

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.)

Civil Action)

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

and)

FEDERAL BUREAU OF INVESTIGATION)
9th and Pennsylvania Avenue, N.W.)
Washington, D.C. 20535,)

and)

JANET RENO, in her official capacity as)
Attorney General of the United States,)

Defendants.)
_____)

COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 et seq., for injunctive and other appropriate relief, and seeking the expedited processing and release of agency records requested by plaintiff from defendant Federal Bureau of Investigation.

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 and

5 U.S.C. §§ 701-706. 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 investigative 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 containing extensive information on privacy issues, including information EPIC has obtained from federal agencies under the FOIA.

4. 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).

5. Defendant Federal Bureau of Investigation ("FBI") is a component of the Department of Justice. FBI is an agency within the meaning of 5 U.S.C. § 552(f).

6. Defendant Janet Reno is Attorney General of the United States and heads the Department of Justice. Defendant Reno is responsible for DOJ and FBI compliance with the laws of the United States and regulations promulgated thereunder, including the laws and regulations at issue in this case.

Defendant FBI's "Carnivore" System

7. On July 11, 2000, the *Wall Street Journal* reported that defendant FBI had deployed a surveillance system known as

"Carnivore," which monitors traffic at the facilities of Internet service providers in order to intercept information contained in the electronic mail of criminal suspects. The *Journal* reported that Carnivore "can scan millions of e-mails a second" and "would give the government, at least theoretically, the ability to eavesdrop on all customers' digital communications, from e-mail to online banking and Web surfing." FBI's System to Covertly Search E-Mail Raises Privacy, Legal Issues, *Wall Street Journal*, July 11, 2000.

Plaintiff's FOIA Request and Request for Expedited Processing

8. By letter to defendant FBI dated July 12, 2000, plaintiff requested under the FOIA "the release of all FBI records concerning the system known as 'Carnivore' and a device known as 'EtherPeek' for the interception and/or review of electronic mail (e-mail) messages."

9. By letter hand-delivered to Myron Marlin, Director of Public Affairs for defendant DOJ, on July 18, 2000, plaintiff requested expedited processing of the FOIA request described in ¶ 8, supra. Plaintiff's request was in conformance with the requirements for such requests set forth in defendant DOJ's regulations. Plaintiff stated that its FOIA request meets the criteria for expedited processing under defendant DOJ's regulations, 28 CFR 16.5(d)(1)(iv), as "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." In support of its request, plaintiff noted the

extensive media coverage of the Carnivore system that had appeared since plaintiff submitted its FOIA request, and cited public questions that had been raised about the potential abuse of the Carnivore system.

10. By letter hand-delivered to Myron Marlin, Director of Public Affairs for defendant DOJ, on July 25, 2000, plaintiff submitted supplemental information in support of its request for expedited processing. Specifically, plaintiff submitted a transcript of a hearing held on July 24, 2000, by the House Judiciary Subcommittee on the Constitution titled, "Fourth Amendment Issues Raised by the FBI's 'Carnivore' Program."

11. By letter sent by facsimile machine to Myron Marlin, Director of Public Affairs for defendant DOJ, on July 27, 2000, plaintiff again submitted supplemental information in support of its request for expedited processing. Specifically, plaintiff submitted an editorial on Carnivore that appeared in the *New York Times* on July 27, 2000, and a report on comments made by defendant Reno concerning Carnivore at a press briefing on the same day.

Defendant's Failure to Respond and Plaintiff's
Entitlement to Expedited Processing

12. To date, defendants have not responded to plaintiff's request for expedited processing of its FOIA request. Plaintiff has exhausted the applicable administrative remedies.

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

14. Defendants have wrongfully withheld the requested records from plaintiff.

CAUSES OF ACTION

First Cause of Action:

Violation of the Freedom of Information Act for Failure to Timely Respond to Request for Expedited Processing

15. Plaintiff repeats and realleges paragraphs 1-14.

16. Defendants' failure to timely respond to plaintiff's request for expedited processing violates the FOIA, 5 U.S.C. § 552(a)(6)(E)(ii), and defendant DOJ's own regulation promulgated thereunder, 28 CFR 16.5(d)(4).

Second Cause of Action:

Violation of the Administrative Procedure Act for Failure to Timely Respond to Request for Expedited Processing

17. Plaintiff repeats and realleges paragraphs 1-14.

18. Defendants' failure to timely respond to plaintiff's request for expedited processing constitutes agency action unlawfully withheld and unreasonably delayed, in violation of the APA. Defendant's failure to timely respond is arbitrary, capricious, an abuse of discretion, not in accordance with law and without observance of procedure required by law, all in violation of the APA.

Third Cause of Action:

Violation of the Freedom of Information Act for Failure to Grant Request for Expedited Processing

19. Plaintiff repeats and realleges paragraphs 1-14.

20. Defendants' 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)(1).

Fourth Cause of Action:

Violation of the Administrative Procedure Act for Failure to Grant Request for Expedited Processing

21. Plaintiff repeats and realleges paragraphs 1-14.

22. Defendants' failure to grant plaintiff's request for expedited processing is arbitrary, capricious, an abuse of discretion, not in accordance with law and without observance of procedure required by law, all in violation of the APA.

Requested Relief

WHEREFORE, plaintiff prays that this Court:

- A. order defendants immediately to process the requested records in their entireties;
- B. order defendants, upon completion of such expedited processing, to disclose the requested records in their entireties 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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