

1 Jennifer Lynch (SBN 240701)
jlynch@eff.org
2 ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
3 San Francisco, CA 94110
Telephone: (415) 436-9333
4 Facsimile: (415) 436-9993

5 Attorney for Plaintiff
6 ELECTRONIC FRONTIER FOUNDATION

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8 **UNITED STATES DISTRICT COURT**
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN FRANCISCO DIVISION**

11 ELECTRONIC FRONTIER FOUNDATION,)
12 Plaintiff,) CASE NO.: 11-cv-5221 DMR
13 v.) **FIRST AMENDED COMPLAINT FOR**
14 DEPARTMENT OF JUSTICE,) **INJUNCTIVE RELIEF FOR VIOLATION**
15 Defendant.) **OF THE FREEDOM OF INFORMATION**
16) **ACT, 5 U.S.C. § 552**

17 1. This is an action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for
18 injunctive and other appropriate relief. Plaintiff seeks the expedited processing and release of
19 records that Plaintiff requested from Defendant Department of Justice and its components, Office
20 of Legal Counsel, Office of Information Policy, National Security Division, and Federal Bureau of
21 Investigation, concerning the agency’s interpretation and use of Section 215 of the USA PATRIOT
22 Act. The requested records concern a matter about which there is an “urgency to inform the public
23 about an actual or alleged [f]ederal [g]overnment activity,” and the requests were “made by a
24 person primarily engaged in disseminating information.” 5 U.S.C. § 552(a)(6)(E)(i)(I), (v)(II);
25 28 C.F.R. § 16.5(d)(1)(ii). Expedition is also warranted because the request involves a “matter of
26 widespread and exceptional media interest in which there exist possible questions about the
27 government’s integrity which affect public confidence.” 5 U.S.C. § 552(a)(6)(E)(i)(II); 28 C.F.R.
28

1 § 16.5(d)(1)(iv). Therefore, Plaintiff is statutorily entitled to the expedited treatment it seeks.

2
3 **PARTIES**

4 2. Plaintiff Electronic Frontier Foundation (EFF) is a not-for-profit corporation
5 established under the laws of the Commonwealth of Massachusetts, with offices in San Francisco,
6 California and Washington, D.C. EFF is a donor-supported membership organization that works to
7 inform policymakers and the general public about civil liberties issues related to technology and to
8 act as a defender of those liberties. In support of its mission, EFF uses the FOIA to obtain and
9 disseminate information concerning the activities of federal agencies.

10 3. Defendant Department of Justice (DOJ) is a Department of the Executive Branch of
11 the United States Government. DOJ is an “agency” within the meaning of 5 U.S.C. § 552(f). The
12 Office of Legal Counsel (OLC), Office of Information Policy (OIP),¹ National Security Division
13 (NSD), and Federal Bureau of Investigation (FBI) are components of Defendant DOJ.

14 **JURISDICTION**

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

18 **VENUE AND INTRADISTRICT ASSIGNMENT**

19 5. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C.
20 § 1391(e).

21 6. Assignment to the San Francisco division is proper pursuant to Local Rule 3-2(c)
22 and (d) because a substantial portion of the events giving rise to this action occurred in this district
23 and division, where Plaintiff is headquartered.

24
25
26 ¹ The Office of Information Policy has primary responsibility for handling FOIA requests
27 submitted to the Office of the Attorney General, Deputy Attorney General, and Associate Attorney
28 General, as well as the Office of Legislative Affairs and the Office of Legal Policy. By letter dated
June 29, 2011, Office of Legal Policy informed Plaintiff that it had no records responsive to
Plaintiff’s request. Thus, Plaintiff’s complaint does not include the Office of Legal Policy.

1 **FACTUAL ALLEGATIONS**

2 **Section 215 of the USA PATRIOT Act**

3 7. Since its passage in 2001, the USA PATRIOT Act (the “Patriot Act”), Pub. L.
4 No. 107-56, 115 Stat. 272 (codified in various sections), has engendered controversy. In particular,
5 the government’s use of one provision — Section 215 — has consistently sparked concern among
6 elected officials, civil liberties advocates, and citizens.

