

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION,  
ELECTRONIC PRIVACY INFORMATION  
CENTER, AMERICAN BOOKSELLERS  
FOUNDATION FOR FREE EXPRESSION, and  
FREEDOM TO READ FOUNDATION,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

Civil Action  
No. 03-CV-2522 (ESH)

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR  
PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S  
MOTION FOR PARTIAL SUMMARY JUDGMENT**

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## INTRODUCTION

This litigation concerns a request filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for records relating to the government's implementation and use of Section 215 of the USA PATRIOT Act ("Patriot Act"), Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001). As this Court observed in earlier litigation between the parties to this action, "the Patriot Act has engendered controversy and debate" from the time it was proposed. *American Civil Liberties Union v. Department of Justice*, 265 F.Supp.2d 20, 24 (D.D.C., 2003) ("*Patriot FOIA I*"). Plaintiffs' FOIA request seeks information concerning what has proved to be one of the most controversial of the Patriot Act's provisions.

Plaintiffs, the American Civil Liberties Union (ACLU), Electronic Privacy Information Center (EPIC), the American Booksellers Foundation for Free Expression (ABFFE), and the Freedom to Read Foundation (FTRF), submitted their FOIA request to the Federal Bureau of Investigation (FBI) on October 23, 2003. The request sought, first, an unredacted copy of a document titled "Business Record Order Requests Since 10/26/2001" ("Section 215 List"), which the government had released in heavily-redacted form in response to an earlier FOIA request. The request also sought any and all other records pertaining to Section 215 of the Patriot Act. Plaintiffs sought expedited processing of their request from the FBI and from the Office of Public Affairs (OPA) of the Department of Justice (DOJ). Plaintiffs filed this action after the FBI denied their request for expedited processing and indicated that it would not release the Section 215 List. After they filed this action, plaintiffs received notice from the FBI that the OPA, too, had denied their request for expedited processing.

The government has moved for partial summary judgment on plaintiffs' request for the Section 215 List and for partial summary judgment on plaintiffs' request for expedited processing. By separate motion, the government has moved for an *Open America* stay with respect to the processing of plaintiffs' request for records other than the Section 215 List. Plaintiffs now cross-move for partial summary judgment with respect to the Section 215 List and for partial summary judgment on their request for expedited processing. By separate motion, plaintiffs move to stay proceedings related to the government's *Open America* motion.

As explained below, the government's refusal to disclose the Section 215 List is not supported by the FOIA. Since this Court's decision in *Patriot FOIA I*, the Attorney General has declassified the number of times that the FBI has relied on Section 215. As a result, whatever justification previously existed for withholding the Section 215 List no longer exists. The government's refusal to provide expedited processing is also unsupported. Plaintiffs have demonstrated beyond any doubt that their request pertains to a matter of widespread media interest and that there exists an urgency to inform the public about government activity. For these reasons and others set forth below, plaintiffs' motion for partial summary judgment should be granted.

### **FACTUAL AND PROCEDURAL BACKGROUND**

The Patriot Act, which the President signed into law in October 2001, dramatically expanded the government's authority to conduct surveillance of individuals living in the United States. Section 213 of the Act, for example, provided explicit authority for the government to conduct so-called "sneak-and-peek" searches. Section 218 of the Act expanded the government's authority to conduct clandestine searches without meeting the ordinary "probable cause" requirement. Section 505 of the Act

expanded the government's "National Security Letter" authority – an authority that allows the FBI unilaterally to order certain kinds of organizations to turn over financial, credit, and electronic communications records.

One of the Patriot Act's most controversial provisions has been Section 215, now codified at 50 U.S.C. § 1861 under the title "Access to certain business records for foreign intelligence and international terrorism investigations." Section 215 authorizes the FBI to obtain orders from the FISA Court requiring any person to disclose "any tangible things (including books, records, papers, documents, and other items)." *Id.* § 1861(a)(1). The provision includes no individualized suspicion requirement and can be invoked against any person or organization. *See id.* § 1861(b)(2). A "gag" subsection prohibits anyone served with a Section 215 order from disclosing to anyone else that the FBI sought or obtained tangible things under the provision. *See id.* § 1861(d). The provision fails to provide any mechanism through which a person served with a Section 215 order may challenge the validity of the order before being required to comply with it.

Section 215 seriously compromises the confidentiality of a vast array of highly personal and constitutionally privileged information. It 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 acknowledged that the FBI could use Section 215 to obtain, among other things, computer files, educational records, and even genetic information.

See Hearing of the House Judiciary Committee, June 5, 2003 (testimony of Attorney General John Ashcroft), available at [www.lanerights.org/ashcroft060503.htm](http://www.lanerights.org/ashcroft060503.htm).<sup>1</sup>

Seeking information about the DOJ's implementation and use of Section 215 and other surveillance provisions of the Patriot Act, in August 2002 plaintiffs submitted a FOIA request to the FBI and DOJ seeking, among other things, policy directives or guidance issued to DOJ employees regarding Section 215, and records indicating the number of times that the FBI had relied on Section 215. See *Patriot FOIA I*, at 25. Plaintiffs also sought the DOJ's responses to an oversight letter sent by the House Judiciary Committee in June 2002. See *id.* By separate letter, plaintiffs sought expedited processing of their FOIA request. See *id.* The DOJ granted plaintiffs' request for expedited processing, see *id.*, agreeing that the request 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," see 28 C.F.R. § 16.5(d)(1)(iv).

