

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
By: JEAN-DAVID BARNEA
Assistant United States Attorney
86 Chambers Street, Third Floor
New York, New York 10007
Telephone: (212) 637-2679
Facsimile: (212) 637-2686
Email: jean-david.barnea@usdoj.gov

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

AMERICAN CIVIL LIBERTIES UNION, and
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION,

Plaintiffs,

v.

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

Defendants.

18 Civ. 12131 (LGS)

ANSWER TO AMENDED COMPLAINT FOR INJUNCTIVE RELIEF

Defendants the Office of the Director of National Intelligence (“ODNI”), National Security Agency (“NSA”), Central Intelligence Agency (“CIA”), and Department of Justice (“DOJ”, and collectively, “Defendants”), by and through their attorney, Geoffrey S. Berman, United States Attorney for the Southern District of New York, answer the Amended Complaint for Injunctive Relief, ECF No. 17 (the “Complaint”), filed by plaintiffs the American Civil Liberties Union and the American Civil Liberties Union Foundation (collectively, “Plaintiffs”) as follows:

1. Paragraph 1 states Plaintiffs' characterization of this action, to which no response is required. To the extent a response is required, deny the allegations in Paragraph 1, except admit that this is an action under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), seeking the production of records from the Defendants.

2. Paragraph 2 states Plaintiffs' characterization of their FOIA requests to the Defendants, to which no response is required. Defendants respectfully refer the Court to the requests for a true and complete statement of their contents.

3. Admit that Defendants had not produced any documents responsive to Plaintiffs' FOIA requests as of the date the Complaint was filed.

4. Deny the allegations in Paragraph 4, except deny knowledge or information sufficient to form a belief as to the truth of the allegation relating to "concern[s]" to the extent they refer to Plaintiffs' subjective beliefs.

5. The first two sentences of Paragraph 5 represent Plaintiffs' characterization of the purpose and use by the government of certain provisions of the Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015, Pub. L. No. 114-23, 129 Stat. 268 ("USA Freedom Act"), to which no response is required. Respectfully refer the Court to the statute for a true and complete statement of its contents. With regard to the third sentence of Paragraph 5, admit that the USA Freedom Act extended the expiration date of 50 U.S.C. § 1861 (which was enacted as Section 215 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272) ("Section 215") and other provisions to December 15, 2019. As for the fourth, fifth, and sixth sentences of

Paragraph 5, deny knowledge or information sufficient to form a belief as to the truth of the allegations regarding what the public knows or needs to know regarding this statute or its use.

6. Paragraph 6 states Plaintiffs' characterization of the relief they seek in this action, to which no response is required. To the extent a response is required, deny that Plaintiffs are entitled to the relief sought or to any relief.

7. Paragraph 7 states legal contentions to which no response is required.

8. Paragraph 8 states a legal contention to which no response is required.

9. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 9.

10. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 10.

11. Admit the allegations of Paragraph 11.

12. Admit the allegations of Paragraph 12.

13. Admit the allegations of Paragraph 13.

14. Admit the allegations of Paragraph 14.

15. Paragraph 15 sets forth Plaintiffs' characterization of the USA Freedom Act and the reasons for its enactment, to which no response is required. To the extent a response is required, respectfully refer the Court to the statute and its legislative history for a true and complete statement of their contents.

16. Paragraph 16 sets forth Plaintiffs' characterization of certain provisions of the USA Freedom Act, to which no response is required. To the extent a response is required, respectfully refer the Court to the relevant provisions of the statute for a true and complete statement of their contents.

17. Paragraph 17 sets forth Plaintiffs' characterization of certain provisions of the USA Freedom Act, to which no response is required. To the extent a response is required, respectfully refer the Court to the relevant provisions of the statute for a true and complete statement of their contents.

18. Paragraph 18 sets forth Plaintiffs' characterization of the legal effect of certain provisions of the USA Freedom Act, to which no response is required. To the extent a response is required, respectfully refer the Court to the relevant provisions of the statute and any judicial interpretation of their effect for a true and complete statement of their contents.

