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WRITING SAMPLE

In July 2016, I wrote and filed a Freedom of Information Act (FOIA) request pertaining to “parallel construction,” a practice employed by law enforcement to conceal the actual—and often illegal—method used to obtain evidence about a suspect, by artificially creating a “parallel” investigative pathway to arrive at the same evidence. I also wrote a corresponding blog post, attached.



July 15, 2016

FOIA/PA Mail Referral Unit
Justice Management Division
Room 115
LOC Building
Washington, D.C. 20530-0001
Attn: FOIA Request
Email: mrufioia.requests@usdoj.gov

Drug Enforcement Administration
Attn: FOIA/PA Unit (SARF)
8701 Morrisette Drive
Springfield, Virginia 22152
Email: dea.foia@usdoj.gov

Federal Bureau of Investigation
FOI/PA Request
Record/Information Dissemination Section
170 Marcel Drive
Winchester, VA 22602-4843
Email: foiparequest@ic.fbi.gov

United States Marshals Service
Attn: FOI/PA Officer
Office of General Counsel
CS-4, 10th Floor, U.S. Marshals Service Headquarters
Washington, D.C. 20530-1000
Email: usms.foia@usdoj.gov

Bureau of Alcohol, Tobacco, Firearms and Explosives
Attn: Disclosure Division, Room 4E.301
99 New York Avenue, NE
Washington, DC 20226
Email: foiamail@atf.gov

Securities and Exchange Commission
Office of FOIA Services
100 F Street NE
Mail Stop 2465
Washington, D.C. 20549

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Freedom of Information Act Office
500 12th Street SW, Stop 5009
Washington, D.C. 20536-5009

Manager FOIA Unit
U.S. Postal Inspection Service
475 L'enfant Plaza SW RM 3301
Washington, D.C. 20260-2101
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**Re: Request Under Freedom of Information Act
(Fee Waiver or Fee Limitation Requested)**

To whom it may concern:

The American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the “ACLU”)¹ submit this Freedom of Information Act (“FOIA”) request (the “Request”) for records pertaining to law enforcement’s practice of “parallel construction” to obscure or withhold original sources of evidence from the public and the courts.

I. Background

“Parallel construction” is an informal term that refers to the law-enforcement practice of manufacturing a sanitized evidentiary basis for a criminal investigation in order to mask the actual methods used to obtain

¹ The American Civil Liberties Union Foundation is a 501(c)(3) organization that provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases, educates the public about the civil rights and civil liberties implications of pending and proposed state and federal legislation, provides analyses of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators. The American Civil Liberties Union is a separate non-profit, 501(c)(4) membership organization that educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analysis of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators.

incriminating information about a suspect. According to media reports, these actual methods often take the form of controversial and potentially illegal or unconstitutional surveillance techniques. Because evidence derived from an unconstitutional search is generally inadmissible in court, law-enforcement agencies—in order to build a case against a defendant—may make their investigation appear legal on the surface, by reverse-engineering a trail of evidence that is more likely to pass Fourth Amendment muster.

Although there is little information available to the public about how widespread parallel construction is, or about how the government uses it to disguise the origin of illegally gathered evidence, it is clear that this tactic has been used in significant ways by law-enforcement agencies.

For example, in September 2013, Drug Enforcement Administration (“DEA”) training slides pertaining to a mass surveillance program called “Hemisphere” were publicly disclosed.² Under Hemisphere, AT&T employees supplied officials with telephony metadata from a database of calls dating back to 1987.³ In sections of the DEA slides—part of a presentation entitled “Protecting the Program”—law-enforcement officials were instructed to “keep the program under the radar” by recreating evidence obtained under the program through the use of subpoenas for call records from cell-phone carriers.⁴ The presentation advised that through the use of this technique, all relevant calls “c[ould] be attributed to the carrier’s records” instead of to Hemisphere, “thus ‘walling off’ the information obtained from Hemisphere” and making the government’s usage of the program untraceable.⁵

Similar language is found in a recently released non-disclosure agreement imposed by the Federal Bureau of Investigation (“FBI”) on the Oklahoma City Police Department in connection with the city’s use of cell-site simulators, also known as “stingray” devices.⁶ Stingrays are invasive electronic surveillance equipment used to track and locate cell phones.⁷ The non-disclosure agreement (“NDA”), obtained through a state open-records request, requires that the Oklahoma City Police Department use the technology “for lead purposes only” and that “[i]nformation obtained” therefrom “may not be used as primary

² Scott Shane & Colin Moynihan, *Drug Agents Use Vast Phone Trove, Eclipsing N.S.A.’s*, N.Y. Times, Sept. 1, 2013, <http://nyti.ms/24UAPO4>.

