

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

AMERICAN CIVIL LIBERTIES UNION and
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION,

Plaintiffs,

v.

OFFICE OF THE DIRECTOR OF
NATIONAL INTELLIGENCE, NATIONAL
SECURITY AGENCY, CENTRAL
INTELLIGENCE AGENCY, and
DEPARTMENT OF JUSTICE,

Defendants.

**AMENDED COMPLAINT FOR
INJUNCTIVE RELIEF**

Case No. 18-cv-12131 (LGS)

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INTRODUCTION

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for injunctive and other appropriate relief. Plaintiffs American Civil Liberties Union and American Civil Liberties Union Foundation (together, the “ACLU”) seek the immediate processing and timely release of agency records from Defendants Office of the Director of National Intelligence (“ODNI”), National Security Agency (“NSA”), Central Intelligence Agency (“CIA”), and U.S. Department of Justice (“DOJ”).

2. On November 21, 2018, Plaintiffs submitted a FOIA request (the “Request”) to ODNI, NSA, CIA, and DOJ seeking records related to the Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015 (“USA Freedom Act” or “the Act”), 129 Stat. 268. The Request seeks information concerning the scope of the government’s surveillance activities under the USA Freedom Act and the efficacy of reforms intended to strengthen privacy protections for Americans.

3. To date, none of the Defendants has released any responsive records.

4. The failure of Defendants to identify and release responsive records is of particular concern because the Request relates to sweeping surveillance activities that implicate core privacy and free speech rights of Americans.

5. The government relies on the USA Freedom Act to engage in the broad collection of Americans’ private information. Most notably, the Act reauthorized, in modified form, Section 215 of the Patriot Act, which the government uses to collect vast amounts of Americans’ communications records, financial records, and other data without a warrant. This provision, along with two others, is set to expire in 2019. However, the public lacks essential information

about the breadth of surveillance under Section 215 today, the ways in which this surveillance is used, and its impact on American citizens and residents. Timely disclosure of the requested records is critical to the ongoing public debate about the lawfulness of Section 215. Without additional information, the public will be unable to engage in an informed debate concerning Section 215's potential reauthorization or other necessary surveillance reforms.

6. Plaintiffs now ask the Court for an injunction requiring ODNI, NSA, CIA, and DOJ to process the Request immediately. Plaintiffs also seek an order enjoining Defendants from assessing fees for the processing of the Request.

JURISDICTION AND VENUE

7. The Court has subject-matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). The Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701–706.

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

PARTIES

9. Plaintiff American Civil Liberties Union is a nationwide non-profit and non-partisan 501(c)(4) organization with more than 1.5 million members dedicated to the constitutional principles of liberty and equality. The American Civil Liberties Union is committed to ensuring that the United States government complies with the Constitution and laws of this country, including its international legal obligations in matters that affect civil liberties and human rights. The American Civil Liberties Union 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 and human rights. Obtaining information about governmental activity, analyzing that information, and

widely publishing and disseminating it to the press and the public is a critical and substantial component of the American Civil Liberties Union's work and one of its primary activities. The American Civil Liberties Union is incorporated in New York State and has its principal place of business in New York City.

10. Plaintiff American Civil Liberties Union Foundation is a separate 501(c)(3) organization that educates the public about civil liberties and employs lawyers who provide legal representation free of charge in cases involving civil liberties. It is incorporated in New York State and has its principal place of business in New York City.

11. Defendant ODNI 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).

12. Defendant NSA is an intelligence agency established within the executive branch of the U.S. government and administered through the Department of Defense. The NSA is an agency within the meaning of 5 U.S.C. § 552(f)(1).

13. Defendant CIA is an intelligence agency established within the executive branch of the U.S. government and is an agency within the meaning of 5 U.S.C. § 552(f)(1).

14. Defendant 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 National Security Division ("NSD"), the Office of the Inspector General ("OIG"), and the Federal Bureau of Investigations ("FBI"), from which the ACLU has requested records, are components of DOJ.

FACTUAL BACKGROUND

The USA Freedom Act

15. The USA Freedom Act was enacted in June 2015 in response to public demands for surveillance reform following revelations that the NSA was collecting the phone records of

millions of Americans in bulk. Those revelations also showed that the government had collected Americans' Internet metadata and financial records in bulk, unbeknownst to the public, based on secret legal interpretations.

16. The USA Freedom Act modified several of the surveillance provisions that the government has used to broadly monitor Americans' communications and other private information. Two key provisions addressed by the Act were Section 215 of the Patriot Act, 50 U.S.C. § 1861, and the pen-register provision of the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. §§ 1841–46.

