

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION
125 Broad Street
New York, NY 10004,

and

ELECTRONIC PRIVACY INFORMATION CENTER
1718 Connecticut Avenue, N.W., Suite 200
Washington, DC 20009,

and

AMERICAN BOOKSELLERS FOUNDATION FOR
FREE EXPRESSION
139 Fulton Street., Suite 302
New York, NY 10038,

and

FREEDOM TO READ FOUNDATION
50 East Huron Street,
Chicago, IL 60611,

Plaintiffs,

v.

DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W.
Washington, DC 20530,

Defendant.

Civil Action

COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for injunctive and other appropriate relief, and seeking the expedited processing and release of agency records requested by Plaintiffs from Defendant U.S. Department of Justice (“DOJ”) and DOJ’s component, Federal Bureau of Investigation (“FBI”).

2. Plaintiffs' FOIA request seeks the release of records related to DOJ's implementation of Section 215 of the USA PATRIOT Act ("Patriot Act"), Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001).

3. In response to a prior FOIA request, the FBI released to Plaintiffs a list of surveillance orders issued under Section 215. Both the list itself and a line indicating the number of times that the FBI had used Section 215 were redacted. In September 2003, the Attorney General announced that he had declassified the number of times that the FBI had used Section 215 and that in fact the FBI had never used the provision. Plaintiffs filed a new FOIA request seeking, principally, an unredacted copy of the list that the FBI had previously released only in redacted form. This litigation relates to that second FOIA request.

Jurisdiction and Venue

4. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552(a)(6)(E)(iii). This court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701-706. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

Parties

5. Plaintiff American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan organization with over 400,000 members dedicated to the constitutional principles of liberty and equality. The ACLU's work includes assessing the impact of federal legislation on civil liberties. The organization publishes newsletters, news briefings, right-to-know handbooks, and other materials that are disseminated to the public. Its material is widely available to everyone, including tax-exempt organizations, not-for-profit groups, law students and faculty, for no cost or for a nominal fee through its public education department. The ACLU also

disseminates information through its website, www.aclu.org, and through an electronic newsletter, which is distributed to subscribers by e-mail.

6. Plaintiff Electronic Privacy Information Center (“EPIC”) is a public interest research organization incorporated as a not-for-profit corporation in Washington, DC. EPIC’s activities include the review of federal investigative activities and policies to determine their possible impact on civil liberties and privacy interests. Among its other activities, EPIC publishes books, reports, and a bi-weekly electronic newsletter. EPIC also maintains a heavily-visited website, www.epic.org, containing extensive information on privacy issues, including information EPIC has obtained from federal agencies under the FOIA.

7. Plaintiff American Booksellers Foundation for Free Expression (“ABFFE”) is the bookseller’s voice in the fight against censorship. Founded by the American Booksellers Association in 1990, ABFFE’s mission is to promote and protect the free exchange of ideas, particularly those contained in books, by opposing restrictions on the freedom of speech; issuing statements on significant free expression controversies; participating in legal cases involving First Amendment rights; collaborating with other groups with an interest in free speech; and providing education about the importance of free expression to booksellers, other members of the book industry, politicians, the press and the public. ABFFE disseminates information about dangers to free expression on its website, www.abffe.com. ABFFE also publishes a monthly newsletter, which it distributes to subscribers, and makes other publications available to the public through its on-line store. Some of the materials are offered for sale; others are available without charge.

8. Plaintiff Freedom to Read Foundation (“FTRF”) is a non-profit membership organization established in 1969 by the American Library Association to promote and defend

First Amendment rights; to foster libraries as institutions fulfilling the promise of the First Amendment for every citizen; to support the rights of libraries to include in their collections and make available to the public any work they may legally acquire; and to set legal precedent for the freedom to read on behalf of all citizens. FTRF disseminates information about its activities on its website, www.ftrf.org.

9. Defendant Department of Justice (“DOJ”) is a Department of the Executive Branch of the United States Government. DOJ is an agency within the meaning of 5 U.S.C. § 552(f)(1). DOJ is responsible for FBI’s compliance with the FOIA.

