

JUDGE SCHEINDLIN

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION,

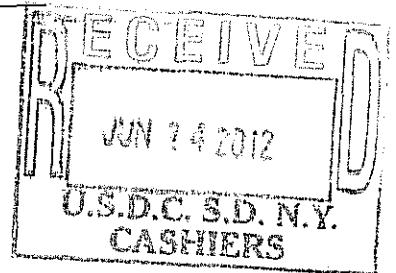
Plaintiff,

v.

UNITED STATES DEPARTMENT OF
JUSTICE, including components Criminal
Division, Executive Office for United States
Attorneys, Office of Information Policy, and
Office of Legal Counsel; UNITED STATES
DEPARTMENT OF THE TREASURY,
including component Internal Revenue
Service,

Defendants.

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 from defendants Department of Justice, including its components Criminal Division, Executive Office for United States Attorneys, Office of Information Policy, and Office of Legal Counsel, and Department of the Treasury, including its component Internal Revenue Service.

2. On February 16, 2012, plaintiff submitted a FOIA request ("the Request") seeking records from defendants regarding the government's access to the contents of individuals' private electronic communications.

3. Recent court decisions and media reports reveal that federal officials are accessing the contents of at least some types of private electronic communications without a warrant. This practice raises serious privacy concerns. Due to the widespread use of e-mail, text messaging, and other forms of private electronic communication, government monitoring of these communications is of great concern to the many individuals who rely on them to exchange information privately with others. Accordingly, there is a public interest in disclosure of the records requested.

4. Defendants have failed to fulfill their obligation to make the requested information available in a timely fashion. Defendants have not released a single record in response to the Request.

5. Plaintiff is entitled to the records it seeks. These records will significantly contribute to the public's understanding of when and how federal authorities are accessing the contents of private electronic communications. Plaintiff is further entitled to a waiver of processing fees because the release of the requested records is in the public interest, and to a limitation of processing fees because the ACLU is a "news media" requester.

6. Plaintiff seeks an injunction requiring defendants to process the Request immediately and expeditiously. Plaintiff also seeks an order enjoining defendants from assessing fees for the processing of the Request.

Jurisdiction and Venue

7. 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.

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

Parties

9. Plaintiff American Civil Liberties Union Foundation (“ACLU”) is a nationwide, non-profit, nonpartisan organization dedicated to the constitutional principles of liberty and equality. The ACLU is committed to ensuring that the U.S. government acts in compliance with the Constitution and laws. 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 is a critical and substantial component of the ACLU’s work and one of its primary activities.

10. Defendant Department of Justice (“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 targets four specific subdivisions of the DOJ: the Criminal Division, the Executive Office for United States Attorneys (“EOUSA”), the Office of Information Policy (“OIP”), and the Office of Legal Counsel (“OLC”).¹ The DOJ is headquartered in Washington, D.C.

11. Defendant Department of the Treasury is an agency within the meaning of 5 U.S.C. § 552(f)(1). Internal Revenue Service is a component of the U.S. Department of the Treasury. The Department of the Treasury is headquartered in Washington, D.C.

¹ Plaintiff filed an identical FOIA request with DOJ component the Federal Bureau of Investigation, but have not yet exhausted its administrative appeal process. Plaintiff anticipates amending this complaint to add the FBI as soon as it is entitled to do so.

Factual Background

12. Recent court decisions and media reports reveal that federal agents are accessing the contents of private electronic communications without a warrant. This practice raises serious privacy concerns.

13. For many Americans, private electronic communications have supplanted the telephone and postal service as their primary means of communicating with others. Since 2006, first-class mail volume has fallen 26%, and it is projected to decline an additional 32% by 2020. Meanwhile, the use of electronic methods of communication has grown dramatically and is now widespread. Ninety-two percent of those adults with Internet access use email. Moreover, six in ten adult Internet users check their email every day. Eighty-three percent of adult Americans own a cell phone, and of those cell phone users, 75% send and receive text messages. These individuals send and receive an average of 41.5 total messages per day; the median user sends and receives 10 text messages per day. Social networking websites, such as Facebook, Twitter, and Myspace, are very popular, and are used by 66% of adult Internet users. Among their other uses, these networks enable users to send private messages to one another.

14. The widespread reliance on these methods to communicate with friends, family, and colleagues creates a strong public interest in determining to what extent the government is accessing private electronic communications without a warrant based on probable cause.

15. Little is known about the government's policies, practices, and procedures for accessing the content of private electronic communications without a warrant. In *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010), the Sixth Circuit held that the government violated the Fourth Amendment when it accessed over 27,000 emails from the defendant's email account without a warrant based on probable cause. It is unknown whether, after *Warshak*, the

government continues to access email without warrants in routine law enforcement investigations. It is also unknown whether the government accesses other forms of private electronic communications, such as text messages and private messages sent through social networking sites, without a warrant based upon probable cause.

