

JUDGE BAER

12 CV 4093

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

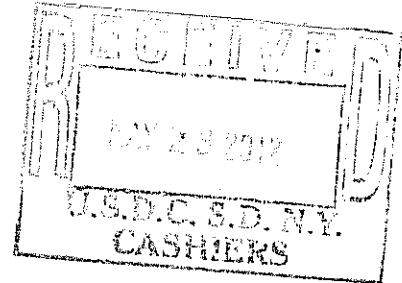
AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION

Plaintiff,

v.

UNITED STATES DEPARTMENT OF  
JUSTICE, including components Criminal  
Division, Drug Enforcement Administration,  
Federal Bureau of Investigation, Bureau of  
Alcohol, Tobacco, Firearms, and Explosives,  
and Office of Information Policy

Defendant.



No. \_\_\_\_\_

**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, seeking the immediate processing and release of agency records requested by plaintiff American Civil Liberties Union Foundation ("the ACLU") from defendant U.S. Department of Justice ("the DOJ").

2. Plaintiff submitted a FOIA request ("the Request") to the DOJ on February 15, 2012 seeking records related to the preparation of statistical reports on the use of pen registers and trap and trace devices for reporting years 2010 and 2011. The Attorney General is required by the Pen Register Act of 1986, codified at 18 U.S.C. § 3126, to submit these reports annually to Congress. The Request also encompasses all records regarding whether these reports were indeed submitted to Congress, including any reasons for failures to submit.

3. Pen registers and trap and trace devices are powerful tools used by law enforcement agencies to intercept non-content information from electronic communications, such as the “to” and “from” lines of emails, the telephone numbers a person dials and those from which he receives calls, and the IP addresses of websites a person visits. Pen registers and trap and trace devices have been used tens of thousands of times annually by law enforcement components within the DOJ.

4. As mandated by 18 U.S.C. § 3126, the Attorney General is required each year to submit a report to Congress detailing statistical data on the use of pen registers and trap and trace devices. Among the data that must be included in the report are the number of investigations involving orders for pen registers or trap and trace devices, the offenses specified in such orders, and the duration of time authorized for those orders.

5. The DOJ has failed to publicly produce any such submission for reporting years 2010 and 2011. Moreover, the DOJ does not have a strong track record of complying with this legal obligation. It failed to submit any data between 2004 and 2008, a problem it rectified in 2009 by supplying five years of delinquent data simultaneously. Similarly, between 1999 and 2003 the DOJ failed to submit any reports and only submitted the delinquent data for these reporting years in late 2004.

6. The Request, seeking the statutorily mandated reports and related records for reporting years 2010 and 2011, directed the DOJ to search several of its own components: the Criminal Division, the Drug Enforcement Administration (“the DEA”), the Federal Bureau of Investigation (“the FBI”), the United States Marshals Service (“the USMS”), the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“the ATF”), and the Office of Information Policy (“the OIP”).

7. Plaintiffs are entitled to the records they seek. The Request relates to a topic of vital public importance. Unlike many other government seizures of private records, orders for pen registers and trap and trace devices do not require law enforcement officials to secure a search warrant. As a result, Congressional and public oversight is a crucial check on the executive's power to use these surveillance tactics. Because the ACLU is primarily oriented towards effectively disseminating information to the public about federal government activity, the processing of plaintiff's request will significantly facilitate both forms of oversight.

8. Plaintiff is additionally entitled to a waiver of processing fees because the release of the requested records is in the public interest and a limitation of processing fees because the ACLU is a "representative of the news media" for the purposes of FOIA.

9. Nearly three months after plaintiff filed its request, only two of the six components of DOJ subject to plaintiff's request, the USMS and OIP, have responded, and OIP's response is incomplete.

10. As for all components except USMS, plaintiff now asks this Court to order defendant to immediately process all records that have been unlawfully withheld. Plaintiff also seeks an order enjoining defendant from assessing fees for the processing of the Request.