In response to plaintiffs' August 2002 FOIA request, the FBI disclosed several documents pertaining to Section 215. Among these was the Section 215 List, which the FBI released in heavily redacted form. To justify the redactions, the government relied 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. § 552(b)(1). Plaintiffs challenged

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<sup>1</sup> A coalition of civil rights, immigrants' rights, and religious organizations have filed suit challenging the constitutionality of Section 215. See *Muslim Community Association of Ann Arbor v. Ashcroft*, No. 03-72913 (E.D.Mich., filed July 30, 2003).

the FBI's withholding of the Section 215 List to the extent the document contained aggregate statistical information relating to the use of Section 215. However, while this Court found that plaintiffs had advanced "a compelling argument that the disclosure of this information will help promote democratic values and government accountability," it ultimately rejected plaintiffs' challenge. *Patriot FOIA I*, at 31.

In September 2003, in response to widespread public concern about Section 215, the Attorney General announced 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." Govt. Summary Judgment Memo, Ex. B, Attachment 2. The memo stated that "The number of times Section 215 has been used to date is zero (0)." *Id.* 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.

*Id.*

On October 23, 2003, plaintiffs filed a second FOIA request with the FBI, seeking (i) an unredacted copy of the Section 215 List; and (ii) any and all other records relating to Section 215. *See* Letter from ACLU to FBI (Oct. 23, 2003) (Govt. Summary Judgment Memo, Ex. B). In the same letter, plaintiffs sought expedited processing of their request on the grounds that plaintiffs are "primarily engaged in disseminating information" and there existed "[a]n urgency to inform the public about an actual or

alleged federal government activity.” *Id.* (quoting 28 C.F.R. § 16.5(d)(1)(ii)). By separate letter to the OPA, plaintiffs sought expedited processing on the grounds that their request 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.” Letter from ACLU to OPA (Oct. 23, 2003) (Ex.A) (quoting 28 C.F.R. § 16.5(d)(1)(iv)). The FBI denied plaintiffs’ request for expedited processing under the “urgency to inform” standard by letter dated October 30, 2003. The FBI’s letter stated:

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.

Letter from FBI to ACLU (Oct. 30, 2003) (Govt. Summary Judgment Memo, Ex. C). OPA denied plaintiffs’ request for expedited processing under the “media interest” standard on January 9, 2004. The January 9 letter stated:

After consideration of your request for expedition, the DOJ Director of Public affairs did not detect “widespread and exceptional media interest,” nor questions concerning the government’s integrity regarding the issue raised in your request. The Director of Public Affairs has therefore denied your request for expedited processing.

Letter from FBI to ACLU (Jan. 9, 2004) (Govt. Summary Judgment Memo, Ex. D).

Plaintiffs commenced this action on December 10, 2003. The government moved for partial summary judgment on February 17.

### **MATTERS IN ISSUE**

As noted above, plaintiffs’ second FOIA request sought, among other things, an unredacted copy of the Section 215 List. In response to this aspect of plaintiffs’ FOIA request, the government has indicated its renewed determination to withhold the redacted

portions of the Section 215 List. *See* Govt. Summary Judgment Memo, pp. 16-17.

Plaintiffs believe that the government's reliance on Exemption 1 to withhold this information is inappropriate. As in the earlier litigation, however, plaintiffs do not seek records pertaining to particular intelligence investigations, whether completed or ongoing. Nor do plaintiffs seek information that, if disclosed, could plausibly undermine the effectiveness of new surveillance tools. Accordingly, and in the interests of judicial economy, plaintiffs hereby withdraw their request for an unredacted copy of the Section 215 List *except* insofar as the redacted information indicates the total number of Section 215 requests received by the FBI's National Security Law Unit during a particular time period.

Plaintiffs' second FOIA request also sought other records related to Section 215. The government has not yet identified any record responsive to this aspect of plaintiffs' request; accordingly, at this time only plaintiffs' entitlement to expedited processing is at issue.

### **STATUTORY FRAMEWORK**

The animating principle behind the FOIA is to safeguard the American public's right to know "what their Government is up to." *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989). The central purpose of the statute is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

Accordingly, the drafters of the FOIA intended "that the courts interpret this legislation broadly, as a disclosure statute and not as an excuse to withhold information from the public." Cong. Rec. 13654 (June 20, 1966) (statement of then-Rep. Donald Rumsfeld).

The Supreme Court has stated that “[o]fficial information that sheds light on an agency’s performance of its statutory duties falls squarely within [the] statutory purpose.”

*Reporters Committee for Freedom of the Press*, 489 U.S. at 773.

The FOIA directs government agencies to disclose certain types of records and describes the manner of disclosure required. Certain records must be listed in the Federal Register. *See* 5 U.S.C. § 552(a)(1). Other records must be made available for public inspection and copying. *See id.* § 552(a)(2). Subsection 552(a)(3) contains a catch-all provision requiring disclosure upon request of records not covered in §§ 552(a)(1) or (2). Certain categories of material are exempted from disclosure; these categories are set out in § 552(b).

