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OFFICE OF THE ATTORNEY GENERAL

October 30, 2014

LEGAL MEMORANDUM **REF: CQA 14-0648**

TO: Director, Customs & Quarantine Agency

FROM: Attorney General of Guam

RE: Photo-Copying / Duplicating Arriving Air Passengers' Documents at the Antonio B. Won Pat International Air Terminal

We are in receipt of your request for a legal opinion and guidance related to the Guam Customs & Quarantine Agency's operations at the Antonio B. Won Pat International Air Terminal.

Question Presented

Do Guam Customs and Quarantine Agency Officers acting in their official capacity have the authority to make photo-copies, take photos, or duplicate documents found in the possession of passengers during border inspections with the intent to retain these copies for investigative or official use?

We have decided to expand the scope of your query to include data kept in electronic format such as laptop computers and other portable electronic media.

Discussion

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

As the text makes clear, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.' " *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006). Our cases have determined that "[w]here a

> search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, ... reasonableness generally requires the obtaining of a judicial warrant." *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995). Such a warrant ensures that the inferences to support a search are "drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 92 L.Ed. 436 (1948). In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement. *See Kentucky v. King*, 563 U.S. ____, ____, 131 S.Ct. 1849, 1856–1857, 179 L.Ed.2d 865 (2011).

Riley v. California, 573 U.S. ____, ____, 134 S.Ct. 2473 (2014) (editorial brackets and ellipsis in original) (declining to extend the doctrine of physical searches incident to a lawful arrest to searches of data on cell phones, and holding that peace officers must generally secure a warrant before conducting such a search). A search warrant obtained from a neutral and detached judicial officer is thus considered the rule subject to narrowly drawn and judicially approved exceptions.

Searches conducted at international borders present one limited exception to the general rule. In *Heidy v. United States Customs Service*, 681 F.Supp. 1445 (C.D. Cal. 1988), the district court for the Central District of California held that the United States Customs Service's policy of retaining copies of documents seized during a border inspection, when a determination had been made that documents were not considered to be in violation of 19 U.S.C. § 1305,* violated the First Amendment. *See also*, *Haase v. Sessions*, 893 F.2d 370, 373 n. 3 (D.C. Cir. 1990) (discussing *Heidy* and noting that the Customs Service had already modified its policies with regard to retaining copies of documents for future forensic examination). Although not binding on the District Court of Guam, its reasoning is persuasive enough to be extended to information kept in electronic format such as a laptop computer's hard drive, compact discs, and portable flash drives.

Travelers crossing international borders may have a lessened expectation of privacy; indeed, they expect that when crossing the border their property will be searched. Nevertheless, the traveler's lessened expectation of privacy has limits, and that is the requirement that the law enforcement officer conducting the search must have "reasonable suspicion" before conducting an invasive forensic examination.

> International travelers certainly expect that their property will be searched at the border. What they do not expect is that, absent some particularized suspicion, agents will mine every last piece of data on their devices or deprive them of their most personal property for days (or perhaps weeks or even months,

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* Title 19 U.S.C. § 1305 provides in pertinent part, "All persons are prohibited from importing into the United States from any foreign country any book, pamphlet, paper, writing, advertisement, circular, print, picture, or drawing containing any matter advocating or urging treason or insurrection against the United States, or forcible resistance to any law of the United States...."

> depending on how long the search takes). *United States v. Ramos–Saenz*, 36 F.3d 59, 61 n. 3 (9th Cir. 1994) ("Intrusiveness includes both the extent of a search as well as the degree of indignity that may accompany a search."). Such a thorough and detailed search of the most intimate details of one's life is a substantial intrusion upon personal privacy and dignity. We therefore hold that the forensic examination of Cotterman's computer required a showing of reasonable suspicion, a modest requirement in light of the Fourth Amendment.

United States v. Cotterman, 709 F.3d 952, 967-68 (9th Cir. 2013) (en banc), *cert. denied* ___U.S. ____, 134 S.Ct. 899 (2014).

> Reasonable suspicion is defined as "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417–18, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981). This assessment is to be made in light of "the totality of the circumstances." *Id.* at 417, 101 S.Ct. 690. "[E]ven when factors considered in isolation from each other are susceptible to an innocent explanation, they may collectively amount to a reasonable suspicion." *United States v. Berber–Tinoco*, 510 F.3d 1083, 1087 (9th Cir. 2007).

Id., 709 F.3d at 968.