19. Paragraph 19 sets forth Plaintiffs' characterization of certain provisions of the USA Freedom Act, to which no response is required. To the extent a response is required, respectfully refer the Court to the relevant provisions of the statute for a true and complete statement of their contents.

20. The allegations in Paragraph 20 represent Plaintiffs' summary and characterization of certain information published by the Government, including the ODNI *Annual Statistical Transparency Report — Calendar Year 2017*, to which no response is required. To the extent a response is required, respectfully refer the Court to the underlying statistical information for a true and complete statement of its contents.

21. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of Paragraph 21 regarding what the public knows regarding Section 215 or its use. The second sentence of Paragraph 21 states a legal contention to which no response is required. The third sentence of Paragraph 21 represents Plaintiffs' characterization of and views about the quantity of information that Defendants have made public regarding the rules and procedures applicable to their activities under Section 215, to

which no response is required. To the extent a response is required, admit that Defendants have made public some, but not all, of the relevant rules and procedures.

22. Deny except aver that Section 215 is set to expire on December 15, 2019, and deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 22 regarding whether Congress will debate its extension or on what schedule.

23. Deny knowledge or information sufficient to form a belief as to the truth of the allegations regarding what the public knows or needs to know regarding this statute or its use.

24. Paragraph 24 quotes and characterizes the FOIA request Plaintiffs sent to the Defendants. Respectfully refer the Court to the request for a true and complete statement of its contents, and admit that the request was dated November 21, 2018.

25. Paragraph 25 characterizes an aspect of the FOIA request Plaintiffs sent to the Defendants. Respectfully refer the Court to the request for a true and complete statement of its contents.

26. Paragraph 26 characterizes an aspect of the FOIA request Plaintiffs sent to the Defendants. Respectfully refer the Court to the request for a true and complete statement of its contents.

27. Paragraph 27 characterizes an aspect of the FOIA request Plaintiffs sent to the Defendants. Respectfully refer the Court to the request for a true and complete statement of its contents.

28. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of Paragraph 28 characterizing the public interest, but admit that Defendants had not produced any documents responsive to Plaintiffs' FOIA requests as of the date the Complaint was filed. Admit the allegations in the second sentence of Paragraph 28.

29. The first and third sentences of Paragraph 29 state legal contentions to which no response is required. Admit the allegation in the second sentence of Paragraph 29 that Defendants had not produced any documents responsive to Plaintiffs' FOIA requests as of the date the Complaint was filed, which was more than twenty business days after the requests were made.

30. Admit the allegation in Paragraph 30.

31. Admit the allegation in Paragraph 31, except to the extent they include a legal contention regarding the timeliness of the submission, to which no response is required.

32. Admit the allegation in the first sentence of Paragraph 32 that ODNI had not produced any documents responsive to Plaintiffs' FOIA requests as of the date the Complaint was filed, and deny that it was required to explain its failure to do so. The second sentence of Paragraph 32 states a legal contention to which no response is required.

33. Deny the allegations of Paragraph 33.

34. Admit the allegation in Paragraph 34.

35. Admit the allegation in Paragraph 35, except to the extent they include a legal contention regarding the timeliness of the submission, to which no response is required.

36. Admit the allegation in the first sentence of Paragraph 36 that NSA had not produced any documents responsive to Plaintiffs' FOIA requests as of the date the Complaint was filed, and deny that it was required to explain its failure to do so. The second sentence of Paragraph 36 states a legal contention to which no response is required.

37. Deny the allegations of Paragraph 37.

38. Admit the allegation in Paragraph 38.

39. Admit the allegation in Paragraph 39, except to the extent they include a legal contention regarding the timeliness of the submission, to which no response is required.

40. Admit the allegation in the first sentence of Paragraph 40 that CIA had not produced any documents responsive to Plaintiffs' FOIA requests as of the date the Complaint was filed, and deny that it was required to explain its failure to do so. The second sentence of Paragraph 40 states a legal contention to which no response is required.

