



Yale Law School

MEDIA FREEDOM AND INFORMATION ACCESS CLINIC
INFORMATION SOCIETY PROJECT

October 30, 2014

VIA ELECTRONIC FILING

The Honorable Analisa Torres
United States District Judge
United States District Court
500 Pearl Street
New York, New York 10007

Re: ACLU, et al. v. National Security Agency, et al.,
Case No. 13 Civ. 09198 (AT) (MHD)
Joint Stipulation and Proposed Order

Dear Judge Torres:

Plaintiffs American Civil Liberties Union and American Civil Liberties Union Foundation write to request that the Court so-order the attached joint stipulation, granting Plaintiffs leave to file a Second Amended Complaint in the above-referenced Freedom of Information Act (“FOIA”) case. The Second Amended Complaint would add allegations and claims regarding one additional FOIA request—a request that is substantively similar to and arises directly from those already in litigation in this case. As set forth in the stipulation, Defendants have consented to Plaintiffs’ motion to amend. The parties have also agreed that (i) within two weeks, the parties will submit to the Court a schedule for the processing of the additional FOIA request; and (ii) Defendants will file their Answer within thirty days of the filing of the Second Amended Complaint.

Plaintiffs’ suit seeks to enforce FOIA requests to seven agencies for information about the scope of the government’s surveillance authority under Executive Order 12,333, as well as the rules that regulate the government’s acquisition, retention, use, and dissemination of the communications of Americans swept up in that surveillance. These FOIA requests were submitted to agencies on May 13, 2013. Plaintiffs filed their Complaint on December 30, 2013, and amended the Complaint on February 18, 2014.

After filing the Amended Complaint, Plaintiffs learned that their initial FOIA request to the National Security Division of the Department of Justice (“NSD”) contained a drafting error: although Plaintiffs intended to seek documents concerning *other* agencies’ authority to conduct surveillance under EO 12,333, the FOIA request mistakenly referred to *NSD’s* authority to conduct surveillance under EO 12,333. Because NSD is not an intelligence agency, it does not itself conduct electronic

surveillance under EO 12,333. On May 15, 2014, NSD responded by stating that it did not possess responsive records, as it was not an intelligence agency authorized to engage in data collection.

In response, on July 29, 2014, Plaintiffs submitted a second FOIA request to NSD that corrected this error. The request seeks legal opinions and other materials regarding the scope of the authority of other agencies, such as CIA and NSA, to collect data under Executive Order 12,333. This second FOIA request uses the same form and structure that the parties negotiated in their search stipulation in this case—*i.e.*, it seeks disclosure of the same categories of information from NSD that Plaintiffs are seeking from other agencies in this case. *Compare* Stipulation and Order Regarding Document Searches, *ACLU v. NSA*, No. 13-cv-9198 (AT) (S.D.N.Y. May 9, 2014), ECF No. 30 (so-ordering the parties' agreement concerning the scope of the agencies' searches), *with* Plaintiffs' Second FOIA Request to NSD (July 29, 2014) (attached hereto as Exhibit A). NSD has acknowledged receipt of Plaintiffs' second FOIA request, but it has not provided a substantive response within the twenty-day time period prescribed by the Freedom of Information Act, 5 U.S.C. § 552(a)(6)(A)(i)-(ii), and it has therefore constructively denied the request.

Plaintiffs seek leave to file a Second Amended Complaint in order to add allegations and claims regarding the second FOIA request submitted to NSD. A copy of the proposed Second Amended Complaint is attached as Exhibit A to the joint stipulation.

Under Federal Rule of Civil Procedure 15(a)(2), Plaintiffs may amend their complaint “with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.” Because Defendants have provided their written consent, Plaintiffs have satisfied the leave-to-amend standard. In addition, this Court’s existing orders setting deadlines for other Defendants to search, review, and process potentially responsive records would not be affected by the proposed amendment.

For the same reasons, the enclosed stipulation furthers the interests of judicial economy and efficiency. If Plaintiffs were not granted leave to amend their complaint, they would instead be required to file a separate lawsuit addressing the second request to NSD—which would presumably be deemed a related case—resulting in unnecessary expenditures of Plaintiffs’, Defendants’, and the Court’s resources.

Accordingly, Plaintiffs respectfully request that the Court so-order the attached joint stipulation.