Section 215 of the Patriot Act

10. The Patriot Act was enacted in October 2001. The Act dramatically expanded the government’s power to collect information about individuals living in the United States, including permanent residents and United States citizens.

11. Section 215 of the Act amended the Foreign Intelligence Surveillance Act (“FISA”), 50 U.S.C. § 1801 *et seq.*, to allow the FBI to require any person or organization to disclose “any tangible things (including books, records, papers, documents, and other items).” Section 215 is now codified at 50 U.S.C. § 1861, under the title “Access to certain business records for foreign intelligence and international terrorism investigations.”

12. Section 215 allows the FBI virtually unfettered access to a vast array of highly personal and constitutionally privileged information. The provision could be used to require a library to disclose its circulation records, a political or advocacy organization to disclose its membership list, a journalist to disclose her sources, or a hospital to disclose medical records. At a June 2003 hearing before the House Judiciary Committee, Attorney General John Ashcroft

stated that the FBI could use Section 215 to obtain, among other things, computer files, educational records, and genetic information.

13. Section 215 does not include a probable cause requirement or an individualized suspicion requirement of any kind. So long as the FBI can point to an ongoing foreign intelligence or terrorism investigation, it can use Section 215 to obtain records pertaining to anyone at all. Nothing in the statute forecloses the government from using the provision to obtain information about innocent people.

14. Section 215 does not require the FBI ever to notify those whose information it has obtained under the provision that their privacy was compromised.

15. Those served with Section 215 orders are prohibited from disclosing to any other person that the FBI sought or obtained information under the provision. The gag order applies with respect to every Section 215 order, without regard to the necessity for secrecy in the particular case.

16. Those served with Section 215 orders are not afforded any opportunity to challenge the validity or constitutionality of the order before complying with it.

17. Section 215's constitutionality is currently the subject of litigation before the United States District Court for the Eastern District of Michigan. Plaintiff ACLU serves as counsel to plaintiffs in that lawsuit.

The Patriot FOIA Request

18. In August 2002, Plaintiffs filed a request ("Patriot FOIA Request") under the FOIA for records concerning the FBI's implementation of the Patriot Act's surveillance provisions. Plaintiffs filed the Patriot FOIA Request with DOJ, FBI, and the Office of Intelligence Policy and Review (OIPR) (collectively, "government").

19. The Patriot FOIA Request sought, among other things, policy guidelines and directives issued by DOJ and/or FBI governing the use of Section 215 of the Act, and records indicating the number of times that Section 215 had been used in particular contexts. It also sought similar records pertaining to certain of the Patriot Act's other surveillance provisions.

20. Plaintiffs sought expedited processing of the Patriot FOIA Request on the grounds that the records sought pertained to "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence," 28 C.F.R. § 16.5(d)(1)(iv).

21. DOJ granted Plaintiffs' request for expedited processing, expressly acknowledging that the Patriot FOIA Request satisfied the standard set out in the agency's regulations.

22. The government did not expeditiously process the Patriot FOIA Request. Accordingly, Plaintiffs filed a Complaint on October 24, 2002, and moved for a Preliminary Injunction on November 13, 2002. Plaintiffs' Memorandum in support of their Motion for Preliminary Injunction noted that the government had "neither disclosed any record in response to Plaintiffs' request nor acceded to Plaintiffs' demand for a processing schedule."

23. This Court held a hearing on Plaintiffs' Motion for Preliminary Injunction on November 26, 2002. At the hearing, the government agreed to process the Patriot FOIA Request by January 15, 2003. Following the hearing, the Court denied Plaintiffs' Motion for Preliminary Injunction but ordered the government to process the Patriot FOIA Request by the agreed-upon date.

24. The government ultimately identified 391 pages as responsive to the Patriot FOIA Request. It released most of these pages, however, in heavily redacted form. To justify the redactions, the government relied principally on Exemption 1 to the FOIA, which authorizes the

government to withhold records that are “specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy . . . and are in fact properly classified pursuant to such Executive order.” 5 U.S.C. § 522(b)(1).