7 8. Section 215 of the Patriot Act, which amended the Foreign Intelligence Surveillance
8 Act (“FISA”), Pub. L. No. 95-511, 92 Stat. 1783 (codified in §§ 50 U.S.C. 1801 - 1885) provides
9 the FBI with the power to obtain a court order for “any tangible thing” upon certification that the
10 requested items are “relevant to an authorized [counterintelligence or counterterrorism]
11 investigation.” 50 U.S.C. § 1861(a)(1), (b)(2)(A). Section 215 — along with Section 206 (the
12 “roving wiretap” provision) of the Patriot Act and the “lone wolf” provision of the Intelligence
13 Reform and Terrorism Prevention Act of 2004 — was initially schedule to sunset in 2005, but,
14 after brief extensions, was subsequently reauthorized for four additional years.

15 9. In 2009, DOJ attorneys publicly disclosed that Section 215 orders were being used
16 to support a “sensitive collection program.” Statement of Todd Hinnen, Deputy Assistant Attorney
17 General, House Judiciary Committee, “The USA PATRIOT Act,” (September 22, 2009).² Shortly
18 after this disclosure, elected officials briefed on the government’s interpretation of Section 215
19 began to question the legitimacy of the government’s use of its expanded Patriot Act powers.
20 Senator Richard Durbin, a member of the Senate Judiciary Committee, stated that the
21 government’s use of “Section 215 is unfortunately cloaked in secrecy. Some day that cloak will be
22 lifted, and future generations will ask whether our actions today meet the test of a democratic
23 society: transparency, accountability, and fidelity to the rule of law and our Constitution.” Remarks
24 of Sen. Richard Durbin, Senate Judiciary Committee “Executive Business Meeting,” (October 1,
25 2009).³

26 _____
27 ² Available at <http://www.justice.gov/ola/testimony/111-1/2009-09-22-nsd-hinnen-patriot-act.pdf>

28 ³ Available at <http://judiciary.senate.gov/resources/webcasts/index.cfm?changedate=09-28-09&p=all> (beginning at 68:00).

1 10. Similarly, then-Senator Russ Feingold, a member of both the Senate Judiciary
2 Committee and the Senate Select Committee on Intelligence, stated: there “is information about the
3 use of Section 215 orders that I believe Congress and the American people deserve to know . . .
4 before we decide whether and in what form to extend these authorities, Congress and the American
5 people deserve to know at least basic information about how they have been used.” Statement of
6 Sen. Russ Feingold, Senate Judiciary Committee Hearing, “Reauthorizing the USA PATRIOT Act:
7 Ensuring Liberty and Security,” September 23, 2009.⁴ Despite the Senators’ admonitions,
8 Section 215 was reauthorized until 2011.

9 11. In May 2011, during truncated debate on the reauthorization of the three expiring
10 provisions, two Senators on the Senate Select Committee on Intelligence again voiced concerns
11 about the government’s use of 215 orders. In an interview, Senator Ron Wyden stated that he was
12 “extremely interested in reforming [Section 215]” and that “the public has a right to public debate
13 about” the government’s interpretation and use of Section 215. Spencer Ackerman, *There’s a*
14 *Secret Patriot Act, Senator Says*, WIRED (May 27, 2011).⁵ Then, in a speech on the Senate floor,
15 Senator Wyden declared:

16 I want to deliver a warning this afternoon: when the American people find out
17 how their government has secretly interpreted the Patriot Act, they will be
18 stunned and they will be angry. . . . The fact is that anyone can read the plain text
19 of the Patriot Act, and yet many members of Congress have no idea how the law
is being secretly interpreted by the executive branch[.]

20 Statement of Sen. Ron Wyden, On Patriot Act Reauthorization (May 26, 2011).⁶ Senator Mark
21 Udall echoed similar concerns about the scope of Section 215: “Congress is granting powers to the
22 Executive Branch that lead to abuse, and frankly shield the Executive Branch from
23 accountability . . . I cannot believe that we are once again being rushed into rubber-stamp policies
24 that threaten the liberty of the American people.” Statement of Sen. Mark Udall, On Patriot Act

25 ⁴ Available at

26 http://judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da1501403&wit_id=e655f9e2809e5476862f735da1501403-0-1.

27 ⁵ Available at <http://www.wired.com/dangerroom/2011/05/secret-patriot-act/>.

28 ⁶ Available at <http://wyden.senate.gov/newsroom/press/release/?id=34eddcdb-2541-42f5-8f1d-19234030d91e>.