Respectfully submitted,

/s/ Ashley Gorski

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cc: David S. Jones, Deputy Chief, Civil Division
J.D. Barnea, Assistant United States Attorney

Exhibit A

NATIONAL SECURITY PROJECT



July 29, 2014

BY CERTIFIED MAIL

Arnetta Mallory, FOIA Initiatives Coordinator
National Security Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Room 6150
Washington, DC 20530-0001

**Re: REQUEST UNDER FREEDOM OF INFORMATION ACT /
Expedited Processing Requested**

Dear Ms. Mallory,

The American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the “ACLU”) submit this request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for access to documents relating to Executive Order 12,333, 3 C.F.R. 200 (1981 Comp.) (“EO 12,333”).

I. Requested Records

Specifically, we request the following records:

1. Formal regulations or policies relating to any agency’s authority under EO 12,333 to undertake “Electronic Surveillance” (as that term is defined in EO 12,333) that implicates “United States Persons” (as that term is defined in EO 12,333), including regulations or policies relating to the acquisition, retention, dissemination, or use of information or communications to, from, or about United States Persons under such authority.¹
2. Records that officially authorize or modify under EO 12,333 any agency’s use of specific programs, techniques, or types of Electronic Surveillance that implicate United States Persons, including official rules or procedures for the acquisition, retention, dissemination, or use of information or communications to, from, or about United States persons

¹ For purposes of this Request, surveillance that “implicates” United States Persons means surveillance that is reasonably believed to involve the interception, acquisition, scanning, or collection of information or communications to, from, or about a United States Person or persons even if the target of such surveillance is not a United States Person.

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under such authority generally or in the context of particular programs, techniques, or types of Electronic Surveillance.

3. Formal legal opinions addressing any agency's authority under EO 12,333 to undertake specific programs, techniques, or types of Electronic Surveillance that implicates United States Persons, including formal legal opinions relating to the acquisition, retention, dissemination, or use of information or communications to, from, or about United States Persons under such authority generally or in the context of particular programs, techniques, or types of Electronic Surveillance.
4. Formal training materials or reference materials (such as handbooks, presentations, or manuals) that expound on or explain how any agency implements its authority under EO 12,333 to undertake Electronic Surveillance that implicates United States Persons, including the acquisition, retention, dissemination, or use of information or communications to, from, or about United States Persons under such authority.
5. Formal reports relating to Electronic Surveillance under EO 12,333 implicating United States Persons that contain any meaningful discussion of (1) any agency's compliance, in undertaking such surveillance, with EO 12,333, its implementing regulations, the Foreign Intelligence Surveillance Act, or the Fourth Amendment; or (2) any agency's interception, acquisition, scanning, or collection of the communications of United States Persons, whether "incidental" or otherwise, in undertaking such surveillance; and that are or were:
 - a. Authored by an inspector general or the functional equivalent thereof;
 - b. Submitted to Congress, the Office of the Director of National Intelligence, the Attorney General, or the Deputy Attorney General; or
 - c. Maintained by the office of the Assistant Attorney General for National Security.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

The Request is intended to supplement a FOIA request filed on May 13, 2013, which is the subject of *ACLU v. NSA*, No. 13 Civ. 9198 (AT) (S.D.N.Y.). To the extent that this Request involves records being processed in response to the ACLU's previous request, we are available to discuss ways of avoiding any unnecessary duplication of effort.

II. Request for Expedited Processing

We request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E). *See also* 28 C.F.R. § 16.5(d). 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. § 552(a)(6)(E)(v); *see also* 28 C.F.R. § 16.5(d)(1)(ii). In addition, the records sought relate to a “matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence,” 28 C.F.R. § 16.5(d)(1)(iv).

A. *The ACLU is an organization primarily engaged in disseminating information in order to inform the public about actual or alleged government activity.*

The ACLU is “primarily engaged in disseminating information” within the meaning of the statute and regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 28 C.F.R. § 16.5(d)(1)(ii). Obtaining information about government activity, analyzing that information, and widely publishing and disseminating that information to the press and public is a critical and substantial component of the ACLU’s work and one of its primary activities. *See ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding non-profit public interest group that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” to be “primarily engaged in disseminating information” (internal citation omitted)).²

Dissemination of information about actual or alleged government activity is a critical and substantial component of the ACLU’s mission and work. The ACLU disseminates this information to educate the public and promote the protection of civil liberties. The ACLU’s regular means of disseminating and editorializing information obtained through FOIA requests include: a paper newsletter distributed to approximately 450,000 people; a bi-weekly electronic newsletter distributed to approximately 300,000 subscribers; published reports, books, pamphlets, and fact sheets; and a widely read blog. The ACLU also regularly issues press releases to call attention to documents obtained through FOIA requests, as well as other breaking news.³ ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.⁴

² *See also Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005).

