



March 10, 2015

**BY EMAIL AND BY UPS**

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 Office of the Inspector General  
 Department of Justice  
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 Room 4726  
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**Re: REQUEST UNDER FREEDOM OF INFORMATION ACT /  
 Expedited Processing Requested**

AMERICAN CIVIL LIBERTIES  
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OFFICERS AND DIRECTORS  
 SUSAN N. HERMAN  
 PRESIDENT

ANTHONY D. ROMERO  
 EXECUTIVE DIRECTOR

RICHARD ZACKS  
 TREASURER

Dear Ms. Waller,

This letter constitutes a request (“Request”) by the American Civil Liberties Union and the American Civil Liberties Union Foundation (collectively “ACLU”) under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the Department of Justice implementing regulations, 28 C.F.R. § 16.1 *et seq.*,<sup>1</sup> for the report prepared by Inspector General Michael E. Horowitz concerning the FBI’s orders for business records under Section 215 of the USA PATRIOT Act between 2007 and 2009.

**I. Background**

Section 215 of the USA PATRIOT Act<sup>2</sup> (“Section 215”) authorizes the Federal Bureau of Investigation (“FBI”) to seek orders from the Foreign Intelligence Surveillance Court compelling the production of “any tangible things” in authorized foreign-intelligence investigations. *See* 50 U.S.C. § 1861.

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<sup>1</sup> The American Civil Liberties Union is a non-profit, 26 U.S.C. § 501(c)(4) membership organization that educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analysis of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators. The American Civil Liberties Union Foundation is a separate 26 U.S.C. § 501(c)(3) organization that provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases, educates the public about civil rights and civil liberties issues across the country, provides analyses of pending and proposed legislation, directly lobbies legislators, and mobilizes the American Civil Liberties Union’s members to lobby their legislators.

<sup>2</sup> Pub. L. No. 107-56, 2001 U.S.C.C.A.N. 272 (2001).

In the USA PATRIOT Improvement and Reauthorization Act of 2005, Congress directed the Office of the Inspector General (“OIG”) to conduct “a comprehensive audit of the effectiveness and use, including improper or illegal use” of Section 215 by the FBI.<sup>3</sup> In March 2007, pursuant to Congress’s directive, the OIG released a report the FBI’s use of Section 215 orders between 2002 and 2005.<sup>4</sup> The following year, the OIG released a report on the FBI’s use of Section 215 orders in 2006.<sup>5</sup> The OIG recently released updated versions of these reports, with newly declassified and unredacted information.<sup>6</sup>

In 2010, the Inspector General informed Congress that the OIG was in the process of writing a report on the FBI’s use of Section 215 orders between 2007 and 2009.<sup>7</sup> The OIG disclosed the existence of the pending report in several other public-facing communications.<sup>8</sup> The report has been complete since at least November of 2014.<sup>9</sup> In February 2015, OIG announced that it had released the classified report to Congress.<sup>10</sup> The unclassified report, however, has not yet been released to the public.<sup>11</sup>

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<sup>3</sup> USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 106A, 120 Stat. 192 (2005).

<sup>4</sup> U.S. DEP’T OF JUSTICE OFFICE OF THE INSPECTOR GEN., REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION’S USE OF SECTION 215 ORDERS FOR BUSINESS RECORDS (Mar. 2007), *available at* <http://www.justice.gov/oig/reports/2014/215-I.pdf>.

<sup>5</sup> U.S. DEP’T OF JUSTICE OFFICE OF THE INSPECTOR GEN., A REVIEW OF THE FBI’S USE OF SECTION 215 ORDERS FOR BUSINESS RECORDS IN 2006 (Mar. 2008), *available at* <http://www.justice.gov/oig/reports/2014/215-II.pdf>.

<sup>6</sup> Press Release, Dep’t of Justice Office of Inspector General, DOJ OIG Announces Release of New Versions of Two Previously-Released Reports on the FBI’s Use of Section 215 Orders for Business Records (Dec. 24, 2012), *available at* <http://www.justice.gov/oig/press/2014/2014-12-24.pdf>.

<sup>7</sup> Letter from Glenn A. Fine, Inspector General, to Senator Patrick Leahy, Chairman of Senate Judiciary Committee (June 15, 2010), *available at* <https://www.emptywheel.net/wp-content/uploads/2010/06/061510FineToLeahy.pdf>.