Ordinarily, an agency faced with a request for records under § 552(a) must

determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and . . . immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination . . . .

*Id.* § 552(a)(6)(A)(i).

Certain requests, however, are entitled to expedited processing. According to the statute, expedited processing is warranted “in cases in which the person requesting the records demonstrates a compelling need,” *id.* § 552(a)(6)(E)(i)(I), and “in other cases determined by the agency,” *id.* § 552(a)(6)(E)(i)(II). DOJ regulations elaborate these standards, stating that expedited processing is warranted where a request involves “[a]n urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information,” 28 C.F.R. § 16.5(d)(1)(ii), or where it involves “[a] matter of widespread and exceptional media

interest in which there exist possible questions about the government’s integrity which affect public confidence,” *id.* § 16.5(d)(1)(iv).<sup>2</sup> If a requester applies for expedited processing, the agency is required to grant or deny expedited processing within 10 days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I).

The statute does not provide a specific time frame for the processing of expedited requests. However, the statute does require that such requests be processed “as soon as practicable.” *Id.* § 552(a)(6)(E)(iii). The DOJ’s regulations, too, require that expedited matters “be given priority and . . . processed as soon as practicable.” 28 C.F.R. § 16.5(d)(4).

Agency denials of requests for expedited processing are subject to judicial review in accordance with 5 U.S.C. § 552(a)(6)(E)(iii), which states:

Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under [5 U.S.C. § 552(a)(4)], except that the judicial review shall be based on the record before the agency at the time of the determination.

5 U.S.C. § 552(a)(6)(E)(iii). An agency’s refusal to grant a request for expedited processing is reviewed by the district court *de novo*. *See Al-Fayed v. CIA*, 254 F.3d 300, 308 (D.C. Cir. 2001).

## ARGUMENT

### I. PLAINTIFFS ARE ENTITLED TO THE AGGREGATE STATISTICAL INFORMATION CONTAINED IN THE SECTION 215 LIST

Plaintiffs have substantially narrowed the issues in dispute with respect to the government’s withholding of the Section 215 List. According to the government,

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<sup>2</sup> DOJ regulations include two other grounds for expedited processing which are not relevant here.

the information withheld in this document . . . identifies project number (ProjID), which are numbers chronologically assigned to each FISA application request from FBI field offices to the then-National Security Law Unit (“NSLU”) . . . at FBIHQ, the date the NSLU received each request, and the total number of requests received since 10/26/2001.

Hardy Decl., ¶ 37. Plaintiffs do *not* seek the chronologically assigned project numbers, and plaintiffs do *not* seek the dates that applications were submitted to the NSLU.

Plaintiffs seek only the “total number of requests received.” As explained below, the government’s withholding of this information is not supported by the FOIA. Since this Court’s decision in *Patriot FOIA I*, the Attorney General has declassified the number of times that the FBI has relied on Section 215. As a result, the justification that the government previously offered for withholding the Section 215 List no longer has any application.

a. The government improperly relies on Exemption 1

As noted above, Exemption 1 applies to 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. § 552(b)(1). “An agency that withholds information pursuant to [this] exemption[] bears the burden of justifying its decision.” *Edmonds v. FBI*, 272 F.Supp.2d 35, 43 (D.D.C. 2003). Exemption 1, like the other FOIA exemptions, “should be narrowly construed.” *Id.* at 43.

The government’s decision to classify documents withheld in reliance on Exemption 1 is subject to *de novo* review. *See, e.g., Goldberg v. United States Department of State*, 818 F.2d 71, 77 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 904 (1988). The “salient characteristics of *de novo* review in the national security context” are:

(1) The government has the burden of establishing an exemption; (2) The court must make a *de novo* determination; (3) In doing this, it must first accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record; [and] (4) Whether and how to conduct an *In camera* examination of the documents rests in the sound discretion of the court, in national security cases as in all other cases.

*Ray v. Turner*, 587 F.2d 1187, 1194 (D.C. Cir. 1978) (internal quotation marks omitted).

While the court is required to accord “substantial weight” to an agency’s affidavit concerning the classified status of disputed records, the court must do this “without relinquishing [its] independent responsibility.” *Goldberg*, 818 F.2d at 77; *see also Ray. v. Turner*, 587 F.2d at 1194 (noting that FOIA drafters “stressed the need for an objective, independent judicial determination, and insisted that judges could be trusted to approach the national security determinations with common sense, and without jeopardy to national security”). Thus, “conclusory and generalized allegations of exemptions” are not acceptable. *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). At a minimum, the agency must demonstrate “a logical connection between the information and the claimed exemption.” *Salisbury v. United States*, 690 F.2d 966, 970 (D.C. Cir. 1982); *see also Goldberg*, 818 F.2d at 78; *Abbotts v. Nuclear Regulatory Commission*, 766 F.2d 604, 606 (D.C. Cir. 1985); *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981).

