

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER)
1718 Connecticut Avenue, N.W.)
Suite 200)
Washington, DC 20009,)
)
Plaintiff,)
)
v.)
)
U.S. DEPARTMENT OF JUSTICE,) Civil Action
950 Pennsylvania Avenue, N.W.)
Washington DC 20530,)
)
Defendant.)
_____)

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 expedited processing and release of agency records requested by plaintiff from defendant U.S. Department of Justice.

Jurisdiction and Venue

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

Parties

3. 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 law enforcement activities and policies to determine their possible impacts 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 site

on the World Wide Web (www.epic.org) containing extensive information on privacy issues, including information EPIC has obtained from federal agencies under the FOIA.

4. Defendant U.S. 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).

The USA Patriot Act, the Otter Amendment and the August 14 Memorandum

5. On October 26, 2001, the President signed into law the Uniting and Strengthening American by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. 107-56, 115 Stat. 272 ("the Patriot Act"). The Act contained a plethora of legislative changes that significantly increased the surveillance and investigative powers of federal law enforcement agencies. The Act also removed several of the checks and balances that traditionally safeguard civil liberties in the face of government investigative activities. As this Court recently noted, "[e]ver since it was proposed, the Patriot Act has engendered controversy and debate." *American Civil Liberties Union v. Department of Justice*, 265 F. Supp. 2d 20, 24 (D.C.C. 2003). Much of that controversy has centered on the fact that "[t]he Justice Department, which is largely responsible for [the Act's] implementation, has provided only limited information to the public regarding how, and how often, the new provisions . . . have been used." *Id.*

6. Many members of Congress have questioned the secrecy surrounding the exercise of Patriot Act authorities, as well as the scope of the law. Senator Patrick Leahy recently commented, "[d]espite the Administration's unprecedented public relations campaign to promote the PATRIOT Act -- including a 16-state, 18-city tour by the Attorney General himself -- the

Administration has yet to show that it is using its PATRIOT powers wisely. Instead, it has been secretly drafting a sequel to PATRIOT that would grant it even more far-reaching powers.”

7. Reflecting Congressional concern about the scope of the Patriot Act, the House of Representatives on July 22, 2003, approved a provision that would prohibit the use of appropriated funds to implement Section 213 of the Act, which permits delayed notification of the execution of a search warrant. The provision, an amendment to the Departments of Commerce, Justice, and State, and the Judiciary, and Related Agencies Appropriations Act of 2004, H.R. 2799, 108th Cong. (2003), was sponsored by Rep. C.L. “Butch” Otter (“the Otter Amendment”). The House passed the amendment by an overwhelming 309-118 margin and referred the legislation to the Senate.

8. On August 14, 2003, Guy A. Lewis, director of DOJ’s Executive Office for United States Attorneys, sent a memorandum to all U.S. Attorneys concerning the Otter Amendment (“August 14 memorandum”). The memorandum encouraged U.S. Attorneys “to call personally or meet with . . . congressional representatives” to discuss “the potentially deleterious effects” of the Otter Amendment. Attached to the memo was a list of names and telephone numbers of House members, with an asterisk next to the names of those who voted in favor of the Amendment.

Plaintiff's FOIA Request and Request for Expedited Processing

9. On September 10, 2003, plaintiff wrote to the Executive Office for United States Attorneys (“EOUSA”) and requested under the FOIA agency records concerning the August 14 memorandum.

10. In its letter to EOUSA, plaintiff requested expedited processing of its request and explained the urgency of disseminating information about the August 14 memorandum to the

public. Pursuant to applicable DOJ regulations, plaintiff also wrote to DOJ's Director of Public Affairs in support of its request for expedition, attaching the letter to EOUSA and incorporating it by reference.

11. In its letter to EOUSA, plaintiff stated:

The government activity at issue here -- the Justice Department urging prosecutors to influence members of Congress -- raises serious questions about the propriety of political appointees and has received considerable media attention in recent days.

12. Plaintiff's letter noted, *inter alia*, that "[a] search in the Lexis–Nexis U.S. newspaper and wire database for articles on this subject between August 14, 2003, when the memorandum was issued, and September 10, 2003 [the date of the request] returns 31 results from newspapers throughout the country."

