

**UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA**

)
PROJECT ON GOVERNMENT)
OVERSIGHT, INC.)
1100 13 th Street NW)
Suite 800)
Washington, DC 20005)
)
Plaintiff,)
)
v.)
)
U.S. NATIONAL SECURITY AGENCY)
9800 Savage Road)
Suite 6932)
Fort George G. Meade, MD 20755-6932)
)
Defendant.)
)

COMPLAINT

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the Declaratory Judgment Act, 28 U.S.C. §§ 220 and 2202, for injunctive, declaratory, and other appropriate relief. Plaintiff Project On Government Oversight, Inc. (“POGO”) challenges the failure of the U.S. National Security Agency (“NSA”), to provide POGO with all non-exempt documents responsive to two FOIA requests POGO filed with NSA seeking reports related to NSA’s surveillance protocols and procedures.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over the parties pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552(a)(6)(C)(i). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331

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

PARTIES

4. Plaintiff POGO is a nonpartisan independent organization based in Washington, D.C. and organized under section 501(c)(3) of the Internal Revenue Code. Founded in 1981, POGO champions reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles. POGO's investigators and journalists take leads and information from insiders and verify the information through investigations using FOIA, interviews, and other fact-finding strategies. POGO's investigative work has been recognized by Members of Congress, executive branch officials, and professional journalism organizations. For instance, in 2015, POGO won the Robert D.G. Lewis Watchdog Award, the Society of Professional Journalists Washington, D.C. Professional Chapter's highest journalistic award, for reporting on the Department of Justice's opaque system for handling allegations of attorney misconduct within its ranks. In 2018, POGO won an award from the Society for Advancing Business Editing & Writing for its investigative series scrutinizing the government's oversight of offshore drilling. POGO extensively used records obtained under FOIA for both of these investigations.

5. NSA is a federal agency within the meaning of FOIA, 5 U.S.C. § 552(f), and has possession and control of the records POGO seeks in this action.

STATUTORY BACKGROUND

6. FOIA requires federal agencies, upon request, to make records "promptly available to any person," 5 U.S.C. § 552(a)(3)(A), unless one or more specific statutory exemptions apply.

7. The agency must provide the public records when they are requested in order “to ensure an informed citizenry, vital to the functioning democratic society.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

8. An agency must make a determination on a FOIA request within twenty business days and notify the requester of which of the requested records it will release, which it will withhold and why, and the requester’s right to appeal the determination to the agency head. 5 U.S.C. § 552(a)(6)(A)(i).

9. The twenty-day deadline for an agency to make a determination on a request begins on the earlier of: (1) the date “the request is first received by the appropriate component of the agency” or (2) “ten days after the request is “first received by any component of the agency that is designated in the agency’s regulations . . . to receive [FOIA] requests.” 5 U.S.C. § 552(a)(6)(A)(ii).

10. In unusual circumstances, an agency may extend the time limits the FOIA prescribes by written notice to the person making such request that sets forth the reasons for such extension and the date on which a determination is “expected” to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. 5 U.S.C. § 552(a)(6)(B)(i).

11. If an agency does not respond to a FOIA request by the statutory deadline, the requester is deemed to have exhausted administrative remedies and may immediately pursue judicial review. 5 U.S.C. §§ 552(a)(6)(C)(i), 552(a)(4)(B).

FACTUAL BACKGROUND

Section 702 of the Foreign Intelligence Surveillance Act

12. In 2008, Congress enacted Section 702 of the Foreign Intelligence Surveillance Act (“FISA”), which gave the intelligence community—including agencies like NSA—the authority to collect, analyze, and share foreign intelligence information about national security threats without obtaining a warrant. “Section 702 authorizes targeted intelligence collection of specific types of foreign intelligence information—such as information concerning international terrorism or the acquisition of weapons of mass destruction—identified by the Attorney General and the Director of National Intelligence[.]” See <https://www.intel.gov/foreign-intelligence-surveillance-act/1237-fisa-section-702>.

13. Section 702 was enacted after 9/11 to give the government greater powers to monitor foreign terrorists. See <https://www.brennancenter.org/our-work/research-reports/whats-next-reforming-section-702-foreign-intelligence-surveillance-act>.

14. “Section 702 only permits the targeting of non-United States persons who are reasonably believed to be located outside the United States. United States persons and anyone in the United States may not be targeted under Section 702.” See <https://www.intel.gov/foreign-intelligence-surveillance-act/1237-fisa-section-702>.

15. While surveillance conducted pursuant to Section 702 is supposed to only target foreigners, it inevitably sweeps in Americans’ private phone calls, emails, and text messages too. Despite this ban, once collected, federal agents can search through this information for communications from both Americans and non-United States persons. Intelligence agencies conduct more than 200,000 of these warrantless “backdoor” searches for Americans’ private

communications every year. See <https://www.brennancenter.org/our-work/research-reports/whats-next-reforming-section-702-foreign-intelligence-surveillance-act>.