The government has not met its burden here. In fact, to defend its refusal to disclose the information sought by plaintiffs, the FBI advances precisely the same explanation that this Court squarely rejected in *Patriot FOIA I*. In *Patriot FOIA I*, the FBI justified withholding aggregate statistical information by arguing that disclosure would

(1) reveal the existence, methodology, and time frame of FBI counterintelligence activities directed at specific targets of national security[,] (2) reveal the nature, objective, requirements, and scope of a specific FBI counterintelligence activity, (3) disclose the intelligence-gathering capabilities of the activity, and (4) provide an assessment of the intelligence source penetration during a specific period of time.

Exhibit IV to Kiefer Decl. filed in *Patriot FOIA I* in support of Defendant's Motion for Partial Summary Judgment on Behalf of the FBI, at 7-8 (Ex. B). In *Patriot FOIA I*, the FBI advanced this explanation with respect to each statistic sought by plaintiffs, notwithstanding that the statistics pertained to several different surveillance authorities. *See Patriot FOIA I*, at 29. Further, the FBI did not explain how the disclosure of aggregate statistics (as opposed to more detailed information) could plausibly endanger national security. *See id.* In sum, the FBI failed to demonstrate any "logical connection between the information and the claimed exemption." *Salisbury v. United States*, 690 F.2d at 970. Consequently, this Court determined that the FBI had not sustained its burden under the FOIA. The Court wrote:

The analysis here has in no way been tailored to the particular surveillance tools about which plaintiffs seek information, and does not address the specific harm likely to flow from the release merely of aggregate statistical information about those tools. In this respect, the FBI largely recites conclusions, rather than explaining the basis for those conclusions.

*Patriot FOIA I*, at 29.

The FBI defends its renewed refusal to disclose the Section 215 List by reciting precisely those arguments that were rejected by this Court in *Patriot FOIA I*. *See Hardy Decl.*, ¶ 37 (reproducing, *verbatim*, the four-point list that this Court found inadequate in the earlier litigation). Plaintiffs respectfully urge this Court to reaffirm its earlier ruling that the FBI's boilerplate explanation does not carry the agency's burden under FOIA.

This Court in *Patriot FOIA I* ultimately concluded that the declaration submitted by the Office of Intelligence Policy and Review (OIPR) provided an independent and sufficient explanation for the withholding of the same material withheld by the FBI. *See Patriot FOIA I*, at 29, 31. The explanation that OIPR furnished in the earlier litigation, however, has no application now that the Attorney General has declassified the number of times that the FBI has relied on Section 215. In the earlier litigation, OIPR’s justification for withholding aggregate statistical information was that disclosure could “reveal the relative frequency with which particular surveillance tools have been deployed” and thereby “undermine the efficiency and effectiveness of such surveillance.” *Patriot FOIA I*, at 31; *see also* Baker Decl. filed in *Patriot FOIA I* in support of Defendant’s Motion for Partial Summary Judgment on Behalf of OIP and OIPR (Ex. C), ¶ 17 (arguing that disclosing the number of Section 215 applications could enable adversaries to discern whether and to what extent business records and other items in the possession of third parties offered a safe harbor from the FBI). Clearly, that explanation can no longer justify the withholding of aggregate statistical information contained in the Section 215 List. Whatever harm to national security might have resulted from the disclosure of the Section 215 List has already resulted from the Attorney General’s declassification order.

The government repeatedly emphasizes that the information declassified by the Attorney General is not the same information that is contained in the Section 215 List. *See* Govt. Summary Judgment Memo, pp. 14-15, 17-18. Plaintiffs’ argument, however, is not that the information is the same but rather that the Attorney General’s declassification order, which declassified the number of times that Section 215 was used

within a particular time period, removed any national security rationale for the continued withholding of the number of times that FBI field offices requested Section 215 orders within the same time period. The only rationale that the government has ever offered for the withholding of the latter statistic is that its disclosure could indicate something about the former one.

b. Plaintiffs' claim with respect to the Section 215 List is not precluded by *res judicata*

Contrary to the government's contention, the doctrine of *res judicata* or claim preclusion has no application in this case. The government correctly notes that *res judicata* prevents parties from re-litigating a claim that was or could have been raised in a former action. *See, e.g., Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979). The doctrine holds that “a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action.” *Id.* The determination of what constitutes a single cause of action, however, is focused on the “nucleus of facts” surrounding a transaction. *Page v. United States*, 729 F.2d 818, 820 (D.C.Cir. 1984) (“*Page*”). Thus, “[*r*]es judicata does not preclude claims based on facts not yet in existence at the time of the original action.” *Drake v. Federal Aviation Administration*, 291 F.3d 59, 66 (D.C. Cir. 2002) (“*Drake*”), *cert. denied*, 537 U.S. 1193 (2003); *see also Stanton v. District of Columbia Court of Appeals*, 127 F.3d 72, 78 (D.C. Cir. 1997) (“[P]ost-judgment events give rise to new claims, so that claim preclusion is no bar.”).