³ *See, e.g.,* Release, American Civil Liberties Union, *Documents Show FBI Monitored Bay Area Occupy Movement*, Sept. 14, 2012, <http://www.aclu.org/node/36742>; Press Release, American Civil Liberties Union, *FOIA Documents Show FBI Using “Mosque Outreach” for Intelligence Gathering*, Mar. 27, 2012, <http://www.aclu.org/national-security/foia-documents-show-fbi-using-mosque-outreach-intelligence-gathering>.

⁴ *See, e.g.,* Peter Finn & Julie Tate, *CIA Mistaken on ‘High-Value’ Detainee, Document Shows*, Wash. Post, June 16, 2009 (quoting ACLU attorney Ben Wizner); Scott Shane, *Lawsuits Force Disclosures by C.I.A.*, N.Y. Times, June 10, 2009 (quoting ACLU attorney Jameel Jaffer).

In addition, the ACLU website includes features that provide information about actual or alleged government activity obtained through FOIA.⁵ For example, the ACLU maintains an online “Torture Database,”⁶ a compilation of over 100,000 FOIA documents that allows researchers and the public to conduct sophisticated searches of FOIA documents relating to government policies on rendition, detention, and interrogation.⁷ Similarly, the ACLU’s webpage about the Office of Legal Counsel (“OLC”) torture memos obtained through FOIA contains commentary and analysis of the memos; an original, comprehensive chart summarizing the memos; links to web features created by ProPublica (an independent, non-profit, investigative-journalism organization) based on the ACLU’s information gathering, research, and analysis; and ACLU videos about the memos.⁸ Beyond its website and online features, the ACLU has produced an in-depth television series on civil liberties, which has included analysis and explanation of information the ACLU has obtained through FOIA.

B. The records sought are urgently needed to inform the public about actual or alleged government activity.

The records sought are urgently needed to inform the public about actual or alleged federal government activity. In particular, the records sought pertain to the conduct and oversight of intelligence activities undertaken pursuant to EO 12,333. Recent reports in the media indicate that the scope of the government’s surveillance under EO 12,333 may be far broader than Americans currently understand, and may operate without the same privacy protections applied to surveillance conducted under other statutory authorities. *See, e.g.,* John Napier Tye, *Meet Executive Order 12333: The Reagan Rule that Lets the NSA Spy on Americans*, Wash. Post (July 18, 2014), <http://wapo.st/Ug0kLS>. Moreover, an independent report issued by the President’s Review Group last December suggested that information collected to, from, or about U.S. persons should receive greater protection—a recommendation that would apply to EO 12,333 surveillance. *See* President’s Review Group on Intelligence and Communications Technologies, *Report and Recommendations 28-29* (Dec. 12, 2013), <http://bit.ly/1cBj5vG>. Despite these urgent calls for reform, the public has few details about the policies, rules, or procedures that currently govern the collection, use, and dissemination of Americans’ information under EO 12,333.

⁵ *See, e.g.,* <http://www.aclu.org/national-security/predator-drone-foia>; <http://www.aclu.org/mappingthefbi>.

⁶ <http://www.torturedatabase.org>.

⁷ The ACLU also maintains a “Torture FOIA” webpage (<http://www.aclu.org/torturefoia>) containing commentary about the ACLU’s FOIA request, press releases, and analysis of the FOIA documents. That webpage also notes that the ACLU, in collaboration with Columbia University Press, has published a book about the documents obtained through FOIA. *See* Jameel Jaffer & Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* (Columbia Univ. Press 2007).

⁸ http://www.aclu.org/safefree/general/olc_memos.html.

The requested records also relate to a “matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence,” 28 C.F.R. § 16.5(d)(1)(iv), and to a matter where there is “urgency to inform the public about an actual or alleged federal government activity.” 28 C.F.R. § 16.5(d)(1)(ii).

