

English and numerous other domestic and international publications. Currently, he is a contributor to Al Jazeera America and is the editor-at-large for *The Public Record*.

3. Mr. Leopold seeks access to certain public records to write a news report for distribution to the general public. His connections and relationships with a wide range of domestic and international media organizations will ensure that any story he drafts based on the information contained in these records will be published and reprinted

4. Defendant National Security Agency (NSA) is an agency of the United States.

5. Defendant Department of Justice (DOJ) is an agency of the United States.

6. The Office of Legal Counsel (OLC) is a component of the DOJ.

7. The NSA and DOJ have possession, custody and control of the records Plaintiff seeks.

JURISDICTION AND VENUE

8. This action arises under the Freedom of Information Act (“FOIA”), 5 USC § 552.

9. This Court has jurisdiction over the parties and subject matter pursuant to 5 USC § 552(a)(4)(B).

10. Venue is proper in this district pursuant to 5 USC § 552(a)(4)(B).

INTRODUCTION

11. Hardly a day goes by without new revelations of warrantless and suspicionless surveillance by the NSA.

12. In just the past year, the public has learned that the NSA hacked into United Nations videoconferences,¹ intercepted the phone calls of allied foreign leaders,² and engaged in bulk collecting and storage of telephone metadata relating to calls made in the United States.³

¹ David Meyer, “NSA Hacked into Encrypted UN Communications, leaked documents show,” *The Guardian* (Aug. 25, 2013).

² Ian Traynor, “Angela Merkel: NSA Spying on allies is not on,” *The Guardian* (Oct. 24, 2013).

13. The Foreign Intelligence Surveillance Court has ruled that the NSA's bulk collection and storage of telephone metadata is consistent with both the Fourth Amendment and Section 215 of the USA PATRIOT Act. *In re application of the Federal Bureau of Investigation for an order requiring the production of tangible things from [REDACTED]*, No. BR 13-109 (F.I.S.C. 2013). According to the court, bulk collection is permissible because there is no requirement for "specific and articulable facts" or that the records pertain to "a foreign power or an agent of a foreign power." *Id.* Though the court required access to the bulk data to be limited through a query that requires reasonable, articulable suspicion, the FISC "Court is aware that in prior years there have been incidents of non-compliance with respect to NSA's handling of produced information," despite the fact that "[a]ccording to the government, in the prior authorization period there have been no compliance incidents." *Id.*

14. The vast scope of the NSA's surveillance program has raised questions about whether the agency has spied on the coordinate branches of the federal government. In response to an inquiry from Sen. Bernie Sanders about whether the NSA spies on members of Congress, NSA director Gen. Keith Alexander responded, "Nothing NSA does can fairly be characterized as 'spying on members of Congress or other American elected officials[.]'"⁴ But the response stated that the agency could make no guarantees that representatives or senators have not had their telephone metadata caught in broad government sweeps.⁵ Further, Alexander did not rule out the possibility that the NSA would, in the future, examine the telephone metadata of specific members of Congress or other American elected officials. According to Alexander, "The NSA can query the metadata only based on phone numbers reasonably suspected to be associated with specific foreign terrorist groups" and "[f]or that reason, NSA cannot lawfully search to determine

³ Roberta Rampton, "Obama to propose ending NSA bulk collection of phone records: official," Reuters (Mar. 25, 2014).

⁴ Adam Silverman, "Responding to Sanders, NSA director denies spying on Congress," Burlington Free Press (Jan. 14, 2014).

⁵ *Id.*

if any records NSA has received under the program have included metadata of the phone calls of any member of Congress, other American elected officials, or any other American *without that predicate*.”⁶ But according to Sen. Feinstein, such a query apparently does not require approval from the FISA court.⁷

15. Jerrold Nadler, an attorney and Congressman on the House Judiciary Committee who attended a secret briefing, relayed that he was told that the contents of a phone call could be accessed “simply based on an analyst deciding that.”⁸

16. These revelations beg the question of whether the NSA has spied on the third branch of government, the judiciary.

17. Little is known about whether the NSA has surveilled judges or their staff. With regard to spying on lawyers in the United States more generally, a recent report published by the National Lawyers Guild, *Breach of Privilege*, details covert governing spying on the legal profession by federal agencies, including the NSA.