In *Drake*, a flight attendant who had been fired by an airline after failing a random drug test filed suit challenging the constitutionality of Federal Aviation Administration (FAA) regulations under which the testing had been conducted. The flight attendant filed

a subsequent suit challenging the FAA's determination that the airline's actions had not violated the regulations. *See id.* at 64-65. The district court held that the second suit arose out of the same factual nucleus as the first and was barred by *res judicata*. *See id.* at 65. The D.C. Circuit disagreed, noting that the FAA issued its determination with respect to the airline's actions after Drake filed the first suit. *See id.* at 66 ("the central events underlying [the second suit] had not even taken place at the time when Drake instigated [the first suit]"). *Res judicata*, the Court held, "does not bar a litigant from doing in the present what he had no opportunity to do in the past." *Id.* at 67.

*Page* is to similar effect. The plaintiff in that case filed suit in 1972 alleging that the Veteran's Administration (VA) had administered harmful drugs to him beginning in 1961. *See Page*, 729 F.2d at 819. That suit was dismissed as statutorily time-barred. *See id.* Plaintiff filed another suit against the VA in 1981, which the district court dismissed on *res judicata* grounds. *See id.* The D.C. Circuit disagreed that the claim was barred on *res judicata* grounds, noting that the second suit claimed that the drug treatment had continued until 1980. *See id.* at 820. The Court wrote, "[s]ince Page's 1972 action obviously could not have asserted claims based on facts that were not yet in existence, the dismissal of that action cannot be *res judicata* of Page's [1981] complaint respecting VA's conduct from 1972 to 1980." *Id.*

Here, as in *Drake* and *Page*, plaintiffs' claim arises out of facts that came into existence *after* earlier litigation. Plaintiffs do not seek to re-litigate issues that were litigated in *Patriot FOIA I*; rather, they seek to litigate now what they had no opportunity to litigate then – namely, the legality of the DOJ's withholding the Section 215 List *in light of the Attorney General's declassification decision*, a decision that was made four

months after this Court's decision in *Patriot FOIA I*. Plaintiffs could not have litigated their present claim in the earlier litigation because, when the parties litigated *Patriot FOIA I*, the "nucleus of fact" on which plaintiffs' present claim is founded did not exist.

## II. PLAINTIFFS ARE ENTITLED TO EXPEDITED PROCESSING

In compliance with the FOIA and applicable DOJ regulations, plaintiffs requested expedited processing of their FOIA request. In support of their request, plaintiffs submitted specific information that clearly established their entitlement to expedited processing.

As discussed further below, the importance of expedited processing to plaintiffs in this case would be difficult to overstate. The principal aim of plaintiffs' FOIA request is to inform the ongoing national debate about whether Congress should renew Section 215 and other Patriot Act surveillance provisions before they expire in December 2005. Until now, this debate has taken place in a "near-total information vacuum." Amy Goldstein, *Fierce Fight Over Secrecy, Scope of Law; Amid Rights Debate, Law Cloaks Data on Its Impact*, Washington Post (Sept. 8, 2003). Relegating plaintiffs' request to the ordinary processing cue would perpetuate this information vacuum until well after the information itself had lost its value. Indeed, the government has made clear that relegating plaintiffs' request to the ordinary processing cue would mean that processing would not be complete until June 2005 *at the earliest*, see Govt. *Open America* Memo, p.15, meaning that disputes about withheld records would probably not be resolved until after Section 215's sunset date.

- a. Plaintiffs are entitled to expedited processing under the "urgency to inform" standard

i. This Court has jurisdiction to grant the requested relief

The government argues that plaintiffs have not exhausted applicable administrative remedies with respect to their request for expedited processing under 28 C.F.R. § 16.5(d)(1)(ii). *See* Govt. Summary Judgment Memo, pp. 18-19. There is no merit to this argument. The Court’s jurisdiction to consider this matter and grant appropriate relief is clear. As noted above, the FOIA provides that

[a]gency action to deny . . . a request for expedited processing . . . shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

5 U.S.C. § 552(a)(6)(E)(iii). The referenced judicial review provision states, in pertinent part:

On complaint, the district court of the United States . . . in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter *de novo* . . . .

5 U.S.C. § 552(a)(4)(B); *see also Al-Fayed v. CIA*, 254 F.3d at 304.<sup>3</sup>

Plaintiffs’ claim is ripe for adjudication, as all applicable administrative remedies have been exhausted. Two judges of this Court have now held that a requester denied expedited processing need not pursue an administrative appeal before seeking judicial review. *See Al-Fayed v. CIA*, No. 00-2092 (CKK), 2000 U.S. Dist. LEXIS 21476 (D.D.C. Sept. 20, 2000) (“Nothing in the statute or its legislative history . . . mandates administrative appeals for all denials of expedited processing before an applicant may seek judicial review.”); *Electronic Privacy Information Center v. Department of Justice*,

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<sup>3</sup> This Court also has jurisdiction of this case under 28 U.S.C. § 1331 (“[t]he district courts shall have original jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States”).