16. What little is known about government surveillance of private electronic communications has prompted public outcries, scrutiny, and debate. The *Warshak* decision was covered extensively in the media. The FBI's "Carnivore" program, which the agency used to monitor criminal suspects' email and Internet usage, caused a great deal of controversy when it was revealed in 2000. The National Security Agency has faced years of public scrutiny and debate over its domestic surveillance program, particularly on the matter of e-mail surveillance.

FOIA Request

17. On February 16, 2012, the ACLU filed a FOIA request seeking release of records regarding access to the contents of private electronic communications by certain of defendants' components. For each component, the Request sought:

1. Policies, procedures, and practices followed to obtain the contents of private electronic communications for law enforcement purposes.
2. Policies, procedures, and practices followed to obtain the contents of private electronic communications without obtaining a warrant based upon probable cause for law enforcement purposes.
3. Any violations of the policies, procedures, and practices to obtain private electronic communications identified in (1) or (2).
4. Court opinions and orders authorizing or denying disclosure of the contents of private electronic communications for law enforcement purposes.
5. All records discussing the impact of *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010) and *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892 (9th Cir. 2008), on the government's ability to obtain the content of private electronic communications for law enforcement purposes.

6. Communications with Internet service providers and mobile carriers regarding obtaining the contents of private electronic communications, including: (a) company manuals, pricing, and data access policies, (b) invoices reflecting payments, and (c) instances in which Internet service providers and mobile carriers have refused to comply with a request or order.

18. Plaintiff filed the request with defendant Department of the Treasury's component the IRS, as well as with defendant Department of Justice's components the Criminal Division, Office of Information Policy, Office of Legal Counsel, the FBI, and the Executive Office for United States Attorneys.

19. Plaintiff sought a reduction or waiver of search, review, and reproduction fees pursuant to the FOIA and each defendant's regulations. Plaintiff is entitled to 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. See 5 U.S.C. § 552(a)(4)(A)(ii)(II). Plaintiff is also entitled to a waiver or reduction in fees because 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." 5 U.S.C. § 552(a)(4)(A)(iii).

Defendants' Response to the Request

20. Although the Request has been pending for nearly four months, no records have been produced. Defendants have not provided any basis for withholding responsive records.

21. By letter dated March 29, 2012, the Criminal Division acknowledged receipt of the Request and assigned it tracking number 201200151F. This letter also noted that plaintiff's request for a fee waiver had been granted. There has been no further response from the Criminal Division.

22. By letter dated March 13, 2012, the OIP acknowledged receipt of the Request and assigned it tracking numbers AG/12-00442 and DAG/12-00443. This letter also noted that plaintiff's requests for fee waivers were being considered. There has been no further response from the OIP.

23. By letter dated March 12, 2012, the OLC acknowledged receipt of the Request and assigned it tracking number FY12-060. It noted that plaintiff's requests for fee waivers were being considered. It also requested that plaintiff contact OLC to clarify the scope of its request. On May 8, 2012, after follow-up communications with OLC, plaintiff agreed to specific revised language narrowing the scope of its request to OLC only. There has been no further response from OLC.²

24. By letter dated March 13, 2012, the IRS acknowledged receipt of the Request. The IRS wrote that it had taken a ten-day statutory extension to respond, making April 6 the response date. However, the IRS wrote that it would not be able to meet this response date, and thus would need to extend the response deadline to July 31, 2012. The letter conceded that plaintiff may file suit if the IRS is not able to meet the April 6 deadline, which it did not meet. After further communications with the IRS, on May 18, 2012, plaintiff agreed to limit the scope of its request to records housed within the IRS's Office of the Chief Counsel and Criminal

²Plaintiff also filed a request with DOJ component the FBI. By letter dated March 8, 2012, the FBI acknowledged receipt of the Request and assigned it tracking number 1184135-000. This letter also noted that plaintiff's requests for fee waivers were being considered. By letter dated June 10, 2012, the FBI stated that it had placed some records responsive to plaintiff's request on its website and, as to other aspects of the request, claimed that plaintiff's request did not "reasonably describe" the records plaintiff seeks. The ACLU intends to file an administrative appeal of the FBI's response to its request. Because the administrative appeals process is ongoing, the ACLU cannot now add the FBI request to this lawsuit, but intends to do so as soon as is permissible.

Investigation division. That same day, the IRS notified plaintiff that it would continue processing plaintiff's request. There has been no further response from the IRS.

25. There has been no response whatsoever from the EOUSA.

Causes of Action

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

27. Defendants' failure to 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 defendants' corresponding regulations.

28. Defendants' failure to grant plaintiff's request for a limitation of fees violates the FOIA, 5 U.S.C. § 552(a)(4)(A)(ii)(II), and defendants' corresponding regulations.

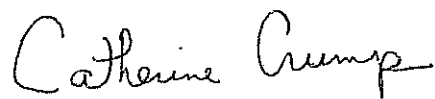
Requested Relief

WHEREFORE, plaintiff respectfully requests that this Court:

- A. Order defendants immediately to process all records responsive to the Request;
- B. Enjoin defendants 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: June 14, 2012

Respectfully submitted,

A handwritten signature in cursive script that reads "Catherine Crump".

Catherine Crump

Attorney Bar Code: cc4067

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

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