### **Jurisdiction and Venue**

11. This Court has both subject matter jurisdiction of the FOIA claim and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

12. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

## **Parties**

13. Plaintiff American Civil Liberties Union Foundation is a nationwide, non-profit, nonpartisan organization dedicated to the constitutional principles of liberty and equality. Plaintiff is committed to ensuring that the U.S. government acts in compliance with the Constitution and law. The ACLU is also committed to principles of transparency and accountability in government, and seeks to ensure that the American public is informed about the conduct of its government in matters that affect civil liberties. Obtaining information about governmental activity, analyzing that information, and widely publishing and disseminating it to the press and the public (in both its raw and analyzed form) is a critical and substantial component of the ACLU's work and one of its primary activities.

14. Defendant Department of Justice ("the DOJ") is a department of the executive branch of the U.S. government and is an agency within the meaning of 5 U.S.C. § 552(f)(1). The Request targeted specific subdivisions of the DOJ: the Criminal Division, the Drug Enforcement Administration ("the DEA"), the Federal Bureau of Investigation ("the FBI"), the United States Marshals Service ("the USMS"), the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("the ATF"), and the Office of Information Policy ("the OIP"). The DOJ is headquartered in Washington, D.C.

## **Factual Background**

15. Federal law enforcement officials regularly rely upon pen registers and trap and trace devices to conduct electronic surveillance. Pen registers and trap and trace devices are powerful surveillance tools that allow law enforcement to seize non-content information from private electronic communications, such as the "to" and "from" addresses on emails, the

telephone numbers a person dials and the numbers from which he receives calls, and the IP addresses of the websites a person visits.

16. Data from prior years demonstrated that law enforcement agencies within the Department of Justice used pen registers and trap and trace devices very frequently and at increasing rates. From 2004 to 2009, the number of times these surveillance methods were used annually more than doubled from 10,885 to 23,895. In 2009, this surveillance method was used over 18 times as frequently as wiretaps.

17. The Pen Register Act of 1986, Article III of the Electronic Communications Privacy Act of 1986, codified at 18 U.S.C. § 3126, requires the Attorney General to compile a report to Congress on the number of pen register orders and orders for trap and trace devices applied for by law enforcement agencies of the Department of Justice. Additionally, the report must include: (1) the number of extensions authorized for such orders; (2) the duration of time authorized for each order; (3) the duration of any extension of each order; (4) the offense specified in each order or application or extension; (5) the number and nature of the facilities affected; and (6) the identity of the applying investigative or law enforcement agency making each application and the person authorizing each order.

18. The DOJ has repeatedly failed to meet its statutory obligation to produce these annual reports. No reports were submitted from 1999-2003 and 2005-2008. Moreover, although the DOJ twice submitted five years of delinquent data with “dumps” in 2004 and 2009, these reports were apparently incomplete.

19. Senator Patrick Leahy has stressed that reporting requirements for pen registers and trap and trace devices are necessary for the “adequate oversight of the surveillance activities

of federal law enforcement.” Therefore, as a result of its repeated failure to meet these requirements, the DOJ has frustrated Congressional and public oversight.

20. Congressional and public oversight in this area is especially critical. Neither a search warrant nor probable cause is necessary for a government official to obtain an order for a pen register or trap and trace device. But Americans have strong privacy interests in the information that such surveillance techniques capture, including the persons they call on their telephones and the identities of those they email. With such private information at stake, Americans also have a clear interest in knowing how often and under what circumstances the DOJ is compiling government lists of such information. Such government lists reveal a great deal about us, including our political associations, our religious beliefs, the identities of our close friends, and what topics interest us during sessions of private reading and research.

#### FOIA Request

21. On February 15, 2012, the ACLU filed a FOIA request (“the Request”) seeking the release of the statutorily mandated reports, as well as records related to their preparation, for reporting years 2010 and 2011. The Request also encompassed all records regarding whether these reports were indeed submitted to Congress, including any reasons for failure to submit the reports.

22. Plaintiff sought a waiver of search, review, and reproduction fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). The disclosure of the requested records is in the public interest, because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. Disclosure of the requested records will contribute significantly to the public’s understanding of how often and under what circumstances the DOJ conducts searches into private information.