No. 03-2078 (JR) (D.D.C, filed 2003) (“neither the statute nor applicable case law” makes administrative appeal of agency’s denial of expedited processing a precondition of judicial review), *appeal docketed*, No. 04-5063 (D.C. Cir, Feb. 27, 2004) The only case that the government relies on, *Oglesby v. Department of Army*, 920 F.2d 57 (D.C. Cir. 1990), did not involve an agency’s refusal to grant expedited processing. Indeed, *Oglesby* predated the statutory amendments that created the right to expedited processing.

ii. Plaintiffs are primarily engaged in disseminating information

Plaintiffs’ request for expedited processing under 28 C.F.R. § 16.5(d)(1)(ii) explained plaintiffs’ information-dissemination activities in detail. With respect to the ACLU and EPIC, for example, plaintiffs stated:

The ACLU publishes newsletters, news briefings, right-to-know handbooks, and other materials that are disseminated to the public. Its material is available to everyone, including tax-exempt organizations, not-for-profit groups, law students and faculty, for no cost or for a nominal fee. The ACLU also disseminates information through its web site ([www.aclu.org](http://www.aclu.org)). The web site addresses civil liberties issues in depth, provides features on civil liberties issues in the news, and contains hundreds of documents that relate to the issues on which the ACLU is focused. Finally, the ACLU disseminates information through an electronic newsletter, which is distributed to subscribers by e-mail.

EPIC is a non-profit, educational organization that routinely and systematically disseminates information to the public. This is accomplished through several means. First, EPIC maintains a heavily visited web site ([www.epic.org](http://www.epic.org)) that highlights the latest news concerning privacy and civil liberties issues. The site also features scanned images of documents EPIC obtains under the FOIA. Second, EPIC publishes a bi-weekly electronic newsletter that is distributed to thousands of readers, many of whom report on technology issues for major news outlets. The newsletter reports on relevant policy developments of a timely nature (hence the bi-weekly publication schedule). It has been published continuously since 1996, and an archive of past issues is available at the EPIC web site. Finally, EPIC publishes and distributes printed books that address a broad range of privacy, civil liberties and technology issues.

Letter from ACLU to FBI (Oct. 23, 2003) (Govt. Summary Judgment Memo, Ex. B), pp. 2-3. Plaintiffs clearly established that they are “primarily engaged in disseminating information” within the meaning of the regulations.<sup>4</sup>

The FBI appears not to have considered whether plaintiffs other than EPIC are “primarily engaged in disseminating information”; the FBI’s denial of plaintiffs’ request for expedited processing addressed only EPIC’s status. *See* Letter from FBI to ACLU (Oct. 30, 2003) (Govt. Summary Judgment Memo, Ex. C) (“the primary activity of the Electronic Privacy Information Center . . . is not information dissemination”). In any event, the FBI’s determination with respect to EPIC is manifestly incorrect. This Court has expressly held that EPIC is a “news media” requester for purposes of fee waivers under the FOIA. *See Electronic Privacy Information Center v. Department of Defense*, 241 F.Supp.2d 5, 11 (D.D.C. 2003) (finding that EPIC is a “representative of the news media” because it “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” (internal quotation marks omitted)). DOJ’s regulations make clear that a “news media” requester will *necessarily* be “primarily engaged in disseminating information” for the purposes of expedited processing. The regulations state, in relevant part,

a requester within the category in paragraph (d)(1)(ii) of this section [setting out the “urgency to inform” standard], *if not a full-time member of the news media*, must establish that he or she is a person whose main

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<sup>4</sup> The legislative history of the FOIA indicates that the “primarily engaged in disseminating information” standard was intended to exclude requesters who disseminated information “only incidentally.” H.R. Rep. No. 104-795, at 26 (1996) (“A requester who only incidentally engages in information dissemination, besides other activities, would not satisfy this requirement.”). The dissemination of information to the public is central, not merely incidental, to plaintiffs’ activities.

professional activity or occupation is information dissemination, though it need not be his or her sole occupation.

28 C.F.R. § 16.5(d)(3) (emphasis added). Other agencies' regulations similarly indicate that "news media" requesters will necessarily satisfy the "primarily engaged in disseminating information" standard for the purposes of expedited processing. *See* 6 C.F.R. § 5.5(d)(3) (Homeland Security) (same as DOJ); 32 C.F.R. § 286.4(d)(3)(ii) (Department of Defense) ("[r]epresentatives of the news media . . . would normally qualify as individuals primarily engaged in disseminating information"); 7 C.F.R. § 1.9(b)(2) (Department of Agriculture) (same as DOD).

iii. Plaintiffs have demonstrated an "urgency to inform the public about an actual or alleged federal government activity"

The government acknowledges that plaintiffs' request seeks information concerning federal government activity, *see* Govt. Summary Judgment Memo, p. 19 n.8, but disputes that there is any urgency to inform the public about this activity, *see id.*, pp. 19-22; *see also* Letter from FBI to ACLU (Oct. 30, 2003) (Govt. Summary Judgment Memo, Ex. C), p. 1 ("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."). In fact, the records that plaintiffs seek are urgently needed, as plaintiffs' FOIA request made clear.

