

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

and

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

and

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

and

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

Plaintiffs,

v.

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

Defendant.

CASE NUMBER 1:02CV02077

JUDGE: Ellen Segal Huvelle

DECK TYPE: FOIA/Privacy Act

DATE STAMP: 10/24/2002

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**FILED**

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COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for injunctive and other appropriate relief, and seeking the immediate processing and release of agency records requested by plaintiffs from defendant Department

of Justice ("DOJ") and DOJ's component, Federal Bureau of Investigation ("FBI").

2. Plaintiffs' FOIA request seeks the release of records related to the government's implementation of the USA PATRIOT Act ("Patriot Act" or "Act"), Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001), legislation that was passed in the wake of the September 11 terrorist attacks. Neither this suit nor the underlying FOIA request questions the importance of safeguarding national security. However, there has been growing public concern about the scope of the Patriot Act and the government's use of authorities thereunder, particularly in relation to constitutionally protected rights. Plaintiffs seek records that are critical to the public's ability to evaluate the government's use of vast new surveillance powers, and whose release can only serve national security, not undermine it.

3. Plaintiffs requested expedited processing of their FOIA request on the grounds that the records sought pertained to "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence," 28 C.F.R. § 16.5(d)(1)(iv). The government granted that request by letter dated September 3. To date, however, the government has furnished no substantive response to the underlying FOIA request. More than two months have now passed since that request was filed.

#### Jurisdiction and Venue

4. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant

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

Parties

5. Plaintiff American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan organization with almost 300,000 members dedicated to the constitutional principles of liberty and equality. The ACLU's work includes assessing the impact of federal legislation on civil liberties. The organization publishes newsletters, news briefings, right-to-know handbooks, and other materials that are disseminated to the public. Its material is widely available to everyone, including tax-exempt organizations, not-for-profit groups, law students and faculty, for no cost or for a nominal fee through its public education department. The ACLU also disseminates information through its website <[www.aclu.org](http://www.aclu.org)> and through an electronic newsletter, which is distributed to subscribers by e-mail.

6. Plaintiff Electronic Privacy Information Center ("EPIC") is a public interest research organization incorporated as a not-for-profit corporation in Washington, DC. EPIC's activities include the review of federal investigative activities and policies to determine their possible impact on civil liberties and privacy interests. Among its other activities, EPIC publishes books, reports, and a bi-weekly electronic newsletter. EPIC also maintains a heavily-visited website <[www.epic.org](http://www.epic.org)> containing extensive information on privacy issues, including

information EPIC has obtained from federal agencies under the FOIA.

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

8. Plaintiff Freedom to Read Foundation ("FTRF") is a non-profit membership organization established in 1969 by the American Library Association to promote and defend First Amendment rights; to foster libraries as institutions fulfilling the promise of the First Amendment for every citizen; to support the rights of libraries to include in their collections and make available to the public any work they may legally acquire; and to set legal precedent for the freedom to read on behalf of all

citizens. Plaintiff FTRF joined the FOIA request of ACLU, EPIC, and ABFFE by letter to defendant dated Oct. 21, 2002.

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

#### The Patriot Act

10. The Patriot Act was enacted in October, 2001. The President signed it into law on October 26. The Act vastly expanded the government's power to obtain personal information pertaining to individuals present in the United States, including permanent residents and United States citizens.

11. Section 215 of the Act amended the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1801 *et seq.*, to allow the FBI to require the production of "any tangible thing[]." The predecessor provision could be invoked only against common carriers, vehicle rental agencies, and similar entities; the Patriot Act removed this restriction. Thus, the new provision can be used to obtain circulation records from libraries, purchase records from bookstores, academic records from universities, medical records from hospitals, or e-mail records from internet service providers. The government need not show probable cause or any individualized suspicion of criminal activity; rather, it need only assert that its request is "for an authorized investigation . . . to protect against international terrorism or clandestine intelligence activities." Section 215 orders can be served on United States citizens, and

they can be issued in part on the basis of First Amendment activity. The subject of a Section 215 order is not provided any notice of the fact that her privacy has been compromised. Further, an entity from which the FBI obtains tangible things under Section 215 is prohibited from disclosing to any person that the FBI made the request.

12. Section 214 amends FISA to allow the government to employ "pen registers" and "trap and trace" devices more broadly. As under Section 215, the FBI need not show probable cause or any individualized suspicion of criminal activity. Section 214 orders can be served on United States citizens and can be issued in part on the basis of First Amendment activity. The subject of a Section 214 order is not provided any notice of the fact that her privacy has been compromised. Any entity whose assistance the government needs in order to effect the surveillance is prohibited from disclosing to any person that the government made the request.

13. Section 213 amends the Federal Rules of Criminal Procedure to allow "sneak-and-peek" searches - that is, searches for which the subjects receive notice only long after the search has been executed. Previously, the Federal Rules made no provision for delayed notice.

14. Section 206 amends FISA to allow "roving" electronic surveillance. Previously, the government was required to specify, in any application for an electronic surveillance order, the persons or entities whose cooperation would be necessary to effect the surveillance. Section 206 amends FISA

to allow the government to obtain surveillance orders without specifying the entities or persons whose cooperation will be needed. Effectively, Section 206 allows the government to intercept all of a person's wire or electronic communications, regardless of the person's location when communicating.

Widespread Public Concern about Government's  
Implementation of the Patriot Act

15. Since the Patriot Act was enacted in October 2001, there has been growing public concern about the scope of the Act and the manner in which the government has been using its expanded authority. Numerous newspapers and magazines have published articles and editorials questioning the necessity for the Act and doubting the wisdom of sacrificing individual liberties for the promise of increased security.