41. Deny the allegations of Paragraph 41.

42. Admit the allegation in Paragraph 42.

43. Admit the allegation in Paragraph 43.

44. Deny the allegations in Paragraph 44.

45. Admit the allegation in the first sentence of Paragraph 45 that DOJ's National Security Division had not produced any documents responsive to Plaintiffs' FOIA requests as of the date the Complaint was filed, and deny that it was required to explain its failure to do so. The second sentence of Paragraph 45 states a legal contention to which no response is required.

46. Deny the allegations of Paragraph 46.

47. Admit the allegation in Paragraph 47.

48. Admit the allegation in the first sentence of Paragraph 48, except to the extent it includes a legal contention regarding the timeliness of the submission, to which no response is required. Deny the allegation in the second sentence of Paragraph 48, and aver that the FOIA request was received and processed by DOJ's Office of Information Policy. As for the third sentence of Paragraph 48, admit that, as of the date the Complaint was filed, Plaintiffs' administrative appeal was pending, and aver that the appeal was denied by the Office of Information Policy on January 3, 2019.

49. Admit the allegation in the first sentence of Paragraph 49 that DOJ's Office of Inspector General had not produced any documents responsive to Plaintiffs' FOIA requests as of the date the Complaint was filed, and deny that it was required to explain its failure to do so. The second sentence of Paragraph 49 states a legal contention to which no response is required.

50. Deny the allegations of Paragraph 50.

51. Admit the allegation in Paragraph 51.

52. Admit the allegations in Paragraph 52, except to the extent they include a legal contention regarding the timeliness of the submission, to which no response is required. Aver that on March 12, 2019, the Federal Bureau of Investigation closed Plaintiffs' administrative appeal.

53. Admit the allegation in the first sentence of Paragraph 53 that the Federal Bureau of Investigation had not produced any documents responsive to Plaintiffs' FOIA requests as of the date the Complaint was filed, and deny that it was required to explain its failure to do so. The second sentence of Paragraph 53 states a legal contention to which no response is required.

54. Deny the allegations of Paragraph 54.

55. Deny the allegations of Paragraph 55.

56. Deny the allegations of Paragraph 56.

57. Deny the allegations of Paragraph 57.

58. Deny the allegations of Paragraph 58.

59. Deny the allegations of Paragraph 59.

60. The remaining unnumbered paragraph of the Complaint contains Plaintiffs' requests for relief, to which no response is required. To the extent a response is required, deny that Plaintiffs are entitled to the specified relief or to any relief.

61. Defendants deny all allegations in the Complaint not expressly admitted or denied.

DEFENSES

FIRST DEFENSE

Some or all of the requested documents are exempt from disclosure. *See* 5 U.S.C. § 552(b).

SECOND DEFENSE

The Court lacks subject matter jurisdiction over Plaintiffs' requests for relief that exceed the relief authorized under FOIA.

THIRD DEFENSE

Plaintiffs have failed to exhaust available administrative remedies as to each Defendant, and, to the extent they have failed to exhaust such remedies, the Complaint should be dismissed for failure to state a claim and/or for lack of subject matter jurisdiction.

FOURTH DEFENSE

Plaintiffs' requests do not reasonably describe the records sought, and therefore do not comply with FOIA and/or do not trigger a search or production obligation.

FIFTH DEFENSE

Plaintiffs' requests are not enforceable under FOIA to the extent a reasonable search cannot be undertaken to identify and locate all responsive records.

WHEREFORE, Defendants respectfully request that the Court enter judgment dismissing the Complaint in its entirety, and grant them such other relief as the Court deems proper, including their costs and disbursements herein.

Dated: New York, New York
March 26, 2019

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York

By: s/ Jean-David Barnea
JEAN-DAVID BARNEA
Assistant United States Attorney
86 Chambers Street, Third Floor
New York, New York 10007
Telephone: (212) 637-2679
Facsimile: (212) 637-2686
E-mail: jean-david.barnea@usdoj.gov

To: Counsel for Plaintiffs (by ECF)