23. Plaintiff also sought a limitation of processing fees on the basis that the ACLU constitutes a representative of the news media and that the records are not sought for commercial use. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II). The ACLU is a representative of the news media because it gathers information of potential interest to the public, compiles that information in raw and processed forms, and makes those compilations available to both the public and news media organizations. The ACLU provides all this information at absolutely no cost to the public and at no cost to other news media organizations. Disclosure is not in the ACLU's commercial interest.

#### Defendant's Response to the Request

24. Although the Request has been pending for nearly three months, only two of the six components of DOJ subject to the Request have disclosed records.

25. By letter dated February 21, 2012, the USMS acknowledged receipt of the Request and assigned it tracking number 2012USMS19587. By letter dated April 30, 2012, the USMS stated it had located 1,463 pages of records responsive to the Request, and disclosed 100 pages of those records. It acknowledged the ACLU's status as a representative of the news media and granted the ACLU a waiver of search fees as well as a waiver of duplication fees for the first 100 pages. However, it declined to grant the ACLU a waiver or reduction in further duplication fees, because it concluded that there is no public interest in disclosure of the requested records. It required payment of \$136.60 before it would produce the remaining 1,363 documents. On May 9, 2012, the ACLU filed an administrative appeal.<sup>1</sup>

26. By letter dated February 22, 2012, the DEA acknowledged receipt of the Request and assigned it tracking number 12-00172-F. This letter made no reference to plaintiff's requests

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<sup>1</sup> Because of the pending administrative appeal, the ACLU's claims against the USMS are not yet ripe. A description of the status of the ACLU's Request to USMS is included for completeness, and in anticipation of amending the Complaint to seek relief against USMS should it not reconsider its decision to deny the ACLU a fee waiver on appeal.

for fee waivers, and noted that FOIA fees up to \$25.00 may be charged. There has been no further response from the DEA.

27. By letter dated March 8, 2012, the FBI acknowledged receipt of the Request and assigned it tracking number 1184317-000. This letter also noted that plaintiff's request for fee waivers were being considered. There has been no further response from the FBI.

28. By letter dated March 15, 2012, the OIP acknowledged receipt of the Request and assigned it tracking number 12-00454. By letter dated May 14, 2012, the OIP released 14 pages of records to the ACLU. However, it referred 529 pages of records to the Criminal Division for further processing. To date, plaintiff has not received any of these records.

29. There has been no response whatsoever from the Criminal Division or the ATF.

#### **Causes of Action**

30. Defendant's failure to promptly make available the records sought by the Request violates the FOIA, 5 U.S.C. § 552(a)(3)(A), and defendant's corresponding regulations.

31. Defendant's failure to properly respond to plaintiff's request for a waiver of search, review, and duplication fees violates the FOIA, 5 U.S.C. § 552(a)(4)(A)(iii), and defendant's corresponding regulations.

32. Defendant's failure to grant plaintiffs' request for a limitation of fees violates the FOIA, 5 U.S.C. § 552(a)(4)(A)(ii)(II), and defendant's corresponding regulations.

#### **Requested Relief**

WHEREFORE, Plaintiffs respectfully request that this Court:

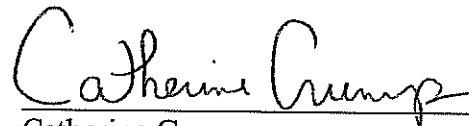
- A. Order the defendant's components the Criminal Division, DEA, FBI, ATF, and OIP immediately to process all records responsive to the Request;



- B. Enjoin the Defendant's components the Criminal Division, DEA, FBI, ATF, and OIP from charging plaintiff search, review, or duplication fees for the processing of the Request;
- C. Issue a declaration that the ACLU qualifies as a "representative of the news media" for purposes of fee assessments under the FOIA;
- D. Award plaintiff its costs and reasonable attorneys' fees incurred in this action; and
- E. Grant such other relief as the Court may deem just and proper.

Dated: May 23, 2012

Respectfully submitted,



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