³ James Ball, *US Drug Agency Partners with AT&T for Access to ‘Vast Database’ of Call Records*, Guardian, Sept. 2, 2013, <http://gu.com/p/3tee>.

⁴ Office of National Drug Control Policy, *Los Angeles Hemisphere: Law Enforcement Sensitive*, <http://s3.documentcloud.org/documents/782287/database.pdf#page=10>.

⁵ *Id.*

⁶ Jenna McLaughlin, *FBI Told Cops to Recreate Evidence From Secret Cell-Phone Trackers*, Intercept, May 5, 2016, <http://interc.pt/1OfNkMm>.

⁷ *Id.*

evidence in any affidavits, hearings or trials.”⁸ The NDA further explained that the agency must “use additional and independent investigative means and methods . . . that would be admissible at trial” in lieu of disclosing to the defendant the fact that a stingray device was used.⁹

Similar instructions were given to FBI agents under the government’s warrantless-wiretapping program, Stellarwind. Agents were instructed that information obtained through the program was:

for lead purposes only and is intended solely for the background information of recipients in developing their own collateral leads. It cannot be used in affidavits, court proceedings, subpoenas, or for other legal or judicial purposes.¹⁰

According to former DEA officials, parallel construction is used on a “daily” basis.¹¹ It is also extremely secretive—when conducted, original evidence and techniques are hidden not only from judges, defense attorneys, and the public, but sometimes even from prosecutors.¹² Such lack of transparency violates the Constitution and undermines the right to a fair trial because it prevents defendants from knowing about unlawful investigative methods that played a role in their prosecutions.¹³ Defendants cannot ask to review potential sources of exculpatory or otherwise material evidence if they do not know that these sources exist in the first place. Meanwhile, the government can sidestep the need to defend the legality of its searches against suppression challenges.

In an effort to supplement the public record with information about agencies’ use of parallel construction, and to identify the practice’s potential

⁸ FBI, Approved Non-Disclosure Notice (2014), <https://www.documentcloud.org/documents/2823907-OKCPDFBI-MOU2.html#document/p1>.

⁹ *Id.*

¹⁰ Offices of the Inspectors General of the DOD, DOJ, CIA, NSA, and ODNI, Report on the President’s Surveillance Program PDF401 (2009), <http://nyti.ms/1HkMjOO>; see also *id.* at PDF44 (describing “scrubbing” procedures with respect to applications under the Foreign Intelligence Surveillance Act).

¹¹ John Shiffman & Kristina Cooke, *Exclusive: U.S. Directs Agents to Cover Up Program Used to Investigate Americans*, Reuters, Aug. 5, 2013, <http://reut.rs/1XsmsRF>.

¹² Kevin Johnson, *Justice Department Reviewing DEA’s Shielding of Sources*, USA Today, Aug. 5, 2013, <http://usat.ly/1Xskzo1>; Brad Heath, *FBI Warned Agents Not to Share Tech Secrets with Prosecutors*, USA Today, Apr. 20, 2016, <http://usat.ly/1XsnrBi>; Department of Justice, Review of the Organized Crime Drug Enforcement Task Forces Fusion Center (2014), available at <http://1.usa.gov/1Xsmuc6>; Tim Cushing, *FBI Hides Its Surveillance Techniques From Federal Prosecutors Because It’s Afraid They’ll Become Defense Lawyers*, Techdirt, Apr. 25, 2016, <https://www.techdirt.com/articles/20160423/20522034256/fbi-hides-surveillance-techniques-federal-prosecutors-because-afraid-theyll-become-defense-lawyers.shtml>.

¹³ See *Brady v. Maryland*, 373 U.S. 83 (1963).

impacts on individuals' constitutional rights and government transparency and accountability, the ACLU seeks such information through this FOIA request.