As the articles cited in plaintiffs' request for expedited processing noted, Section 215 will sunset at the end of 2005. *See, e.g.*, Frank Kramer, *Why the Patriot Act Worries Booksellers*, Boston Globe (Oct. 8, 2003). The President has urged Congress to renew the provision before it expires. *See, e.g.*, President George W. Bush, State of the Union Address, Jan. 20, 2004, available at [www.whitehouse.gov](http://www.whitehouse.gov) ("Key provisions of the Patriot

Act are set to expire next year. . . . The terrorist threat will not expire on that schedule. . . . Our law enforcement needs this vital legislation to protect our citizens. You need to renew the Patriot Act.”). As this Court noted in *Patriot FOIA I*, the DOJ “has provided only limited information to the public regarding how, and how often, the new [surveillance] provisions . . . have been used.” *Patriot FOIA I*, at 24; *see also* Amy Goldstein, *Fierce Fight Over Secrecy, Scope of Law; Amid Rights Debate, Law Cloaks Data on Its Impact*, Washington Post (Sept. 8, 2003). Plaintiffs believe that neither the public nor Congress can make an informed decision about the necessity or wisdom of renewing Section 215 without more information about the way that the FBI has implemented and used the provision.

The government has made clear in its papers that relegating plaintiffs’ request to the ordinary processing cue would likely mean delaying the release of information about Section 215 until after the debate about renewing the Patriot Act has taken place. *See* Govt. *Open America* Memo, p.15 (stating that, in non-expedited processing cue, plaintiffs’ request would be completed in “approximately 15 months”); Hardy Decl., ¶ 30 (“*the earliest* documents responsive to plaintiffs’ request will be available is on or about June 1, 2005” (emphasis added)). At that point, the information would be of relatively little use to the public. The records plaintiffs seek are needed *now*, to inform an ongoing debate. The government should not be permitted to withhold the records until the records are of only historical interest. *Cf. Al-Fayed v. CIA*, 254 F.3d at 311 (expedited processing is appropriate where “a delay in obtaining information can reasonably be foreseen to cause a significant adverse consequence to a recognized interest” (internal quotation marks omitted)).

The ongoing debate about renewing Patriot Act surveillance provisions is only one of several factors that makes plaintiffs' request urgent. A second factor is that Congress is considering several legislative proposals to amend the Patriot Act. Several of the articles plaintiffs cited in their request for expedited processing discussed these proposals. *See, e.g.*, Frank Kramer, *Why the Patriot Act Worries Booksellers*, Boston Globe (Oct. 8, 2003) (expressing concern about proposed Anti-Terrorism Tools Enhancement Act, which would "grant[] the FBI even more power to search business records, including bookstore and library records"); Bernie Sanders, *Patriot Act Overreaches*, USA Today (Sept. 23, 2003) ("Because the USA Patriot Act was passed so quickly in the wake of 9/11, it is not surprising that there are excesses that need to be remedied. But these new proposals make the onerous provisions of the USA Patriot Act even worse."); Bob Egelko & Maria Alicia Gaura, *Libraries Post Patriot Act Warnings*, San Francisco Chronicle (March 10, 2003) (discussing proposed Freedom to Read Protection Act, which "would allow library and bookstore searches only if federal agents first showed they were likely to find evidence of a crime"). Plaintiffs' FOIA request seeks information that would make the debate about these proposals more informed. Here, again, information released months from now (or 15 months from now, in the government's proposal) will be of little use.

A third factor adding to the urgency of plaintiffs' request is that their request concerns government activity that is ongoing rather than completed. Plaintiffs' request does not seek information about historical practices or about investigations that were completed many years ago. Rather, it seeks information about FBI surveillance that has taken place in recent months and about checks that the FBI may have put in place to

ensure that new surveillance provisions will not be abused in the future. The records plaintiffs seek are important precisely because they concern surveillance that could be taking place now. *Cf. Al-Fayed v. CIA*, 254 F.3d at 310 (finding expedited processing inappropriate where “[a]ll of the events and alleged events occurred two to three years before plaintiffs made their requests for expedited processing,” and stating that “[a]lthough these topics may continue to be newsworthy, none of the events at issue is the subject of a currently unfolding story”).

b. Plaintiffs are entitled to expedited processing under the “media interest” standard

As plaintiffs’ request for expedited processing made clear, plaintiffs’ FOIA request pertains 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). This Court recognized in *Patriot FOIA I* that the Patriot Act “has engendered controversy and debate” since it was first enacted. *Patriot FOIA I*, at 24. The government *itself* acknowledged the widespread media interest in the Patriot Act by granting plaintiffs’ request for expedited processing. *See id.* at 25. The controversy surrounding the Act has only grown over time. *See, e.g.*, Editorial, *An Unpatriotic Act*, New York Times (Aug. 25, 2003) (“When the Patriot Act raced through Congress after Sept. 11, critics warned that it was an unprecedented expansion of the government’s right to spy on ordinary Americans. The more people have learned about the law, the greater the calls have been for overhauling it.”). Plaintiffs’ FOIA request concerns what has perhaps been the most controversial of the Patriot Act’s provisions.