Misuse of Section 702 by Intelligence Community

16. FISA established the United States Foreign Intelligence Surveillance Court (“FISC”), a special U.S. Federal court that holds nonpublic sessions to consider issuing search warrants under FISA. Proceedings before the FISC are *ex parte*, meaning the government is the only party present. *Id.* <https://bja.ojp.gov/program/it/privacy-civil-liberties/authorities/statutes/1286>.

17. Every Section 702 targeting decision is to be “individualized and documented, approved pursuant to a multi-step process embodied in specific targeting procedures, and reviewed by an independent oversight team” and “[a]ny identified compliance errors are remedied and reported to the FISC and Congress.” See <https://www.intel.gov/foreign-intelligence-surveillance-act/1237-fisa-section-702>.

18. In a 2011 “secret court opinion” by then FISC Chief Judge John D. Bates, NSA was found to have “unlawfully gathered tens of thousands of e-mails and other electronic communications between Americans...collecting as many as 56,000 ‘wholly domestic’ communications each year.” See https://www.washingtonpost.com/world/national-security/nsa-gathered-thousands-of-americans-e-mails-before-court-struck-down-program/2013/08/21/146ba4b6-0a90-11e3-b87c-476db8ac34cd_story.html.

19. “[T]he chief judge...expressed consternation at what he saw as a pattern of misleading statements by the government and hinted that the NSA possibly violated a criminal law against spying on Americans.” *Id.*

20. The Bates Court ruled NSA’s collection method unconstitutional:

By expanding its Section 702 acquisitions to include the acquisition of Internet transactions through its upstream collection, NSA has, as a practical matter, circumvented the spirit of [the law],...NSA's knowing acquisition of tens of thousands of wholly domestic communications through its upstream collection is a cause of concern for the court.

Id.

21. Beyond violations at a systematic level, there is evidence of abuses by NSA analysts including, an “NSA analyst’s backdoor searches for the communications of a prospective tenant of a rental property they owned; and [a]n NSA analyst’s backdoor search for the communications of two individuals the analyst had met on an online dating service.” *See* <https://www.brennancenter.org/our-work/research-reports/pclob-report-reveals-new-abuses-fisa-section-702>.

Section 702 Reauthorization is of Urgent and Immediate Public Concern

22. Section 702 was originally set to expire on December 31, 2023. In the weeks leading up to that date, there were alternative bills introduced that would replace Section 702. Rather than advance one of these proposed bills, Congress, “inserted an extension of Section 702 into the “must-pass” National Defense Authorization Act, which was signed into law by President Biden in 2024, and included a provision extending Section 702 until April 19, 2024. *Id.*

23. Missing from this authorization language was any provision that would prevent the Administration from continuing this surveillance (and any potential misuses) into 2025.

Under Section 702, surveillance takes place pursuant to annual “certifications” approved by the FISA court. The law that established Section 702 includes a provision stating that any certifications in place at the time the law sunsets remain in effect until they expire. The extension of Section 702 in the defense authorization act did not include a prohibition on the government obtaining new certifications, meaning the intelligence agencies could go to the FISA court in early April and get a new certification

— one that would allow the surveillance to continue until April 2025 even if Congress chose not to reauthorize the law.

See <https://www.brennancenter.org/our-work/research-reports/whats-next-reforming-section-702-foreign-intelligence-surveillance-act#:~:text=Under%20Section%20702%2C%20surveillance%20takes,in%20effect%20until%20they%20expire.>

24. Even though the existing certification allows surveillance—in its current form—until April 2024, because Section 702 allows the FISA court to grant new certifications, April 2024 is nothing more than a soft deadline.

25. As the issue of Section 702’s potential sunseting and any subsequent surveillance bill are currently being debated by Congress, it is imperative that the public be made aware of the extent that agencies, including NSA, have used and in some cases misused their surveillance powers.

26. Having access to information around NSA’s surveillance activities will allow the public to be better informed on an issue that quite possibly affects the privacy of each and every American citizen and the domestic scope, reach, and limits of a federal intelligence power.

Plaintiff’s April 6, 2022 FOIA Request

27. On March 23, 2022, via NSA’s online submission portal, Plaintiff submitted a FOIA request (“Request 1”) seeking two NSA Office of Inspector General (“OIG”) evaluations completed between April 2021 and September 2021, that were referenced in an NSA OIG semiannual report found at <https://oig.nsa.gov/Portals/71/Reports/SAR/NSA%20OIG%20SAR%20-%20APR%202021%20-%20SEP%202021%20-%20Unclassified.pdf?ver=IwtrthntGdfEb-EKTOm3gg%3d%3d>.