17. Among other reforms, the USA Freedom Act prohibited bulk collection under Section 215 and FISA's pen-register provision, mandated the disclosure of certain judicial opinions issued by the Foreign Intelligence Surveillance Court ("FISC"), and imposed new reporting requirements to aid the public's understanding of the government's surveillance activities. *See* 129 Stat. 268.

18. With respect to Section 215, the USA Freedom Act put an end to the NSA's bulk collection of Americans' call records. Instead, the Act created a new framework for the government to conduct wide-ranging queries of communications records held by companies. For example, the government is permitted to collect the complete communications records of a target, *plus* the complete communications records of every individual who is in contact with that target. The government must conduct these queries based on specific search terms and must apply procedures that minimize the collection and retention of irrelevant records.

19. The USA Freedom Act also reformed the FISC. The Act provided for the appointment of amici curiae to help the Court evaluate applications that "present[] a novel or significant interpretation of the law," 50 U.S.C. § 1803(i)(2)(A), and it requires the Director of

National Intelligence to make certain FISC opinions publicly available “to the greatest extent practicable,” *id.* § 1872(a).

20. Despite these reforms, surveillance under Section 215 continues to be conducted on an immense scale: for example, in 2017, the government collected more than 534 million call detail records, even though it had only 40 surveillance targets.

21. At the same time, the public lacks other basic information about the breadth of Section 215 surveillance and how the USA Freedom Act has been interpreted since its passage three years ago. The government has failed, for example, to comply with the Act’s requirement that it publicly report the number of unique identifiers returned by the government’s queries of communications data. *See* 50 U.S.C. § 1873(b)(5)(B). Nor has the government disclosed many of the rules that set the bounds of Section 215 surveillance, including its current minimization procedures and interpretations of key statutory terms intended to limit the scope of this surveillance.

22. Section 215 is scheduled to expire in 2019, and Congress will soon begin to debate whether to reauthorize this controversial surveillance authority.

23. There continue to be significant gaps in the public’s understanding of Section 215 and other provisions of FISA. Release of the requested records will provide crucial information about the scope of the government’s surveillance authority under Section 215 and the effectiveness of USA Freedom Act’s reform measures in protecting Americans’ privacy.

The FOIA Request

24. On November 21, 2018, the ACLU submitted FOIA Requests to ODNI, NSA, CIA, and DOJ (including its components NSD, OIG, and FBI) seeking the following records:

Records requested from all agencies

- (1) Inspector general reports dated on or after June 1, 2015, concerning surveillance conducted pursuant to 50 U.S.C. § 1861 or 50 U.S.C. §§ 1841–1846.
- (2) Reports or FISC filings dated on or after June 1, 2015, concerning compliance violations related to surveillance conducted pursuant to 50 U.S.C. § 1861 or 50 U.S.C. §§ 1841–1846.
- (3) Policies, procedures, guidance, reports, or FISC filings concerning the requirement that investigations of U.S. persons in which orders are sought pursuant to 50 U.S.C. § 1861 and 50 U.S.C. §§ 1842–43 must not be “conducted solely upon the basis of activities protected by the first amendment to the Constitution.”

Records requested from the Department of Justice, including the FBI

- (4) Filings, orders, or opinions in the FISC or Foreign Intelligence Surveillance Court of Review (“FISCR”) dated on or after June 1, 2015, containing discussion or analysis of:
 - (a) The meaning of “specific selection term” or “specific identifier” in 50 U.S.C. § 1861 or 50 U.S.C. §§ 1841–42.
 - (b) The requirement that a specific selection term “limit, to the greatest extent reasonably practicable, the scope of tangible things sought consistent with the purpose of seeking the tangible things,” 50 U.S.C. § 1861(k)(4)(A)(i)(II).
 - (c) The meaning of “call detail records” in 50 U.S.C. § 1861, including but not limited to the meaning of “session-identifying information.”
- (5) The following minimization procedures:
 - (a) The most recent set of minimization procedures approved as part of an application for the production of call detail records on an ongoing basis, pursuant to 50 U.S.C. § 1861(b)(2)(C).
 - (b) The four most recent sets of minimization procedures approved as part of an application for the production of tangible things, pursuant to 50 U.S.C. § 1861(b)(2)(B).
 - (c) The four most recent sets of privacy or minimization procedures approved as part of an application for installation of a pen register or trap and trace device, pursuant to 50 U.S.C. § 1842.