16. Public concern has become sufficiently widespread that Congress has sought to monitor closely the implementation of the Act. On June 13, 2002, the Chairman and Ranking Member of the House Judiciary Committee sent a 16-page letter to the Attorney General, noting that it is the responsibility of the House Judiciary Committee to "conduct oversight of the [DOJ's] implementation of the USA PATRIOT Act" and requesting that the Department of Justice respond to 50 detailed questions about its use of authorities under the Act. The June 13 letter requested that, if any answers required the disclosure of classified material, the DOJ "provide those answers under separate cover to the Committee in accordance with appropriate security procedures."

17. The DOJ provided a partial response on July 26. The July 26 letter, signed by Assistant Attorney General Daniel J. Bryant, supplied answers to 28 of the 50 questions posed by the House Judiciary Committee's letter. In addition, the July 26 letter stated that classified answers to six additional questions would "be provided to the House Permanent Select Committee on Intelligence through the appropriate channels."

18. On or about August 29, the DOJ supplied answers to the remaining 22 questions posed by the House Judiciary Committee's June 13 letter. None of these answers referenced classified material.

Plaintiff's FOIA Request  
and Request for Expedited Processing

19. Plaintiffs submitted their FOIA request in separate letters to the DOJ and FBI, both dated August 21. (As noted above, plaintiff FTRF joined the FOIA request of ACLU, EPIC, and ABFFE by letter to defendant dated Oct. 21, 2002.) The request sought records relating to defendant's implementation of the Patriot Act, focusing on those surveillance provisions of the Act that have obvious and serious implications for individual privacy and the freedom of speech.

20. For example, plaintiffs requested all policy directives and other guidance issued by DOJ and/or FBI regarding the use of authority granted by Section 215 of the Patriot Act, which the government is reportedly using to obtain records from libraries,



bookstores, and internet service providers. Plaintiffs also requested all policy directives and other guidance issued by DOJ and/or FBI regarding the expanded use of pen registers and trap & trace devices authorized by Section 214.

21. Plaintiffs' request also sought all records prepared or collected by DOJ and/or FBI in connection with the classified answers referenced in the DOJ's letter of July 26. Plaintiffs believe that these answers were improperly classified, as they consist only of aggregate, statistical information whose disclosure would not jeopardize ongoing investigations or any legitimate government interest.

22. Under separate cover, but also by letter dated August 21, plaintiffs requested expedited processing of their FOIA request, stating 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" (internal quotation marks omitted).

23. By letter dated September 3, the DOJ acknowledged receipt of plaintiffs' FOIA request and granted plaintiffs' request for expedited processing, noting that the DOJ had "initiated searches in the Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, Legislative Affairs and Legal Policy" and that the DOJ would notify plaintiffs "as soon as those searches are completed."

24. By letter to the FBI dated September 5, plaintiffs sought confirmation that the FBI (as well as the DOJ) would expedite the processing of plaintiffs' FOIA request.

25. The FBI responded by letter dated September 18, confirming that the FBI would expedite processing of plaintiffs' request.

26. By telephone on October 16, defendant DOJ stated that it has not yet determined which records, if any, to disclose in response to plaintiffs' FOIA request.

Defendants' Failure to  
Disclose the Records Sought

27. Notwithstanding defendant's assurance that the processing of plaintiffs' request would be expedited, to date defendant has not disclosed any record in response to plaintiffs' FOIA request nor stated which records, if any, it intends to disclose. It has now been more than two months since plaintiffs submitted their request.

28. Defendant is improperly withholding the records sought by plaintiffs' FOIA request.

29. Plaintiffs have exhausted the applicable administrative remedies.

CAUSES OF ACTION

First Cause of Action:

Violation of the FOIA for Failure to Make Promptly  
Available the Records Sought by Plaintiffs' Request

30. Plaintiffs repeat and reallege paragraphs 1-29.

31. Defendant's failure to make promptly available the records sought by plaintiffs' request violates the FOIA, 5 U.S.C. § 552(a) (3) (A).

Second Cause of Action:

Violation of the FOIA for Failure Timely to Respond to Plaintiffs' Request

32. Plaintiffs repeat and reallege paragraphs 1-29.

33. Defendant's failure timely to respond to plaintiffs' request violates the FOIA, 5 U.S.C. § 552(a) (6) (A) (i), and DOJ's own regulation promulgated thereunder, 28 C.F.R. § 16.6(b).

Third Cause of Action

Violation of the FOIA for Failure to Expedite the Processing of Plaintiffs' Request

34. Plaintiffs repeat and reallege paragraphs 1-29.

35. Defendant's failure to expedite the processing of plaintiffs' request violates the FOIA, 5 U.S.C. § 552(a) (6) (E) (iii), and DOJ's own regulation promulgated thereunder, 28 C.F.R § 16.5(d).

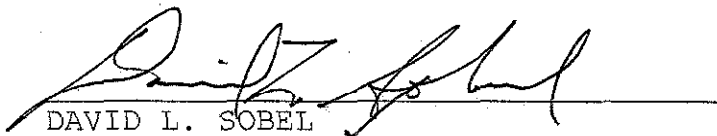
Requested Relief

WHEREFORE, plaintiffs pray that this Court:

- A. order defendant immediately to state which records it intends to disclose in response to plaintiffs' FOIA request;
- B. order defendant immediately to process plaintiffs' FOIA request and to disclose the requested records;

- C. award plaintiff its costs and reasonable attorneys fees incurred in this action; and
- D. grant such other relief as the Court may deem just and proper.

Respectfully submitted,



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