28. Specifically, Plaintiff requested:

1. The NSA OIG’s evaluation of whether “NSA’s Rules-Based Targeting (RBT) controls provide reasonable assurance that

collection sites are selected for targeting efficiently, effectively, and in compliance with applicable authorities and directives”; and

2. The NSA OIG’s evaluation of “whether NSA analysts were appropriately documenting the foreign intelligence purpose and using approved U.S. person (USP) identifiers as query terms against Foreign Intelligence Surveillance Act (FISA) Section 702 data and in accordance with applicable query procedures.”

29. On April 6, 2022, POGO emailed NSA to request an acknowledgment of receiving Request 1. NSA did not respond.

30. On October 24, 2022, POGO again emailed NSA to request an acknowledgment of receiving Request 1. NSA replied on October 25, 2022, and informed POGO that the agency could not find the original request but would create a new case for it.

31. On November 16, 2022, NSA sent a formal acknowledgment letter for Request 1 assigning it tracking number 115130 and dating the request received on October 25, 2022.

32. POGO challenged the October acknowledgment date and on December 16, 2022, NSA agreed to change the date to April 6, 2022.

33. In an October 20, 2023 email, in response to a request for a status update for Request 1, NSA explained that there is a significant backlog and NSA was unable to provide an estimated completion date.

34. Following the October 20, 2023 email, POGO repeatedly called and emailed NSA for a status update and NSA did not respond until February 16, 2024. Once again, the agency pointed to a backlog and did not provide an estimated completion date.

35. To date, POGO has not received any additional correspondence from NSA and has not received documents responsive to Request 1.

36. Under U.S.C. § 552(a)(6)(C)(i), Plaintiff has now effectively exhausted all applicable administrative remedies with respect to Request 1.

Plaintiff's March 23, 2022 FOIA Request

37. On March 23, 2022, via NSA's online portal, Plaintiff submitted a second FOIA request ("Request 2") seeking an NSA OIG report produced between April and September 2021.

38. Specifically, Plaintiff requested the NSA OIG's "Quick Reaction Report on Concerns Discovered during an Inspection of the Cryptologic Services Group Key West." The report is mentioned here on page 1: <https://oig.nsa.gov/Portals/71/Reports/SAR/NSA%20OIG%20SAR%20-%20APR%202021%20-%20SEP%202021%20-%20Unclassified.pdf?ver=IwtrthntGdfEb-EKTOm3gg%3d%3d>.

39. NSA formally acknowledged Request 2 on March 31, 2022, and assigned it the tracking number 113927.

40. In an October 20, 2023 email, in response to a request for a status update for Request 2, NSA explained that there is a significant backlog and NSA was unable to provide an estimated completion date.

41. Following the October 20, 2023 email, POGO repeatedly called and emailed NSA for a status update and NSA did not respond until February 16, 2024. Once again, the agency pointed to a backlog and did not provide an estimated completion date.

42. To date, POGO has not received any additional correspondence from NSA and has not received documents responsive to Request 2.

43. Under U.S.C. § 552(a)(6)(C)(i), Plaintiff has now effectively exhausted all applicable administrative remedies with respect to Request 2.

**PLAINTIFF'S CLAIM FOR RELIEF
(Wrongful Withholding of Non-Exempt Records)**

44. Plaintiff repeats and re-alleges paragraphs 1-43.

45. Plaintiff properly asked for records within the custody and control of the U.S. National Security Agency.

46. Defendant NSA wrongfully withheld agency records requested by Plaintiff by failing to comply with the statutory time limit for making a determination on Plaintiff's April 6, 2022 and March 23, 2022 FOIA requests of NSA.

47. Plaintiff POGO is therefore entitled to injunctive and declaratory relief with respect to the immediate processing and disclosure of the records requested in its March 3, 2022 and April 6, 2022 FOIA requests.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

- (1) Order Defendant to immediately and fully process plaintiff's March 23, 2022 and April 6, 2022 FOIA requests and to disclose all non-exempt documents immediately and at no cost to Plaintiff;
- (2) Issue a declaration that Plaintiff is entitled to the immediate and expedited processing and disclosure of the requested records at no cost to Plaintiff;
- (3) Provide for expeditious processing in this action;
- (4) Retain jurisdiction of the action to ensure no agency records are wrongfully withheld;
- (5) Award Plaintiff its costs and reasonable attorney's fees in this action; and
- (6) Grant such other relief as the Court may deem just and proper.

Respectfully submitted,

/s/Anne L. Weismann
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Dated: March 26, 2024

Attorney for Plaintiff