

March 23, 2015

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VIA E-MAIL ONLY

Hon. Desley Brooks (dbrooks@oaklandnet.com)
Hon. Noel Gallo (ngallo@oaklandnet.com)
Hon. Dan Kalb (dkalb@oaklandnet.com)
Hon. Abel Guillen (aguillen@oaklandnet.com)
Oakland City Council
1 Frank H. Ogawa Plaza
Oakland, CA 94612

Re: March 24, 2015 Agenda Item 7 – Federal FY2014/2015 PSGP Grant Funds

Dear Honorable Members of the Public Safety Committee:

As members of the DAC Ad Hoc Privacy Committee, we write to request that the Public Safety Committee amend the staff proposed resolution for the March 24, 2015 Agenda Item 7, regarding the Law Enforcement Unit Air FLIR (Forward Looking Infrared Thermal Imaging System). We believe that this is an appropriate test of the framework which the DAC Ad Hoc Committee is seeking your approval of.

The staff report states that the FY2014/15 grant deadline for purchases is June 30, 2016, so there is no imminent threat of lost funding. Due to the favorable feedback we have received from your Committee, including its February 10, 2015 “approved in concept” vote regarding the DAC Committee’s privacy policy and additional recommendations, which include a standing privacy committee, citywide privacy policy, and surveillance equipment ordinance, and because the full City Council in July 2013 wisely required a Privacy and Data Retention Policy be implemented first before activating the DAC, and because the full City Council in March 2014 gave the task of drafting the Privacy and Data Retention Policy to a citizens committee, we request that the following language be included in the March 24, 2015 Resolution:

“FURTHER RESOLVED: The [Standing Privacy Committee] [DAC Ad Hoc Committee] [citizens committee appointed by the City Council] shall draft a Privacy and Data Retention Policy that specifies the allowable uses of, and governs the collection, retention, storage, and dissemination of information processed by, the Law Enforcement Unit Air FLIR; and be it

FURTHER RESOLVED: The Law Enforcement Unit Air FLIR shall not be used in any manner until the City Council approves the Privacy and Data Retention Policy for the Law Enforcement Unit Air FLIR.”

FLIR/Thermal Imaging System

The City of Oakland does not have a use policy regarding FLIR, nor have they produced any privacy or data guidelines in response to Brian Hofer's December 30, 2014 Public Record Act Request #7354¹. The City did respond to another part of his request by stating it has no use policies or training manuals for its controversial Stingray. It is likely that no such policy exists for FLIR, and also likely that Oakland Police Department has used some version of a FLIR (air, and/or handheld) since at least 2010.²

This is of great concern because in 2001 the United States Supreme Court ruled directly on Thermal Imaging Systems, finding their use invasive, and illegal without a warrant under the Fourth Amendment. In *Kyllo*, law enforcement used a FLIR without first seeking a warrant, to detect heat emitting from a suspected marijuana grow house.

“Where, as here, the Government uses a device that is not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a Fourth Amendment “search,” and is presumptively unreasonable without a warrant....in the case of the search of a home’s interior—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment.” *Kyllo v. United States* (533 US 27 - 2001).

Like Stingray, FLIR operates in a dragnet fashion, especially when attached to a helicopter flying over homes. Law enforcement has previously argued that it is only heat emanating from homes, and thus not intrusive. The *Kyllo* Court rejected this argument.

“Such a mechanical interpretation of the Fourth Amendment was rejected in *Katz*, where the eavesdropping device in question picked up only sound waves that reached the exterior of the phone booth to which it was attached. Reversing that approach would leave the homeowner at the mercy of advancing technology—including imaging technology that could discern all human activity in the home. Also rejected is the Government’s contention that the thermal imaging was constitutional because it did not detect “intimate details.” Such an approach would be wrong in principle because, in the sanctity of the home, *all* details are intimate details. See, *e. g.*, *United States v. Karo*, 468 U. S. 705; *Dow Chemical, supra*, at 238, distinguished. It would also be impractical in application, failing to provide a workable accommodation between law enforcement needs and Fourth Amendment interests. See *Oliver v. United States*, 466 U. S. 170, 181.” *Kyllo*, Pp. 35–40.

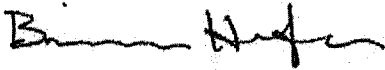
¹ <http://records.oaklandnet.com/request/7354> , see items #13, #14 re existing FLIR/Thermal Imaging.

² See March 16, 2010 Knight memo to then-Chief Batts.

You are likely aware of the recent “Rang-R” handheld Doppler radar story that broke in USA Today on January 20, 2015³. These portable devices allow the user to “see-thru” walls to locate bodies on the other side. Rang-r and Doppler devices are also the subject of the above Public Record Act Request. Stated simply – it is time to address all this equipment with the DAC Committee’s proposed surveillance equipment ordinance, which calls for the creation of use policies.

One can imagine valid uses for Air FLIR at the Port. PSGP funds are after all meant for “maritime use.” Container and cargo ship fires are two likely scenarios, and perhaps warehouse fires on port-adjacent property. The policy could specify these allowable uses, and ensure that the privacy of Oaklanders is not violated. We can craft a reasonable policy that allows the use of the equipment while protecting privacy. We did it for the DAC.

Sincerely,



Brian Hofer
Chair, DAC Ad Hoc Committee
Member, Oakland Privacy Working Group

/s/

Nadia Kayyali
Electronic Frontier Foundation
DAC Ad Hoc Committee

³ <http://www.usatoday.com/story/news/2015/01/19/police-radar-see-through-walls/22007615/>