

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION and
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION,

Plaintiffs,

v.

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

Defendants.

**COMPLAINT FOR
INJUNCTIVE RELIEF**

Case No. 1:16-cv-8936

Hon. _____

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COMPLAINT FOR INJUNCTIVE RELIEF

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 record

Section 702. Without additional information, the public will be unable to engage in an informed debate concerning Section 702's potential reauthorization.

6. Plaintiffs now ask the Court for an injunction requiring NSA, ODNI, DOJ, and CIA 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), (a)(6)(E)(iii). 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 500,000 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 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).

12. Defendant ODNI is a department of the execuDe M

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FACTUAL BACKGROUND

Section 702 of FISA

15. Congress enacted Section 702 as part of the FISA Amendments Act of 2008 (“FAA”), giving the government broad authority to monitor Americans’ international communications without a warrant. *See* 50 U.S.C. § 1881a.

16. While Section 702 surveillance is ostensibly “targeted” at foreigners located overseas, the government uses this authority to acquire the phone calls, emails, and other internet communications of Americans who are in contact with its foreign targets.

17. For example, the government may collect Americans’ communications when a U.S. person communicates with family members, friends, business associates, or other contacts abroad whom the government has targeted under Section 702. The government may also collect Americans’ communications when it mistakenly targets a U.S. person for surveillance.

18. The government implements Section 702 through at least two programs: the “PRISM” and “Upstream” programs.

19. Using PRISM surveillance, the government compels electronic communications providers—like Apple, Facebook, and Microsoft—to furnish communications sent to or from a target’s account, such as an email account used by a non-U.S. person located overseas.

20. Through Upstream surveillance, the government intercepts international telephone calls and internet communications as they are routed across major communications networks inside the United States. With respect to internet communications, the government compels providers—like AT&T and Verizon—to search the contents of international traffic in bulk for communications that are to, from, or about the NSA’s targets.

21. Judicial review of Section 702 surveillance is narrowly circumscribed. Once a year, the government presents a set of certifications to the Foreign Intelligence Surveillance Court (“FISC”), describing at a high level of generality the surveillance the government intends to conduct. Those certifications do not identify the government’s individual targets, nor do they specify the various places and facilities at which its surveillance will be directed. *See* 50 U.S.C. §§ 1881a(a), 1881a(g).

22. Section 702 surveillance is not predicated on an individualized determination of probable cause or on any suspicion of wrongdoing. More broadly, the FISC does not approve, supervise, or review the government’s interception of individual Americans’ communications.

23. The statute’s safeguards are limited to the requirement that each agency adopt “targeting” and “minimization” procedures, which must be “reasonably designed . . . to minimize the acquisition and retention, and prohibit the dissemination” of U.S. person information. 50 U.S.C. § 1881a(e); *id.* § 1801(h)(1). These procedures, however, grant the government wide latitude to seize, search, analyze, and use the communications of Americans.

24. Surveillance under Section 702 is conducted on an immense scale: in 2015 alone, the government relied on Section 702 to obtain the communications of 94,368 targets under a single court order.

25. The public, however, still lacks basic information about the breadth of Section 702 surveillance and the policies and procedures that apply to this surveillance. The government has not disclosed, for example, the number of communications involving Americans that are subject to Section 702 surveillance. Nor has the government disclosed many of the rules that set the bounds of this surveillance today, including its current targeting procedures, its current

minimization procedures, and its complete sets of rules for using Section 702 to investigate or prosecute individual Americans.

26. Section 702 is scheduled to expire in 2017, and Congress has already begun to hold hearings about whether to reauthorize this warrantless surveillance authority.

27. Because disclosures to date leave significant gaps in the public's understanding of Section 702 surveillance, release of the requested records will provide crucial information about how Section 702 is being used by the government and what safeguards exist to protect Americans' privacy.

The FOIA Request

28. On September 14, 2016, the ACLU submitted identical FOIA requests to the FBI, NSA, and DHS. The requests sought records regarding the use of Section 702 surveillance authority.

- (f) The most recent version of the NSA “FAA 702 Curriculum,” including the training courses titled “FISA Amendments Act (FAA) 702” (also known as “OVSC1203”), “FAA 702 Practical Applications,” “FAA 702 Adjudicator Training,” and “FAA 702 Targeting Adjudication.”

29. 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. § 522(a)(6)(E).

30. 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).

31. 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

32. 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 expedited processing and waiver of fees, while others have denied those same requests.

33. Under the statute, Defendants have twenty working days to respond to a request. *See* 5 U.S.C. § 552(a)(6)(A)(i). If there are “unusual circumstances,” an agency may extend the time limit by no more than ten working days. More than 30 working days have passed since Plaintiffs filed the Request. Thus, these time periods have elapsed.

NSA

34. By letter dated September 23, 2016, the NSA acknowledged receipt of the Request and assigned it reference number 85461. The NSA denied Plaintiffs' request for expedited processing and their request for a fee waiver. The NSA further denied Plaintiffs' request that Plaintiffs be placed in the "media" fee category, and instead placed Plaintiffs in the "all other" fee category.

35. On October 28, 2016, Plaintiffs timely filed by mail an administrative appeal from the NSA's denial of the request for expedited processing, the denial of the request for a fee waiver, and the placement of Plaintiffs in the "all other" fee category. NSA received the appeal on October 31, 2016. Plaintiffs' administrative appeal remains pending.

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.

Office of the Director of National Intelligence

38. By letter dated September 20, 2016, ODNI acknowledged receipt of the Request and assigned it reference number DF-2016-00314. ODNI denied Plaintiffs' request for expedited processing and granted their request for a fee waiver.

39. To date, ODNI has neither released responsive records nor explained its failure to do so. Plaintiffs have ex nor th nor exp ee

47. 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.

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

*Office of Information Policy, Office of the Attorney General,
and Office of the Deputy Attorney General*

49. By two emails dated September 22, 2016, the OIP acknowledged receipt of the Request and assigned it two reference numbers: DOJ-2016-005518 (Office of the Attorney General) and DOJ-2016-005536 (Office of the Deputy Attorney General).

50. By letter dated September 23, 2016, OIP, responding on behalf of the Offices of the Attorney General and Deputy Attorney General, granted the request for expedited processing and deferred consideration of the request for a fee waiver. The letter stated that the Request had been assigned to a Government Information Specialist in the Office of Information Policy and that records searches had been initiated in the Offices of the Attorney General and Deputy Attorney General.

51. In the same letter, OIP advised Plaintiffs that “unusual circumstances” would impact the time required to process the Request, and that the office would need more than the ten additional days provided by the statute to respond.

52. To date, OIP, the Office of the Attorney General, and the Office of the Deputy Attorney General have neither released responsive records nor explained their failure to do so. Plaintiffs have exhausted all administrative remedies because OIP, the Office of the Attorney General, and the Office of the Deputy Attorney General have failed to comply with the time limit for responding to the Request under FOIA

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