- (d) The current standard minimization procedures for surveillance conducted pursuant to Title I, Title III, Section 703, Section 704, and Section 705(b) of FISA.
- (6) Filings, orders, or opinions in the FISC or FISCR concerning the Supreme Court's decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018).
- (7) FISC filings dated on or after January 1, 2015, that provide notice pursuant to FISC Rule of Procedure 11—identifying an issue not previously presented to the court—and all related filings, submissions, legal memoranda, orders, or opinions.
- (8) The following records related to the appointment of amici curiae in the FISC:
 - (a) FISC orders or other records dated after June 1, 2015, in which the FISC advised the government that it was considering appointment of an amicus curiae in response to a proposed application; the proposed application itself; and all responsive filings by the government.
 - (b) Legal memoranda, orders, or opinions in the FISC or FISCR in any matter in which an amicus curiae was appointed.
 - (c) Transcripts of any oral argument before the FISC or FISCR in which an amicus curiae participated.
- (9) FISC filings dated on or after January 1, 2015, made by the recipient of a FISC order—including but not limited to any challenge initiated by a communications provider—and all responsive filings by the government.
- (10) Legal memoranda, orders, or opinions in the FISC or FISCR addressing the applicability of the Fourth Amendment or FISA to the use of cell-site simulator technology—including but not limited to a “stingray” device—as well as the most recent set of minimization procedures approved as part of an application in the FISC to use cell-site simulator technology.
- (11) Notifications of FISA surveillance:
 - (a) Provided pursuant to 50 U.S.C. § 1845(c) or (d) and dated on or after January 1, 2009.
 - (b) Provided pursuant to 50 U.S.C. § 1881e(a) or (b) and dated on or after January 1, 2009.
- (12) The criminal complaint or indictment for each criminal case filed on or after June 1, 2015, in which investigators or prosecutors received information

obtained or derived from Section 215, 50 U.S.C. § 1861, including but not limited to “lead” information.

25. Plaintiffs sought expedited processing of the Request on the grounds that there is a “compelling need” for these records because the information requested is urgently needed by an organization primarily engaged in disseminating information in order to inform the public about actual or alleged federal government activity. 5 U.S.C. § 552(a)(6)(E).

26. Plaintiffs sought a waiver of search, review, and reproduction fees on the grounds that 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.” *Id.* § 552(a)(4)(A)(iii).

27. Plaintiffs also sought a waiver of search and review fees on the grounds that the ACLU qualifies as a “representative of the news media” and that the records are not sought for commercial use. *Id.* § 552(a)(4)(A)(ii).

Defendants’ Responses to the Request

28. Despite the urgent public interest surrounding the requested documents, none of the Defendants has released any record in response to the Request. Some of the Defendants have granted the ACLU’s requests for waiver of fees, while others have denied that same request. All Defendants have denied the ACLU’s request for expedited processing.

29. Under the statute, Defendants ordinarily have twenty working days to respond to a request, and have an additional ten working days if certain “unusual circumstances” apply. *See* 5 U.S.C. § 552(a)(6)(A)(i), (B)(i). More than thirty working days have passed since Plaintiffs submitted the Request. Thus, the statutory time-period has elapsed.

Office of the Director of National Intelligence

30. By email dated December 7, 2018, ODNI acknowledged receipt of the Request and assigned it reference number DF-2019-00070. ODNI denied Plaintiffs' request for expedited processing and granted their request for a fee waiver.

31. On December 13, 2018, Plaintiffs timely filed by email an administrative appeal from the ODNI's denial of expedited processing. Plaintiffs' administrative appeal remains pending.

32. To date, ODNI has neither released responsive records nor explained its failure to do so. Plaintiffs have exhausted all administrative remedies because ODNI has failed to comply with the time limit for responding to the Request under FOIA.

33. ODNI continues to wrongfully withhold the requested records from Plaintiffs.

National Security Agency

34. By letter dated December 3, 2018, the NSA acknowledged receipt of the Request and assigned it reference number 105767. The NSA denied Plaintiffs' request for expedited processing and stated that there will be no assessable fees for Plaintiffs' request.

35. On December 13, 2018, Plaintiffs timely filed by email an administrative appeal from the NSA's denial of expedited processing. By letter dated December 21, 2018, the NSA responded to Plaintiffs' administrative appeal and affirmed its denial of expedited processing.

36. To date, NSA has neither released responsive records nor explained its failure to do so. Plaintiffs have exhausted all administrative remedies because the NSA has failed to comply with the time limit for responding to the Request under FOIA.

37. NSA continues to wrongfully withhold the requested records from Plaintiffs.

Central Intelligence Agency

38. By letter dated November 28, 2018, the CIA acknowledged receipt of the Request and assigned it reference number F-2019-00520. The CIA denied Plaintiffs' request for expedited processing and made no mention of Plaintiffs' request for a fee waiver.