18. The NSA, and the Executive branch more generally, have a powerful incentive in intercepting communications involving judges or their staff. For example, the NSA might desire to learn about deliberations by this Court in cases involving Guantanamo detainees, or in cases involving the Foreign Intelligence Surveillance Court. It is not beyond peradventure that the NSA would conclude that such deliberations are relevant to an investigation into foreign terrorism and that a federal judge’s phone number could be “associated” with a foreign terrorist organization, in the broadest sense of that word.

19. The Department of Justice, one of the defendants in this case, has previously taken the position that it has the legal authority to mislead federal courts on issues involving

⁶ *Id.* (emphasis added).

⁷ Dan Roberts, “US Intelligence outlines checks it says validate surveillance,” *The Guardian* (June 15, 2013).

⁸ *Id.*

national security. *Islamic Shura Council of S. Cal. v. FBI*, 779 F. Supp. 2d 1114, 1117 (C.D. Calif. 2011)(“The Government asserts that it had to mislead the Court regarding the Government's response to Plaintiffs’ FOIA request to avoid compromising national security.”) To an agency which has taken the position that federal judges cannot be trusted to avoid compromising national security, it would be a logical step to approve, or at least to consider, surveillance of judges who handle national security cases.

STATEMENT OF FACTS

PLAINTIFF’S FOIA REQUESTS

OLC

20. On March 10, 2014, Mr. Leopold sent, via email, a FOIA request to the OLC requesting “any and all memoranda and legal opinion from the Office of Legal Counsel about the propriety of surveilling federal and state judges.” Mr. Leopold requested a waiver of fees.

21. OLC assigned Mr. Leopold’s FOIA request number 14-035.

22. In a letter dated April 2, 2014, OLC informed Mr. Leopold that it had located no responsive records.

23. Mr. Leopold filed an administrative appeal. In a letter dated April 11, 2014, DOJ informed Mr. Leopold that it had received his administrative appeal on April 5, 2014, and assigned it number AP-2014-02314.

24. As of the filing of this Complaint, Mr. Leopold has not received a final response to his appeal AP-2014-02314.

25. Under 5 USC § 552(a)(6)(C)(i), Mr. Leopold is deemed to have exhausted his administrative remedies with regard to the appeal of his FOIA request to OLC because Defendant has failed to comply with the statutory time limit.

NSA

26. On March 10, 2014, Mr. Leopold sent, via email, a FOIA request to the NSA requesting “any and all NSA policies, memoranda, training materials and guidance about the propriety of surveilling federal and state judges.” Mr. Leopold requested a waiver of fees.

27. NSA assigned Mr. Leopold’s FOIA request number 77093.

28. In a letter dated April 4, 2014, NSA informed Mr. Leopold that it had begun processing his request.

29. As of the filing of this Complaint, Mr. Leopold has not received a response to his FOIA to NSA with a determination as to whether NSA will grant his request for a fee waiver.

30. As of the filing of this Complaint, Mr. Leopold has not received a response to his FOIA request to NSA with a determination as to whether NSA will release or withhold all of the requested records.

31. Under 5 USC § 552(a)(6)(C)(i), Mr. Leopold is deemed to have exhausted his administrative remedies with regard to his FOIA request to NSA because Defendant has failed to comply with the statutory time limit.

COUNT I:
VIOLATION OF FOIA

32. This Count realleges and incorporates by reference all of the preceding paragraphs.

33. Each of the documents referred to in this Complaint is incorporated herein by reference.

34. Defendants have violated FOIA by improperly withholding the requested records.

35. Defendants have violated FOIA by failing to conduct an adequate search.

36. Defendants have violated FOIA by failing to grant Mr. Leopold's requests for a fee waiver.

37. Mr. Leopold has been and will continue to be irreparably harmed until Defendants are ordered to produce the requested records.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

- (1) Declare Defendant's failure to comply with FOIA to be unlawful;
- (2) Declare that Plaintiff is entitled to a fee waiver under FOIA;
- (3) Order Defendant to process the requested records without further delay and release all nonexempt portions to Plaintiff without charging Plaintiff fees;
- (4) Grant Plaintiff an award of attorney fees and other litigation costs reasonably incurred in this action pursuant to 5 USC § 552(a)(4)(E)(i);
- (5) Grant Plaintiff such other and further relief which the Court deems proper.

Respectfully Submitted,

/s/ Jeffrey Light

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