13. In support of its assertion that the August 14 memorandum is a matter that raises "questions about the government's integrity which affect public confidence," plaintiff quoted two editorials questioning the legality of the memorandum. A New York Times editorial that plaintiff quoted noted:

[o]ne member of Congress, Representative John Conyers Jr., a Michigan Democrat, has charged that Mr. Ashcroft's lobbying campaign, in which United States attorneys have been asked to participate, may violate the law prohibiting members of the executive branch from engaging in grassroots lobbying for or against Congressional legislation Instead of spin-doctoring the problem, Mr. Ashcroft should work with the [PATRIOT Act's] critics to develop a law that respects Americans' fundamental rights.

Plaintiff also quoted a Washington Post editorial that said:

[T]here's something a little unsettling about this mass deployment. Perhaps it's the wholesale and seemingly involuntary nature of the enterprise: the U.S. attorneys aren't requested to contact lawmakers or hold public meetings but instructed to do so, and given a handy form on which to report on their sessions with members Perhaps it's the sense that the prosecutors, while political and a part of a Republican administration, also ought to be at some remove from partisan politics Perhaps it's that the administration hasn't been nearly so

accommodating about the importance of educating lawmakers and the public when it involves folks on the other side This campaign . . . uncomfortably blurs the line between law and politics.

14. In support of its assertion that it is “primarily engaged in disseminating information” within the meaning of the FOIA and DOJ regulations, plaintiff addressed its news collection and dissemination activities:

EPIC is a non-profit, educational organization that routinely and systematically disseminates information to the public. This is accomplished through several means. First, EPIC maintains a heavily visited Web site (www.epic.org) that highlights the “latest news” concerning privacy and civil liberties issues. The site also features scanned images of documents EPIC obtains under the FOIA. Second, EPIC publishes a bi-weekly electronic newsletter that is distributed to over 15,000 readers, many of whom report on technology issues for major news outlets. The newsletter reports on relevant policy developments of a timely nature (hence the bi-weekly publication schedule). It has been published continuously since 1996, and an archive of past issues is available at our Web site. Finally, EPIC publishes and distributes printed books that address a broad range of privacy, civil liberties and technology issues. A list of EPIC publications is available at our Web site.

15. Plaintiff noted that “the U.S. District Court for the District of Columbia has held that EPIC is a ‘news media’ requester under the FOIA.” (citing *Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003)).

Defendant DOJ’s Denial of Plaintiff’s Expedition Request

16. By letter to plaintiff dated September 22, 2003, EOUSA denied plaintiff’s request for expedited processing, on behalf of both EOUSA and the Director of Public Affairs. The letter stated, in relevant part:

In accordance with 28 C.F.R. 16.5(d)(2), we referred your request for expedited treatment to the Director of Public Affairs, Department of Justice. The Office of Public Affairs has informed us that they have denied your expedite request. The Office of Public Affairs determined that the subject of your request is not one of exceptional media interest, nor does it raise any questions about the government’s integrity which might affect public confidence. Furthermore . . . [y]our letter does not support a finding that there is an urgency to inform the public about an actual or alleged federal government activity (28 C.F.R. 16.5(d)(1)(ii)). Therefore, in the

absence of any such justification, I must deny your request for expedited treatment.

17. Plaintiff is entitled to expedited processing of its FOIA request under the standards contained in defendant DOJ's regulations.

18. Defendant's failure to grant plaintiff's request for expedited processing violates the FOIA, 5 U.S.C. § 552(a)(6)(E)(i), and defendant DOJ's own regulation promulgated thereunder, 28 CFR § 16.5(d).

19. Plaintiff has exhausted the applicable administrative remedies.

20. Defendant DOJ has wrongfully withheld the requested records from plaintiff.

Requested Relief

WHEREFORE, plaintiff prays that this Court:

- A. order defendant immediately to process the requested records in their entirety;
- B. order defendant, upon completion of such expedited processing, to disclose the requested records in their entirety and make copies available to plaintiff;
- C. provide for expeditious proceedings in this action;
- 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.

Respectfully submitted,

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D.C. Bar admission pending

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