



U.S. Department of Justice

*United States Attorney
Southern District of New York*

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July 8, 2013

BY HAND

The Honorable William H. Pauley
United States District Judge
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: *ACLU et al. v. FBI et al.*, 11 Civ. 07562 (WHP)

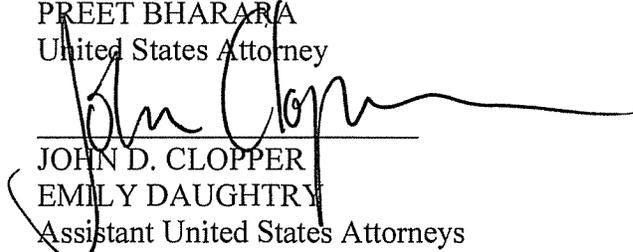
Dear Judge Pauley:

In accordance with the Court's Order, dated June 7, 2013, we write to provide the Court with a status report by the parties in the above-referenced Freedom of Information Act ("FOIA") case. Counsel for the parties have conferred and were unable to agree on the appropriate next steps. Please find attached the respective statements of the parties. In sum, the Government respectfully proposes that it file, on or before, September 6, 2013, a further status report. By that date, the Government anticipates that it will be better able to estimate the time for completing a re-review of the records at issue in this case and for filing briefs in support of renewed motions for summary judgment. Plaintiffs oppose the Government's request for an extension and respectfully urge the Court to require the Government to complete its re-review of the records at issue in this case by July 31, 2013 at the latest.

Thank you for your consideration of this matter. We respectfully request that the Court docket this letter and the attached statements of the parties and make it a part of the record of this case.

Respectfully,

PREET BHARARA
United States Attorney

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

AMERICAN CIVIL LIBERTIES
UNION, *et al.*,

Plaintiffs,

v.

FEDERAL BUREAU OF
INVESTIGATION, *et al.*,

Defendants.

11 Civ. 7562 (WHP)

ECF Case

**STATEMENTS OF THE PARTIES IN RESPONSE TO ORDER, DATED
JUNE 7, 2013**

In accordance with the Court's Order, dated June 7, 2013, the parties' respective positions are set forth below:

The Government's Statement:

As noted in our previous letter to the Court, dated June 7, 2013, in response to the unauthorized disclosure of a top secret U.S. court document, the Director of National Intelligence ("DNI") directed that certain information related to Section 215 of the USA PATRIOT Act of 2001, codified at 50 U.S.C. § 1861 ("Section 215"), the "business records" provision of the Foreign Intelligence Surveillance Act, be declassified and immediately released to the public. *See* DNI Statement on Recent Unauthorized Disclosures of Classified Information, *available at* <http://www.odni.gov/index.php/newsroom/press-releases/191-press-releases-2013/868-dni-statement-on-recent-unauthorized-disclosures-of-classified-information>. As the Court is aware, in this lawsuit brought pursuant to the Freedom of Information Act ("FOIA"), the ACLU seeks certain records relating to Section 215.

While the Government's previous withholdings of classified information in this case were appropriate, in light of subsequent developments, the Government is currently engaged in an inter-agency review process designed to assess what additional information, if any, can be declassified consistent with the protection of national security.¹ The review process involves coordination among the Office of the Director of National Intelligence and affected elements of the intelligence community, as well as the Department of Justice, and includes review of information in addition to that pertaining to Section 215. Because of the broad national security

¹ Should the Court find it helpful, the Government is prepared to submit an ex parte, in camera declaration in further support for its request for an abeyance until September 6, 2013.

interests at stake, the Government can neither review the records at issue in this lawsuit in isolation nor rush to judgment on their disclosure pursuant to FOIA. Rather, once the inter-agency review process has reached a stage when updated judgments can reasonably be made regarding the documents at issue, the Government will need to re-review the documents in order to determine what, if any, information in these particular documents is no longer classified or otherwise exempt from disclosure, and therefore will be released to the plaintiff pursuant to the FOIA. Moreover, because of the equities involved, and national security interests at stake, all of the documents potentially impacted by the process described above will require close scrutiny. This will include line-by-line review and further inter-agency consultation. Until this process is complete the Government cannot predict whether or how much information may ultimately be released to the plaintiff. However, once the documents have been re-reviewed, the Government anticipates that it will withdraw its current motion for summary judgment, and file a new motion for summary judgment, supported by new declarations that take into account, as appropriate, relevant information related to declassifications regarding the Government's program under Section 215.