The government’s electronic surveillance powers have been a significant matter of public concern and media interest for many years, particularly after the revelation of the NSA’s warrantless wiretapping program. The legislation that emerged out of that controversy—the FAA—has been the subject of widespread interest and debate since the moment it was introduced in 2008. *See, e.g.*, Sean Lengell, *House Approves Update of Bipartisan Spy Laws*, Wash. Times, June 21, 2008; Editorial, *Mr. Bush v. the Bill of Rights*, N.Y. Times, June 18, 2008; Editorial, *Compromising the Constitution*, N.Y. Times, July 8, 2008 (stating that the FAA would “make it easier to spy on Americans at home, reduce the courts’ powers and grant immunity to the companies that turned over Americans’ private communications without warrant”); Editorial, *Election-Year Spying Deal is Flawed, Overly Broad*, USA Today, June 25, 2008.

This public debate has only grown with the disclosure of information about the scope and intrusiveness of government surveillance. Scores of articles published during the past year have addressed the government’s surveillance activities—including those under EO 12,333. *See, e.g.*, Zack Whittaker, *Legal Loopholes Could Allow Wider NSA Surveillance, Researchers Say*, CBS News (June 30, 2014), <http://cbsn.ws/1ticymy>; Mike Masnick, *Privacy Oversight Board Turns Its Sights on the Real Problem: Executive Order 12333*, Techdirt (July 23, 2014), <http://bit.ly/1rS7Ud8>; Naomi LaChance, *Should Executive Order 12333 Be Repealed?*, U.S. News (July 21, 2014), <http://bit.ly/1qav5Mz>; John Napier Tye, *Meet Executive Order 12333: The Reagan Rule that Lets the NSA Spy on Americans*, Wash. Post (July 18, 2014), <http://wapo.st/Ug0kLS>.

Many of these articles have highlighted pressing concerns about whether Americans’ privacy is adequately protected when the government engages in surveillance under EO 12,333. The Request seeks information bearing directly on this matter of public interest.

As the sustained media interest concerning the scope and privacy implications of the government’s electronic surveillance power clearly shows, the impact of EO 12,333 on Americans’ privacy constitutes a “matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence,” 28 C.F.R. § 16.5(d)(1)(iv). The Request will inform urgent and ongoing debate about the government’s surveillance and wiretapping activities.

Accordingly, expedited processing should be granted.

III. Request for a Fee Limitation and Public Interest Fee Waiver

The ACLU requests a waiver of search and review fees because the requested records are not sought for commercial use and because the ACLU is a “representative of the news media.” 5 U.S.C. § 552(a)(4)(A)(ii)(II). Dissemination of information about actual or alleged government activity is a critical and substantial component of the ACLU’s mission and work. The ACLU disseminates this information to educate the public and promote the protection of civil liberties. Its regular means of disseminating and editorializing information obtained through FOIA requests include: a paper newsletter distributed to approximately 450,000 people; a bi-weekly electronic newsletter distributed to approximately 300,000 subscribers; published reports, books, pamphlets, and fact sheets; a widely read blog; heavily visited websites, including an accountability microsite, <http://www.aclu.org/accountability>; and a video series.

The ACLU therefore meets the statutory definition of a “representative of the news media” as an “entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii); *see also Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *cf. Am. Civil Liberties Union v. Dep’t of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding non-profit public interest group to be “primarily engaged in disseminating information”). Indeed, the ACLU recently was held to be a “representative of the news media.” *Serv. Women’s Action Network v. Dep’t of Defense*, 888 F. Supp. 2d 282, 287-88 (D. Conn. 2012); *see also Am. Civil Liberties Union of Wash. v. Dep’t of Justice*, No. C09-0642RSL, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011) (finding ACLU of Washington to be a “representative of the news media”), *reconsidered in part on other grounds*, 2011 WL 1900140 (W.D. Wash. May 19, 2011).

The ACLU also requests a waiver of all search, review, or duplication fees on the ground that disclosure of the requested information is in the public interest because: (1) it “is likely to contribute significantly to public understanding of the operations or activities of the government,” and (2) it “is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). This request clearly satisfies these criteria.