II. Requested Records

The ACLU seeks the release of records—including legal and policy memoranda; guidance documents; instructions; training documents; formal and informal presentations; directives; contracts or agreements; and memoranda of understanding—that:

- (1) contain the phrase “for lead purposes only”;
- (2) contain the phrase “collateral leads”;
- (3) instruct or advise officials, agents, or lawyers that certain investigative information or techniques are for “background purposes only”;
- (4) instruct or advise officials, agents, or lawyers that certain information or techniques are not to be used as “primary evidence”;
- (5) instruct or advise officials, agents, or lawyers that certain information or techniques are not to be used or described in reports, subpoenas or other legal process, affidavits, court applications, court submissions, testimony, or communications with defendants or defense counsel;
- (6) instruct or advise officials, agents, or lawyers to “scrub,” remove, or omit certain information or techniques from reports, subpoenas or other legal process, affidavits, court applications, court submissions, testimony, or communications with defendants or defense counsel; and
- (7) instruct or advise officials or agents to withhold information from prosecutors in order to avoid disclosure to defendants.

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), the ACLU requests that responsive electronic records be provided electronically in their native file format, if possible. Alternatively, the ACLU requests that the records be provided electronically in a text-searchable, static-image format (PDF), in the best image quality in the agency's possession, and that the records be provided in separate, Bates-stamped files.

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ACLU FOIA Seeks Information About How Government Lauanders Evidence



By [Fiona Tang](#), Speech, Privacy, and Technology Project
JULY 15, 2016 | 1:30 PM

TAGS: [Stingray Tracking Devices](#), [Surveillance Technologies](#), [Privacy & Technology](#), [NSA Surveillance](#), [Surveillance by Other Agencies](#), [Privacy and Surveillance](#), [National Security](#)

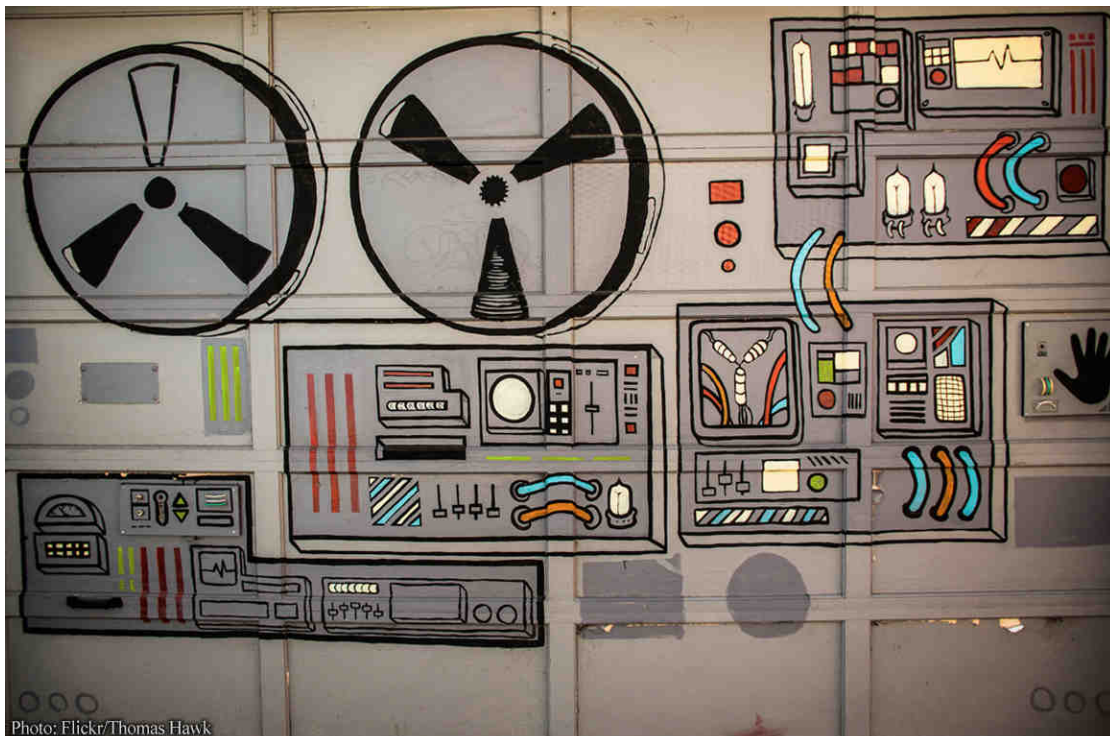


Photo: Flickr/Thomas Hawk

Today the ACLU filed a [Freedom of Information Act \(FOIA\) request](#) seeking records related to “parallel construction,” the government’s practice of falsifying a trail of evidence in order to conceal controversial investigative techniques from the courts and the public.