25. Among the redacted documents released by the FBI was a document titled “Business Record Order Requests Since 10/26/2001” (“Section 215 List”). The document appears to be a list of occasions on which the FBI invoked Section 215 of the Patriot Act between October 26, 2001, and February 7, 2003. Both the list itself and a line indicating the total number of times that the FBI used Section 215 are redacted.

26. By motions filed on January 24 and March 7, 2003, the government moved for Summary Judgment, arguing that it had complied with its obligations under the FOIA. Plaintiffs cross-moved for Summary Judgment by motion filed on March 21, arguing principally that the government could not rely on FOIA’s exemptions to justify the withholding of “aggregate, statistical information indicating the extent to which the FBI has relied on new surveillance authorities.”

27. This Court issued a ruling on May 19, 2003, granting the government’s Motion for Summary Judgment and denying Plaintiffs’ Cross-Motion. *See American Civil Liberties Union et al. v. U.S. Dept. of Justice*, 265 F.Supp.2d 20 (D.D.C. 2003). The opinion acknowledged that “the public has a significant and entirely legitimate desire for th[e] information” sought by the Patriot FOIA Request and that Plaintiffs’ had advanced a “compelling argument that the disclosure of this information will help promote democratic values and government accountability.” *Id.* at 31. However, the Court ultimately concluded that it was nonetheless “obliged to uphold DOJ’s withholding.” *Id.*

The Section 215 FOIA Request

28. Public concern about the Patriot Act and about Section 215 in particular increased as the government continued to withhold even the most innocuous information concerning the use of new surveillance provisions. *See, e.g., Amy Goldstein, Fierce Fight Over Secrecy, Scope of Law; Amid Rights Debate, Law Cloaks Data on Its Impact*, Washington Post (Sept. 8, 2003) (“the paradox of this debate is that it is playing out in a near-total information vacuum: By its very terms, the Patriot Act hides information about how its most contentious aspects are used, allowing investigations to be authorized and conducted under greater secrecy”).

29. The Attorney General was dismissive of public concerns. *See, e.g., Dan Eggen, Patriot Monitoring Claims Dismissed; Government Has Not Tracked Bookstore or Library Activity, Ashcroft Says*, Washington Post (Sept. 19, 2003) (“‘The charges of the hysterics,’ Ashcroft added, ‘are revealed for what they are: castles in the air built on misrepresentation; supported by unfounded fear; held aloft by hysteria.’”); Eric Lichtblau, *Ashcroft Mocks Librarians and Others Who Oppose Parts of Counterterrorism Law*, New York Times (Sept. 16, 2003) (noting that Attorney General had characterized concerns about the Patriot Act as “baseless hysteria”).

30. On or about September 20, the Attorney General released a memo stating that he had “declassified the number of times to date the Department of Justice, including the Federal Bureau of Investigation (FBI), has utilized Section 215 of the USA PATRIOT ACT relating to the production of business records.” The memo stated that “The number of times Section 215 has been used to date is zero (0).”

31. The Attorney General’s memo did not explain the government’s previous insistence that national security would be irredeemably compromised by the release of the very information that the Attorney General was now declassifying. However, the memo stated:

To date we have not been able to counter the troubling amount of public distortion and misinformation in connection with Section 215. Consequently, I have determined that it is in the public interest and the best interest of law enforcement to declassify this information.

32. Following the Attorney General's declassification order, counsel for Plaintiffs contacted Anthony J. Coppolino, who had served as counsel to the government in the litigation concerning the Patriot FOIA Request, to ask whether the FBI would provide Plaintiffs with an unredacted copy of the Section 215 List. Mr. Coppolino agreed to convey the request to the FBI. In a subsequent telephone call, Mr. Coppolino informed Plaintiffs that he had not been able to obtain a response from the FBI.

33. On October 23, Plaintiffs filed a request ("Section 215 FOIA Request") under the FOIA for an unredacted copy of the Section 215 List. The Section 215 FOIA Request also sought "Any and all records relating to Section 215 of the Patriot Act, including any and all records indicating the number of times Section 215 has been used." Plaintiffs submitted the Section 215 FOIA Request to the FBI.