First, as described in Part II.B, the requested material concerns “the operations or activities” of the Department of Justice. E.O. 12,333 is “intended to enhance human and technical collection techniques, especially those undertaken abroad, and the acquisition of significant foreign intelligence, as well as the detection and countering of international terrorist activities and espionage conducted by foreign powers.” EO 12,333 § 2.2. It authorizes the government to collect intelligence, and it sets forth certain limitations on intelligence-gathering activities relevant to civil liberties. In its brief in a recent case before the Supreme Court of the United States, the government emphasized its authority to conduct surveillance of Americans’ foreign contacts abroad under Executive Order No. 12,333, without conforming to various statutory restrictions. Br. for

Petitioners, *Clapper v. Amnesty Int'l USA*, No. 11-1025, 2012 WL 3090949, at *45 (U.S. 2012). How the government actually does this, and whether it appropriately accommodates the constitutional rights of American citizens and residents whose communications are intercepted in the course of that surveillance, are matters of great significance. This question is a matter of pressing public concern. *See, e.g.*, John Napier Tye, *Meet Executive Order 12333: The Reagan Rule that Lets the NSA Spy on Americans*, Wash. Post (July 18, 2014), <http://wapo.st/Ug0kLS>.

Moreover, the requested materials will “contribute significantly to the public understanding” of the intelligence community’s operations or activities. 5 U.S.C. § 552(a)(4)(A)(iii). Though the subject of foreign-intelligence collection is a matter of great public interest and concern, little information on how the Department of Justice construes the authority conferred by EO 12,333 and its implementing regulations is currently publicly available.

For example, in the *Clapper* brief described above, the government made no argument beyond a handful of one-sentence assertions of its authority under EO 12,333. *See Br. for Petitioners, Clapper v. Amnesty Int'l USA*, No. 11-1025, 2012 WL 3090949 at *4, *33, *41, *45 (U.S. 2012). Likewise, the publicly available administrative agency materials typically do little more than restate EO 12,333’s limits on the intelligence community in slightly different ways or provide predictable definitions for terms left undefined in the executive order. *See, e.g.*, Nat’l Sec. Agency, *United States Signals Intelligence Directive 18* (Jan. 2011); Army Regulation 381-10, *U.S. Army Intelligence Procedures* § 2-2(1) (2007); Dep’t of Def., DOD 5240 1-R, *Procedures Governing the Activities of DOD Intelligence Components that Affect United States Persons* § C2.3.12 (Dec. 1982). Judicial treatments of EO 12,333 contribute equally little to the public understanding of the limits of intelligence-gathering powers under EO 12,333. *See, e.g.*, *United States v. Marzook*, 435 F. Supp. 2d 778 (N.D. Ill. 2006); *United States v. Poindexter*, 727 F. Supp. 1470 (D.D.C. 1989); *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984).

For these reasons, we request that all fees related to the search, review, and duplication of the requested records be waived. If the search and review fees will not be waived, we ask that you contact us at the email address listed below should the estimated fees resulting from this request exceed \$100.

* * *

We request that responsive electronic records be provided electronically in their native file format, if possible. *See* 5 U.S.C. § 552(a)(3)(B). Alternatively, we request that the records be provided electronically in a text-searchable, static-image format (PDF), in the best image quality in the agency’s possession, and in separate, Bates-stamped files.

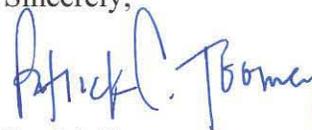
We also request that you provide an estimated date on which you will finish processing this request. *See* 5 U.S.C. § 552(a)(7)(B).

If this FOIA request is denied in whole or in part, please provide the reasons for the denial, pursuant to 5 U.S.C. § 552(a)(6)(A)(i). In addition, please release all segregable portions of otherwise exempt material in accordance with 5 U.S.C. § 552(b). Furthermore, if any documents responsive to this request are classified, please identify those documents, including a date and document number where possible, so we may begin the process of requesting a Mandatory Declassification Review under the terms of Executive Order 13,526 (2010).

Thank you for your consideration of this request. If you have any questions or concerns, please do not hesitate to contact us at the email address listed below. Pursuant to 5 U.S.C. § 552(a)(6)(A)(i), we expect a response regarding this request within the twenty business-day statutory time limit.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Sincerely,



Patrick Toomey
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National Security Project
American Civil Liberties Union

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