICE have implemented specific timeframes to be met when demanding assistance from an outside agency on the search of an electronic device.**
- **Supervisor Review:** CBP has established supervisory review at different stages of its border searches of information in documents or electronic devices. ICE has limited supervisory review in making case management decisions, but supervisory review is required when technical assistance is not received in a reasonable period of time.
- **Privacy Act and Civil Rights and Civil Liberties Concerns:** In response to privacy concerns raised about searches of electronic devices, DHS has, among other things, undertaken to implement new procedures that include enhancement of recordkeeping processes, updated and continued training of officers and Special Agents, and the implementation of internal auditing procedures on the search, detention, and seizure of electronic devices. ICE and CBP continue to work with the DHS Privacy Office and the DHS Office for Civil Rights & Civil Liberties.

Background

- On July 16, 2008, CBP and ICE, in coordination with DHS Headquarters, issued separate policies on searching documents and electronic devices at the border. These policies consolidated and updated previous customs and immigration policies and established guidance for detention, seizure, sharing, retention, and destruction of information.
- The CBP policy was made available to the public through posting on the CBP website. Both the ICE and CBP provided these policies during congressional briefings.
- CBP and ICE continue to develop and refine mechanisms for tracking searches of electronic devices and providing statistics in an easily accessible manner.
- CBP, ICE, and the Privacy Office are currently working on a Privacy Impact Assessment (PIA) being conducted on the July 2008 border search policies and any subsequent policy developments.

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