<sup>8</sup> *See* U.S. DEP’T OF JUSTICE OFFICE OF THE INSPECTOR GEN., TOP MANAGEMENT AND PERFORMANCE CHALLENGES FACING THE DEPARTMENT OF JUSTICE – 2013 (Dec. 11, 2013), *available at* <http://www.justice.gov/oig/challenges/2013.htm>; U.S. DEP’T OF JUSTICE OFFICE OF THE INSPECTOR GEN., REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 1001 OF THE USA PATRIOT ACT (Apr. 2013), *available at* <http://www.justice.gov/oig/reports/2013/s1304.pdf> (“The OIG is again examining . . . the number of NSLs issued and Section 215 applications filed by the FBI between 2007 and 2009, and any improper or illegal uses of these authorities.”); U.S. DEP’T OF JUSTICE OFFICE OF THE INSPECTOR GEN., SEMIANNUAL REPORT TO CONGRESS, APRIL 1, 2012 – SEPTEMBER 30, 2012 (Oct. 31, 2012), *available at* <http://www.justice.gov/oig/semiannual/1211/report.htm>; U.S. DEP’T OF JUSTICE OFFICE OF THE INSPECTOR GEN., SEMIANNUAL REPORT TO CONGRESS, OCTOBER 1, 2011 – MARCH 31, 2012 (Apr. 30, 2012), *available at* <http://www.justice.gov/oig/semiannual/1205/report.htm>.

<sup>9</sup> U.S. DEP’T OF JUSTICE OFFICE OF THE INSPECTOR GEN., TOP MANAGEMENT AND PERFORMANCE CHALLENGES FACING THE DEPARTMENT OF JUSTICE – 2014 (Nov. 10, 2014), *available at* <http://www.justice.gov/oig/challenges/2014.htm> (noting that the review was completed “months ago”).

<sup>10</sup> Press Release, Dep’t of Justice Office of Inspector General, DOJ OIG Issues Classified Report on the FBI’s Use of Section 215 Orders (Feb. 10, 2015), *available at*

Section 215 is scheduled to sunset on June 1 of this year. Because of public disclosures about the government's use of Section 215 and because of the impending sunset, the statute will be the subject of significant legislative debate regarding in the coming months. Many members of the public will participate in that debate when Congress takes up the issue, and the OIG report will be critically important in informing them as to whether, and in what form, the government's surveillance authority under Section 215 should be extended.

## **II. Record Requested**

The ACLU requests the OIG's report on the FBI's use of Section 215 orders between 2007 and 2009 referenced in the OIG's press release from February 10, 2015.<sup>12</sup> The ACLU requests that OIG locate, process, and disclose its unredacted version of the report.

## **III. 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 this record 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.<sup>13</sup> In addition, the record sought relates to a "matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence."<sup>14</sup>

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 FOIA and related regulations.<sup>15</sup> 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.<sup>16</sup>

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[http://www.justice.gov/oig/press/2015/2015\\_02\\_10.pdf](http://www.justice.gov/oig/press/2015/2015_02_10.pdf).

<sup>11</sup> *See id.*

<sup>12</sup> *See id.*

<sup>13</sup> 5 U.S.C. § 552(a)(6)(E)(v); *see also* 28 C.F.R. § 16.5(d)(1)(ii).

<sup>14</sup> 28 C.F.R. § 16.5(d)(1)(iv).

<sup>15</sup> 5 U.S.C. § 552(a)(6)(E)(v)(II); 28 C.F.R. § 16.5(d)(1)(ii).

<sup>16</sup> *See* ACLU v. Dep't of Justice, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004); Leadership Conference on Civil Rights v. Gonzales, 404 F. Supp. 2d 246, 260 (D.D.C. 2005).

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.<sup>17</sup> ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.<sup>18</sup>

In addition, the ACLU website includes features that provide information about actual or alleged government activity obtained through FOIA.<sup>19</sup> For example, the ACLU maintains an online "Torture Database," 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.<sup>20</sup> Related ACLU webpages contain commentary and analysis of the documents; an original, comprehensive chart summarizing the memos; links to web features created by ProPublica (an independent, nonprofit, investigative-journalism organization) based on the ACLU's information gathering, research, and analysis; and ACLU videos about the memos. In addition to these various web-based outlets, 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 record sought is urgently needed to inform the public about actual or alleged government activity.*

The record sought is urgently needed to inform the public about actual or alleged federal government activity. The record sought pertains to the FBI's use

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<sup>17</sup> See, e.g., Release, American Civil Liberties Union, Documents Show FBI Monitored Bay Area Occupy Movement (Sept. 14, 2012), *available at* <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), *available at* <http://www.aclu.org/national-security/foia-documents-show-fbi-using-mosque-outreach-intelligence-gathering>.

<sup>18</sup> 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).

<sup>19</sup> See, e.g., *Drone FOIA – Released Documents*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/national-security/drones-foia-released-documents>.