Indicative of widespread concern about the Patriot Act and its implications for civil liberties is that, as of February 4, 2004, approximately 250 governing bodies in the

United States had adopted resolutions urging that Congress narrow some provisions of the Patriot Act, including Section 215. *See* Michelle Garcia, *N.Y. City Council Passes Anti-Patriot Act Measure*, Washington Post (Feb. 5, 2004). Plaintiffs' request for expedited processing cited articles discussing these resolutions. *See, e.g.*, Dan Eggen, *Patriot Monitoring Claims Dismissed; Government Has Not Yet Tracked Bookstore or Library Activity, Ashcroft Says*, Washington Post (Sept. 19, 2003) ("More than 150 cities and three states have passed resolutions condemning the legislation as an attack on individual liberties."). Also indicative of widespread public concern is that, in August 2003, the Attorney General embarked on a cross-country tour to defend the Patriot Act against its numerous critics. Plaintiffs' request for expedited processing cited articles discussing the tour. *See, e.g.*, Editorial, *Ashcroft's Dragnet*, Boston Globe (Sept. 9, 2003) ("John Ashcroft arrives in Boston this morning to brief law enforcement personnel on the USA Patriot Act. The invitation-only session is part of Ashcroft's 18-city tour to defend the Patriot Act against mounting claims that it undermines civil liberties. Instead of a pep rally for officials, Ashcroft should be addressing the citizens, who have legitimate concerns about the new law.").

Plaintiffs' request for expedited processing also cited articles making clear that concern about Section 215 is *particularly* widespread:

Passed 45 days after the attacks of Sept. 11, the Patriot Act is a massive overhaul of government security procedures. It includes more than 1,000 sections authorizing enhanced surveillance, reporting of suspicious activities, tighter immigration provisions, and information-sharing among intelligence agencies. . . .

Of particular concern is Section 215, which authorizes searches of private documents including financial, medical, and library records without a warrant, and prevents doctors, librarians, and others from informing clients that the records have been requested. Although the act seemingly

carves out activities “otherwise protected by the First Amendment,” a huge loophole allows the surveillance if those activities are not the “sole reason” for the search.

Editorial, *Ashcroft’s Dragnet*, Boston Globe (Sept. 9, 2003); *see also* Bernie Sanders, *Patriot Act Overreaches*, USA Today (Sept. 23, 2003) (expressing concern that “[t]he legal standard for obtaining an order [under Section 215] is so loose that the government is virtually certain to get whatever it wants, whenever it wants.”); Bob Egelko & Maria Alicia Gaura, *Libraries Post Patriot Act Warnings: Santa Cruz Branches Tell Patrons that FBI May Spy on Them*, San Francisco Chronicle (March 10, 2003). (“[I]n the last year, Section 215 has roused organizations of librarians and booksellers into a burst of political activity, and is being cited increasingly by critics as an example of the new law’s intrusiveness.”); Dan Eggen, *Patriot Act Monitoring Claims Dismissed: Government Has Not Tracked Bookstore or Library Activity, Ashcroft Says*, Washington Post (Sept. 19, 2003) (noting that “Section 215[] has become a central focus of criticism from civil liberties groups, booksellers and librarians, and has perhaps been some lawmakers’ most frequently cited example of potential government abuse”).

The government makes much of the fact that plaintiffs’ request for expedited processing cited only a handful of news articles. But it is nonsensical to measure the merit of a request for expedited processing by counting the number of news articles that the request cites. The articles cited by plaintiffs are from diverse sources, including the *Boston Globe*, the *Washington Post*, *USA Today*, *Newsday*, and the *San Francisco Chronicle* – five of the most significant media outlets in the nation.<sup>5</sup> More importantly,

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<sup>5</sup> See <http://www.infoplease.com/ipea/A0004420.html> (listing largest newspapers by circulation).

the cited articles repeatedly reference the ongoing national discussion about the Patriot Act and make clear that concern about the Act is widespread.

The articles cited by plaintiffs also make clear that the debate around Section 215 implicates government integrity. *See, e.g.*, Editorial, *Ashcroft's Dragnet*, Boston Globe (Sept. 9, 2003) (“Ashcroft’s defenders challenge skeptics to provide evidence that anyone’s rights have been abused by the Patriot Act. But how could anyone tell?”); *id.* (“the Justice Department’s clandestine behavior regarding the act only fuels suspicions”); Dan Eggen, *Patriot Monitoring Claims Dismissed; Government Has Not Tracked Bookstore or Library Activity, Ashcroft Says*, Washington Post (Sept. 19, 2003) (noting that Section 215 “has perhaps been some lawmakers’ most frequently cited example of potential government abuse”); Frank Kramer, *Why the Patriot Act Worries Booksellers*, Boston Globe (Oct. 8, 2003) (“[t]his vast authority to search bookstore and library records secretly could be abused at any time in the future”). Notably, the Attorney General himself acknowledged in his declassification order that public concern about the FBI’s implementation of Section 215 had become so acute that “[p]ublic confidence in law enforcement” had begun to erode. *See* Govt. Summary Judgment Memo, Ex. B, Attachment 2.

## CONCLUSION

For the foregoing reasons, plaintiffs' motion for partial summary judgment should be granted.<sup>6</sup>

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<sup>6</sup> The Court should retain jurisdiction, as the grant of the relief plaintiffs seek through this motion will not resolve all issues in the case. Once the government completes the processing of records responsive to plaintiffs' FOIA request, the propriety of any withholdings may be the subject of further litigation. *See* Complaint, at 11 (requesting Court to "[o]rder Defendant, upon completion of . . . expedited processing, to disclose the requested records in their entirety and make copies available to Plaintiffs . . .").