



 COMMENTARY RIGHTS & JUSTICE

What's Behind the FBI's Obsessive "Stingray" Secrecy?

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Despite the FBI's best efforts, "Stingray" surveillance technology is well on its way to becoming, in the words of one Baltimore defense attorney, "the worst-kept secret" in law enforcement.

On Tuesday, the Erie County Sheriff's Office complied with a judge's order to release a trove of documents relating to the police department's Stingray use. The released documents suggest that police in New York state have been using Stingrays—military-grade surveillance technology supposedly reserved for emergencies and national security threats—in routine police work without seeking court authorization to do so and, at the request of the FBI, dropping cases to avoid revealing information about the device in court.

Then yesterday, Detective Emmanuel Cabreja, a member of the Baltimore police's Advanced Technical Team, testified in a pretrial hearing that his department has used Stingrays to track 4,300 cell phones since 2007.

Cabreja also testified that the FBI had coached him on what to say on the stand, and that his answers were constrained by a non-disclosure agreement (NDA) with the agency.

And he's not the only one the FBI has sought to keep quiet.

The Baltimore non-disclosure agreement Cabreja presented in court yesterday is virtually identical to one that was released in the Erie County, New York documents last week. Both resemble an agreement signed by the Minnesota Bureau of Criminal Apprehension, a heavily redacted version of which was acquired by the Minnesota Star Tribune in December 2014.

As Cyrus Farivar, senior editor at *Ars Technica*, pointed out, the identical documents from different jurisdictions suggest that the FBI language is "boilerplate and likely exists in other agreements with other law enforcement agencies nationwide."

The exacting language of the NDA helps explain the gaps in police and court documents involving Stingrays—and the stonewalling encountered by inquisitive reporters, judges, and records requesters. Under the agreement, police are forbidden to reveal "any information concerning" Stingray technology to the public, the media, the courts, or any other government agencies "without the prior written approval of the FBI."

The agreement specifically forbids the police to reveal anything about the device ("beyond the evidentiary results obtained through" its use) at any point during a trial, including:

- during pre-trial matters;
- in search warrants and related affidavits;
- in discovery;

- in response to court ordered disclosure;
- in other affidavits;
- in grand jury hearings;
- in the State's case-in-chief, rebuttal, or on appeal; and
- in testimony in any phase of a civil or criminal trial.

It's no wonder that Erie County cops rarely seek court permission to use Stingray technology, that police in Tacoma submitted more than 170 misleading warrant applications to county judges, or that Tallahassee police lied in incident reports about how they track suspects.

In effect, the FBI is requiring police and prosecutors to present evidence in court while systematically concealing its origin. If police or prosecutors reveal Stingray use, they may have to drop the case or withdraw the evidence.

If that's not a recipe for police misconduct and prosecutorial deception, I don't know what is.

When Detective Cabreja was asked whether he thought the FBI non-disclosure agreement instructed him to withhold evidence from the court, even under court order, he said yes.

None of the new Stingray documents, which the ACLU and its affiliates have had to fight tooth and nail to acquire, reveal details of the technology that would, in the words of the NDA, allow targets to "employ countermeasures to avoid detection." (Indeed, the best Stingray countermeasure is already well known: turn off your cell phone or leave it at home.)

With the existence of Stingray technology now well known, the FBI's demand for secrecy in any given case is increasingly difficult to justify. The principal effect, and the apparent intent, is to allow the tool's use without having to persuade a court of its lawfulness. So far the tactic has succeeded in dodging a test of whether Stingray deployments are violating the Fourth amendment rights of thousands of innocent bystanders.

As my TCF colleague Barton Gellman put it, "Either the use of this technology is legal or it's not, and the government is working quite hard to avoid a judgment on that. I don't see how that's defensible. It's called the Department of Justice, not the Department of Win at all Costs."