34. Plaintiffs sought expedited processing of the Section 215 FOIA Request on the grounds that the records sought pertained to "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence," 28 C.F.R. § 16.5(d)(1)(iv).

35. Plaintiffs also sought expedited processing of the Section 215 FOIA Request on the grounds that Plaintiffs are "primarily engaged in disseminating information" and there is "[a]n urgency to inform the public about an actual or alleged federal government activity," 28 C.F.R. § 16.5(d)(1)(ii).

36. After filing the Section 215 FOIA Request, Plaintiffs again contacted Mr. Coppolino to ask for an unredacted copy of the Section 215 List. Mr. Coppolino reiterated that he had been unable to obtain any response from the FBI and advised Plaintiffs to contact the FBI directly.

37. By letter dated October 30, the FBI informed Plaintiffs that their request for expedited processing under 28 C.F.R. § 16.5(d)(1)(ii) had been denied. The letter stated, in relevant part:

Based on the information you have provided, I cannot find that there is a particular urgency to inform the public about an actual or alleged federal government activity beyond the public's right to know about government activity generally. Additionally, the primary activity of the Electronic Privacy Information Center (EPIC) is not information dissemination, which is required for a requester to qualify for expedited processing under this standard.

38. Defendant has not responded to Plaintiffs' application for expedited processing under 28 C.F.R. § 16.5(d)(1)(iv).

39. On November 10, Plaintiffs contacted Alina M. Semo at the FBI's Office of the General Counsel, requesting an unredacted copy of the Section 215 List and stating Plaintiffs' desire to avoid unnecessary litigation. Ms. Semo stated that she would consider Plaintiffs' request by November 14.

40. Plaintiffs contacted Ms. Semo again on November 14. Ms. Semo explained that the FBI had not yet considered Plaintiffs' request, that she did not know when the FBI would be able to consider it, and that the FBI would not be able to consider Plaintiffs' request expeditiously because the relevant personnel were "too busy fighting the war on terror."

41. Plaintiffs reiterated their desire to avoid litigation and offered to allow the FBI more time to respond to the remainder of the Section 215 FOIA Request if the FBI expeditiously released an unredacted copy of the Section 215 List. Ms. Semo agreed to consider this proposal but to date has not contacted Plaintiffs with a response.

42. Defendant's failure to grant Plaintiffs' request for expedited processing under 28 C.F.R. § 16.5(d)(1)(ii) violates the FOIA, 5 U.S.C. § 552(a)(6)(E), and Defendant's regulation promulgated thereunder, 28 C.F.R. § 16.5(d).

43. Defendant's failure to respond to Plaintiffs' request for expedited processing under 28 C.F.R. § 16.5(d)(1)(iv) violates the FOIA, 5 U.S.C. § 552(a)(6)(E), and Defendant's regulation promulgated thereunder, 28 C.F.R. § 16.5(d).

44. Plaintiff has exhausted the applicable administrative remedies.

45. Defendant DOJ has wrongfully withheld the requested records from Plaintiff.

Requested Relief

WHEREFORE, Plaintiffs pray that this Court:

- A. Order Defendant immediately to process the requested records in their entirety;
- B. Order Defendant, upon completion of such expedited processing, to disclose the requested records in their entirety and make copies available to Plaintiffs;
- C. Provide for expeditious proceedings in this action;
- D. Award Plaintiffs their costs and reasonable attorneys' fees incurred in this action; and
- E. Grant such other relief as the Court may deem just and proper.

Respectfully submitted,

DAVID L. SOBEL
D.C. Bar No. 360418
Electronic Privacy Information Center
1718 Connecticut Ave., N.W., Suite 200
Washington, DC 20009
Phone: (202) 483-1140 x105
Fax: (202) 483-1248

JAMEEL JAFFER
ANN BEESON
American Civil Liberties Union
125 Broad St.
New York, NY 10004
Phone: (212) 549-2500
Fax: (212) 549-2629

ARTHUR B. SPITZER
D.C. Bar No. 235960
American Civil Liberties Union of the National Capital
Area
1400 20th St., N.W. #119
Washington, DC 20036
Phone: (202) 457-0800
Fax: (202) 452-1868

Counsel for Plaintiffs