<sup>20</sup> *The Torture Database*, AMERICAN CIVIL LIBERTIES UNION, <http://www.torturedatabase.org>. 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).

of Section 215 orders to collect intelligence information, as well as the FBI's progress in responding to the recommendations in prior OIG reports.<sup>21</sup> The record also pertains more generally to the government's interpretation and implementation of a controversial legal authority that seriously impacts Americans' privacy and free speech rights. The record is urgently needed because the provisions in Section 215 are scheduled to sunset on June 1 of this year, and will therefore be the subject of significant congressional and public debate regarding reauthorization before that time. The OIG report will no doubt be one of the most important public documents used in this debate; it is vitally needed to inform the ongoing public debate about whether the provision should be reenacted, and with what amendments.<sup>22</sup>

The requested record also relates 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 under Section 215 have been a significant matter of public concern and media interest for many years.<sup>23</sup> This public debate has only intensified with the recent disclosure of information about the scope and intrusiveness of government surveillance in the name of national security and intelligence gathering. Scores of articles published during the past two years have addressed the government's surveillance activities under Section 215 specifically.<sup>24</sup>

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<sup>21</sup> See U.S. DEP'T OF JUSTICE OFFICE OF THE INSPECTOR GEN., FY 2012 PERFORMANCE BUDGET (Apr. 2014), available at <http://www.justice.gov/sites/default/files/jmd/legacy/2014/04/04/fy12-oig-justification.pdf>.

<sup>22</sup> See *Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260 (noting an urgency to inform the public due to "the upcoming expiration" of a statute to which the request pertained, and "[p]laintiff's FOIA requests could have a vital impact on the development of the substantive record" in the reauthorization of the law).

<sup>23</sup> See, e.g., Mark Bryant, *Congress Urged to Amend Section 215*, WASH. POST (Feb. 27, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A11379-2004Feb27.html>; Editorial, *Revising the Patriot Act*, N.Y. TIMES (Apr. 10, 2005), <http://www.nytimes.com/2005/04/10/opinion/10sun1.html>; Charlie Savage, *Public Said to Be Misled on Use of the Patriot Act*, N.Y. TIMES (Sept. 11, 2011), <http://www.nytimes.com/2011/09/22/us/politics/justice-dept-is-accused-of-misleading-public-on-patriot-act.html>.

<sup>24</sup> See, e.g., Charlie Savage, *Obama to Call for End to N.S.A.'s Bulk Data Collection*, N.Y. TIMES (Mar. 24, 2014), <http://www.nytimes.com/2014/03/25/us/obama-to-seek-nsa-curb-on-call-data.html>; Tom McCarthy, *"This Overreach is Unacceptable": The Case Against NSA Bulk Collection*, GUARDIAN (Jan. 23, 2014), <http://www.theguardian.com/world/2014/jan/23/nsa-bulk-collection-chorus-surveillance-under-patriot-act>; Charlie Savage and Michael D. Shear, *President Moves to Ease Worries on Surveillance*, N.Y. TIMES (Aug. 9, 2013), <http://www.nytimes.com/2013/08/10/us/politics/obama-news-conference.html>; Juliet Eilperin, *Was Congress Kept in the Dark About Section 215? Not Quite.*, WASH. POST (June 8, 2013), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/06/08/was-congress-kept-in-the-dark-about-prism-not-quite/>.

Accordingly, expedited processing should be granted.

#### **IV. Request for a Fee Limitation and Public Interest Fee Waiver**

The ACLU requests a waiver of search and review fees because the requested record is 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. As noted above, the ACLU disseminates this information to educate the public and promote the protection of civil liberties through a variety of outlets, including print and electronic newsletters, a series of highly visited websites, a video series, published reports, books, pamphlets, and fact sheets.

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.”<sup>25</sup>

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, the requested material concerns “the operations or activities” of the federal government. As described above, the request relates to the government’s use of its surveillance authority under Section 215. That includes the manner in which the FBI interprets its authority and the extent to which it has complied with OIG’s past recommendations. How the government gathers information, and whether it has complied with recommendations in past OIG reports, are matters of great significance. This question is a matter of pressing public concern.

Moreover, the requested materials will “contribute significantly to the public understanding” of the government’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, the OIG’s report, which is perhaps the

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<sup>25</sup> 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); *see also* Serv. Women’s Action Network v. Dep’t of Defense, 888 F. Supp. 2d 282, 287-88 (D. Conn. 2012) (finding the ACLU and the ACLU of Connecticut to be representatives of the new media); *ACLU 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).



clearest and most direct insight into the use and possible misuse of Section 215, remains unavailable to the public.

For these reasons, we request that all fees related to the search, review, and duplication of the requested record 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 the responsive electronic record be provided electronically in its native file format. *See* 5 U.S.C. § 552(a)(3)(B). Alternatively, we request that the record be provided electronically in a text-searchable, static-image format (PDF), in the best image quality in the agency's possession.

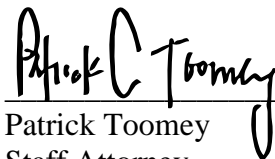
We also request that you provide an estimated date on which you will finish processing this request, pursuant to 5 U.S.C. § 552(a)(7)(B).

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 the record requested cannot be released because it is classified, please identify the documents and provide a date and document number if 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.

I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief.

Sincerely,



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