Accordingly, the Government respectfully requests that the Court continue to hold the pending cross-motions for summary judgment in abeyance until September 6, 2013, at which time the Government will file another status report and will set forth a proposal for further proceedings. In the interim, the Government will continue to assess the impact of the Government's recent declassification of information concerning intelligence collection pursuant to Section 215 on both the arguments in the Government's pending Motion for Summary Judgment and the underlying withholdings in this case. The requested period of abeyance attempts to strike the appropriate balance between, on the one hand, moving this case forward to a prompt final resolution and, on the other, affording the Government sufficient time to coordinate the inter-agency review process described above. While the Government anticipates that the re-review of documents at issue in this case will extend beyond September 6, 2013, the Government anticipates that, by that date, it will be better able to estimate the time for completing the re-review and for filing briefs in support of renewed motions for summary judgment.

ACLU's Statement:

Plaintiffs respectfully oppose the lengthy delay sought by the government in this case. Plaintiffs filed the FOIA request at issue two years ago, in order to vindicate the public's right to understand how the government and the Foreign Intelligence Surveillance Court interpret the government's powers under Section 215 of the Patriot Act to collect "any tangible things" that are "relevant to" certain authorized investigations. That information is vitally important to the ongoing and national debate about the authority of our government to track our every phone call. The Freedom of Information Act ("FOIA") was designed to provide Americans not just access, but *timely* access, to information necessary to understand the operations of their government. The

government should not be permitted to avoid its statutory obligation in the midst of the current controversy through the lengthy and apparently indefinite delay it seeks.

For years, the government refused to publicly explain its legal interpretation of Section 215, in spite of complaints by members of Congress that the government was relying upon a secret interpretation of Section 215 that would shock Americans. The consequences of that secret interpretation are now public: It allows the government to force telecommunications providers to turn over “on an ongoing daily basis” the call records of every single one of their customers, whether or not relevant to an ongoing investigation. Secondary Order, *In re Application of the FBI for an Order Requiring the Prod. of Tangible Things from Verizon Bus. Network Servs., Inc. on Behalf of MCI Commc’n Servs., Inc. d/b/a Verizon Bus. Servs.*, No. BR 13-80 (FISA Ct. Apr. 25, 2013), available at <http://bit.ly/11FY393>.

The disclosure of this order—by a leak that was later authenticated by the Director of National Intelligence and other government officials—has prompted a national debate of immense import.

The government has shown that, when it desires, it can respond quickly to the disclosures at issue here. Within days of the order’s release and in the midst of the controversy it generated, the government declassified details about the surveillance program authorized by Section 215. *See, e.g.*, James R. Clapper, DNI Statement on Recent Unauthorized Disclosures of Classified Information, Office of the Director of National Intelligence (June 6, 2013), <http://1.usa.gov/13jwuFc>. In the weeks since, various executive officials—including the President himself—have issued public statements defending the Section 215 program and declassifying additional details about its operation. This public record speaks clearly to the government’s ability to formulate legal arguments, to assess risks to national security, and to make disclosures in a timely manner with regard to its interpretation of Section 215.

Despite the urgency with which the government declassified certain details to support its surveillance activities, the government in this suit has requested an additional sixty days, in addition to the thirty it originally requested and received—at which point it proposes simply to provide an estimate of how much *more time* it wants to decide whether to release any additional information. Such a lengthy delay is inconsistent with the purposes of FOIA and with the manifest public interest in the information sought by Plaintiffs. The government has not articulated a rationale for its request persuasive enough to overcome this public interest. Never has the moment been more prescient for the government to disclose the documents sought pertaining to its surveillance of the American public at large.

For these reasons, Plaintiffs oppose the government’s request and respectfully urge the Court to require the government to complete its declassification review promptly and, in any event, no later than July 31.