Under parallel construction, instead of disclosing how its investigation actually took place, the government presents a sanitized version of events. The practice allows the government to evade legal challenges to the use of such techniques, and also to keep the very existence of such techniques a secret. Recent news reports have shown that parallel construction might be far more common than we’d like to think, so we’ve asked the government to provide any records it has documenting the practice.

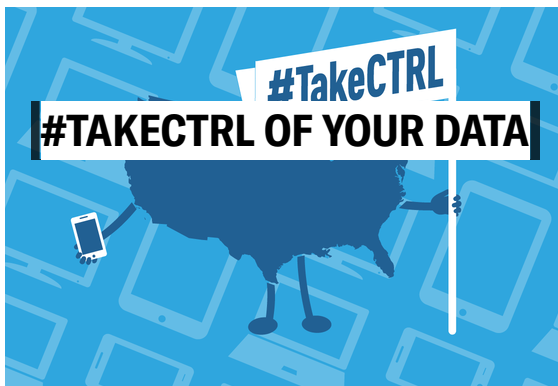
Because evidence derived from an unconstitutional search is generally inadmissible in court, law enforcement agencies—in order to build a case against a defendant—may make their investigation appear legal on the surface, by reverse-engineering a trail of evidence that passes Fourth Amendment muster. Here’s how it would work:

Suppose the government acquires incriminating information about a suspect using method “A,” a novel and potentially unlawful technique. In order to keep method “A” secret, and to avoid having to defend the legality of method “A” in court, the government circles back to method “B,” a lawful technique, and re-acquires the same incriminating information uncovered by method “A.” In this way, the government fakes the investigative path that led it to the information, masking the fact that it ever used illegal method “A” at all. As far as anyone knows, it only

used “B.”

As the ACLU has made clear, parallel construction [violates the constitutional rights of the accused](#) and [insulates intelligence programs from judicial review](#). It allows the government to illegally collect evidence while evading its obligation to disclose, and then justify, how the evidence was obtained. Even when law enforcement gathers evidence pursuant to statute, it is the responsibility of the courts—not the government—to determine whether the government actually followed the statute and whether the search method is in fact constitutional. The government doesn’t get to decide this for itself while keeping its use of the surveillance secret.

If all this sounds shocking, that’s because it is. Unfortunately, we only know bits and pieces about parallel construction—but, based in large part on government documents procured through FOIA, we do know it’s real.



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For example, parallel construction has been used to cover up [some of the most notorious surveillance techniques](#) in the past

decade. It initially captured the public's attention in August 2013, when [Reuters published an article](#) scrutinizing the elusive Drug Enforcement Administration Special Operations Division's use of the practice. Parallel construction received renewed attention this past May, when a [non-disclosure agreement](#) between the FBI and the Oklahoma City Police Department was [released through a state records request](#). The non-disclosure agreement governs the use of [cell site simulators](#)—colloquially known as “stingrays”—and requires that the Oklahoma City Police Department use the technology for “[lead purposes only](#),” further explaining that the agency must “use additional and independent investigative means and methods . . . that would be admissible at trial” in lieu of [disclosing to the defendant the fact that a stingray device was used](#).

Why would the Oklahoma City Police Department agree to limit the use of stingrays to “lead purposes only”? Beyond simply keeping the technology secret from the public or criminal defendants, it allowed the government to avoid legal challenges to the use of stingrays. Where the government is using novel and controversial surveillance techniques, that's no small thing. Two courts—one [state appellate court in Maryland](#), and a [federal district court in New York](#)—recently determined that the use of a stingray device without a warrant violates the Fourth Amendment, and both courts barred the government from using evidence obtained via stingray in criminal prosecutions.

Similar instructions were given to FBI agents who were fed tips from the government's warrantless-wiretapping program, Stellarwind. Agents were instructed that information obtained through the program was:

for lead purposes only and is intended [solely for the background information of recipients](#) in developing their own collateral leads. It cannot be used in affidavits, court proceedings, subpoenas, or for other legal or judicial purposes.

These examples show that parallel construction is real, and that it is dangerous—but there is much more to learn. We are filing this FOIA request to clarify how widespread the practice actually is, and how the government uses it.

Parallel construction allows law enforcement to conceal intrusive surveillance programs, evade statutory disclosure obligations, and use unconstitutionally obtained evidence in court—without any form of check or oversight. It provides an extraordinarily convenient solution to law enforcement, while jeopardizing privacy rights in the process. For these reasons, it is imperative that the government make its practice of parallel construction openly accessible to the public for review and debate.

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