39. On December 14, 2018, Plaintiffs timely filed by fax an administrative appeal challenging the adequacy of CIA's denial of expedited processing.

40. To date, CIA has neither released responsive records nor explained its failure to do so. Plaintiffs have exhausted all administrative remedies because the CIA has failed to comply with the time limit for responding to the Request under FOIA.

41. CIA continues to wrongfully withhold the requested records from Plaintiffs.

Department of Justice

National Security Division

42. By email dated November 29, 2018, NSD acknowledged receipt of the Request and assigned it reference number FOIA/PA #19-033. The email stated that Plaintiffs' request for expedited processing was under consideration. It made no mention of Plaintiffs' request for a fee waiver.

43. By email dated December 10, 2018, NSD denied Plaintiffs' request for expedited processing.

44. On December 13, 2018, Plaintiffs timely filed by email an administrative appeal from the NSD's denial of the request for expedited processing. Plaintiffs' administrative appeal remains pending.

45. To date, NSD has neither released responsive records nor explained its failure to do so. Plaintiffs have exhausted all administrative remedies because NSD has failed to comply with the time limit for responding to the Request under FOIA.

46. NSD continues to wrongfully withhold the requested records from Plaintiffs.

Office of the Inspector General

47. By email dated November 30, 2018, OIG acknowledged receipt of the Request and assigned it control number 19-OIG-061. OIG denied Plaintiffs' request for expedited processing and stated that Plaintiffs would be notified beforehand if fees were required to process the Request.

48. On December 7, 2018, Plaintiffs timely filed by mail an administrative appeal challenging the adequacy of OIG's denial of expedited processing. OIG confirmed receipt of the appeal by email dated December 11, 2018 and assigned it tracking number DOJ-AP-2019-001383. Plaintiffs' administrative appeal remains pending.

49. To date, OIG has neither released responsive records nor explained its failure to do so. Plaintiffs have exhausted all administrative remedies because the OIG has failed to comply with the time limit for responding to the Request under FOIA.

50. OIG continues to wrongfully withhold the requested records from Plaintiffs.

Federal Bureau of Investigation

51. By email dated December 10, 2018, the FBI acknowledged receipt of the Request, denied Plaintiffs' request for expedited processing, and stated that "unusual circumstances" applied, which it said would delay processing of the Request. The FBI also stated that Plaintiffs would be charged applicable duplication fees "[a]s an educational institution, noncommercial

scientific institution or representative of the news media requester” pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II), and it denied Plaintiffs’ request for a fee waiver.

52. On December 19, 2018, Plaintiffs timely filed by mail an administrative appeal from the FBI’s denial of the requests for expedited processing and a fee waiver. Plaintiffs’ administrative appeal remains pending.

53. To date, the FBI has neither released responsive records nor explained its failure to do so. Plaintiffs have exhausted all administrative remedies because the FBI has failed to comply with the time limit for responding to the Request under FOIA.

54. The FBI continues to wrongfully withhold the requested records from Plaintiffs.

CAUSES OF ACTION

55. Defendants’ failure to make a reasonable effort to search for records responsive to the Request violates FOIA, 5 U.S.C. § 552(a)(3), and Defendants’ corresponding regulations.

56. Defendants’ failure to promptly make available the records sought by the Request violates FOIA, 5 U.S.C. §§ 552(a)(3)(A), (a)(6)(A), and Defendants’ corresponding regulations.

57. Defendants’ failure to process Plaintiffs’ request expeditiously and as soon as practicable violates FOIA, 5 U.S.C. § 552(a)(6)(E), and Defendants’ corresponding regulations.

58. Defendants’ failure to grant Plaintiffs’ request for a waiver of search, review, and duplication fees violates FOIA, 5 U.S.C. §§ 552(a)(4), (a)(6), and Defendants’ corresponding regulations.

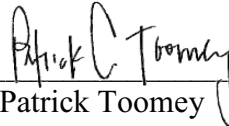
59. Defendants’ failure to grant Plaintiffs’ request for a limitation of fees violates FOIA, 5 U.S.C. §§ 552(a)(4), (a)(6), and Defendants’ corresponding regulations.

REQUESTED RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

- A. Order Defendants to conduct a thorough search for all responsive records;
- B. Order Defendants to immediately process and release any responsive records;
- C. Enjoin Defendants from charging Plaintiffs search, review, or duplication fees for the processing of the Request;
- D. Award Plaintiffs their costs and reasonable attorneys' fees incurred in this action;
and
- E. Grant such other relief as the Court deems just and proper.

Respectfully submitted,



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