> The reasonable-suspicion standard is not a particularly high threshold to reach. "Although ... a mere hunch is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." *Arvizu*, 534 U.S. at 274, 122 S.Ct. 744 (citations and internal quotation marks omitted); *see also Brignoni–Ponce*, 422 U.S. at 881, 95 S.Ct. 2574 ("The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." (quoting *Adams v. Williams*, 407 U.S. 143, 145, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972))). Reasonable suspicion is a "commonsense, nontechnical conception[ ] that deal[s] with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " *Ornelas*, 517 U.S. at 695, 116 S.Ct. 1657 (quoting *Illinois v. Gates*, 462 U.S. 213, 231, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). Protection of the public safety justifies such an approach.
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> When reviewing an officer's reasonable suspicion, we "must look at the 'totality of the circumstances.' " *Arvizu*, 534 U.S. at 273, 122 S.Ct. 744; *Cotterman*, 709 F.3d at 970 ("It is not our province to nitpick the factors in isolation but instead to view them in the totality of the circumstances."). "This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person." *Arvizu*, 534 U.S. at

> 273, 122 S.Ct. 744 (citations and internal quotation marks omitted). It also precludes a "divide-and-conquer analysis" because even though each of the suspect's "acts was perhaps innocent in itself ... taken together, they [may] warrant[ ] further investigation." Id. at 274, 122 S.Ct. 744. "A determination that reasonable suspicion exists ... need not rule out the possibility of innocent conduct." *Id.* at 277, 122 S.Ct. 744.
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> In the context of border patrol stops, the totality of the circumstances may include characteristics of the area, proximity to the border, usual patterns of traffic and time of day, previous alien or drug smuggling in the area, behavior of the driver, appearance or behavior of passengers, and the model and appearance of the vehicle. *Brignoni–Ponce*, 422 U.S. at 884–85, 95 S.Ct. 2574. Not all of these factors must be present or highly probative in every case to justify reasonable suspicion. *See id.* And the facts must be filtered through the lens of the agents' training and experience. *Id.* at 885, 95 S.Ct. 2574.

United States v. Valdes-Vega, 738 F.3d 1074, 1078-79 (9th Cir. 2013) (en banc) (editorial ellipsis and brackets in original; quoting *Ornelas v. United States*, 517 U.S. 690 (1996); *United States v. Arvizu*, 534 U.S. 266 (2002); and *United States v. Brignoni–Ponce*, 422 U.S. 873 (1975)); *see also*, *United States v. Saboonchi*, 990 F.Supp.2d 536, 569 (D. Md. 2014) ("a search of imaged hard drives of digital devices taken from the Defendant at the border and subjected to forensic examination days or weeks later cannot be performed in the absence of reasonable suspicion").

In *United States v. Saboonchi*,___ F.Supp.2d ____, 2014 WL 3741141 (D. Md. July 28, 2014) the district court for the District of Maryland determined that the Supreme Court's decision in *Riley*, which declined to extend the search incident to lawful arrest exception to warrantless searches of cell phones did not affect its earlier analysis that the border exception and reasonable suspicion sufficed to conduct a warrantless forensic examination of electronics seized at the border. And presumably, *United States v. Cotterman*, 709 F.3d 952 (9th Cir. 2013), *cert denied* ___ U.S. ____, 134 S.Ct. 899, 187 L.Ed.2d 833 (2014), is still good law in the Ninth Circuit. But we cannot guarantee that the district court's reasoning in *Saboonchi* will be adopted in the Ninth Circuit or that the Ninth Circuit's reasoning in *Cotterman* will not be challenged in the future when applied to border searches conducted after *Riley*. For that reason, we must strongly caution law enforcement officers that absent the possibility that evidence will be destroyed or lost, a search warrant will always be the preferred course of action before conducting a forensic examination of documents or other property seized at the border.

Although adoption of or reliance upon the federal government's policies, procedures, and practices may not immunize local government from constitutional challenges, we have found the following directives issued by the U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) to be consistent with the law in the Ninth Circuit, and might prove useful in drafting policies for the Guam Customs and Quarantine Agency:

- U.S. Immigration and Customs Enforcement Directive No. 7-6.1: Border Searches of Electronic Devices (available at https://www.dhs.gov/xlibrary/assets/ice_border_search_electronic_devices.pdf);
- U.S. Immigration and Customs Enforcement Directive No. 7-6.0: Border Searches of Documents and Electronic Media (available at https://cdt.org/files/security/20080716_ICE%20Search%20Policy.pdf); and
- U.S. Customs and Border Protection, Directive No. 3340-049 (available at http://www.dhs.gov/xlibrary/assets/cbp_directive_3340-049.pdf).

We hope this addresses your inquiry. For further information concerning this matter, please use the reference number shown above.

OFFICE OF THE ATTORNEY GENERAL

By: _____

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