1 Reauthorization (May 26, 2011).⁷

2 12. Senators Wyden and Udall co-sponsored an amendment to the reauthorization of the
3 Patriot Act. The amendment would have required government officials to “not secretly reinterpret
4 public laws and statutes in a manner that is inconsistent with the public’s understanding of these
5 laws, and [to] not describe the execution of these laws in a way that misinforms or misleads the
6 public.” S.A. 339 to S. 1038, 112th Cong. § 3 (2011). The amendment would have also required
7 the Attorney General to publish “the legal basis for the intelligence collection activities described
8 in [a] February 2, 2011 report [from the Attorney General and Director of National Intelligence
9 regarding intelligence collection authorities scheduled to expire under Section 224 of the Patriot
10 Act].” *Id.* Again, over the objection of Senators briefed on the government’s interpretation and
11 use of Section 215, the three expiring provisions of the Patriot Act were extended until 2014.

12 13. On September 21, 2011, Senators Wyden and Udall sent a joint letter to Attorney
13 General Eric Holder describing the DOJ’s pattern of “misleading statements pertaining to the
14 government’s interpretation” of Section 215. Letter from Sens. Wyden and Udall to Attorney
15 General Eric Holder (Sept. 21, 2011).⁸ The Senators expressed particular concern with
16 representations made by the DOJ analogizing the use of Section 215 to grand jury subpoenas, as
17 well as with DOJ statements denying that Section 215 had not been subject to a secret legal
18 interpretation by the DOJ. *Id.* The Senators closed by urging DOJ to “avoid a negative public
19 reaction and erosion of confidence in US intelligence agencies” by “initiat[ing] an informed public
20 debate about these authorities today.” *Id.*

21 **Plaintiff’s FOIA Requests and Requests for Expedited Processing**

22 14. In letters dated June 2, 2011 and sent by email to the OLC, OIP, NSD, and FBI,
23 Plaintiff requested under the FOIA all agency records (including, but not limited to, electronic
24 records) created from January 1, 2004 to the present discussing, concerning, or reflecting the DOJ
25 or any of its component’s interpretation or use of Section 215, including:
26

27 ⁷ Available at http://markudall.senate.gov/?p=press_release&id=1090.

28 ⁸ Available at <http://wyden.senate.gov/download/?id=a3670ed3-9f65-4740-b72e-061c7de83f75>.

- 1 (1) All reports, memoranda, guidance, presentations, legal briefs, emails,
2 or any other record describing the types of “tangible things” which the
3 DOJ or any of its components has sought or has the authority to seek
4 through Section 215 orders, whether “pure” or “combination” orders
5 (i.e., a 215 order made in conjunction with a pen register/trap and
6 trace order);
- 7 (2) All reports, memoranda, guidance, presentations, legal briefs, emails,
8 or any other record related to the use of Section 215 orders to further
9 any “sensitive collection program;”
- 10 (3) All reports, memoranda, guidance, presentations, legal briefs, emails,
11 or any other record relating to the scope of the FBI’s authority under
12 Section 215 or the legal basis for “sensitive collection programs”
13 supported by Section 215 orders, including any briefings provided to
14 the Senate Select Committee on Intelligence or the Senate Judiciary
15 Committee, including the February 2, 2011 report;
- 16 (4) All reports, memoranda, guidance, presentations, legal briefs, emails,
17 or any other record related to modifications by the Foreign
18 Intelligence Surveillance Court to applications for Section 215 orders
19 submitted by the FBI;
- 20 (5) All reports, memoranda, guidance, presentations, legal briefs, emails,
21 or any other record related to the Foreign Intelligence Surveillance
22 Court’s refusal to grant any applications for Section 215 orders
23 submitted by the FBI;
- 24 (6) All reports, memoranda, guidance, presentations, legal briefs, emails,
25 or any other record related to the FBI’s withdrawal of any applications
26 for Section 215 orders from the Foreign Intelligence Surveillance
27 Court;
- 28 (7) All reports, memoranda, guidance, presentation, legal briefs, emails or
any other record related to the number of U.S. persons identified as
subjects in Section 215 orders and the number of non-U.S. persons
identified as subjects in Section 215 orders;
- (8) Copies of any invoices, receipts, bills, or any other similar document
sent to the FBI by any business or organization in order to be
reimbursed for the cost of compliance with a Section 215 order.

15. In its June 2 letters, Plaintiff also formally requested that the processing of these requests be expedited because they pertain to information about which there is “[a]n urgency to inform the public about an actual or alleged federal government activity,” and the requests were “made by a person primarily engaged in disseminating information.” 5 U.S.C. § 552(a)(6)(E)(i)(I),

1 (v)(II); 28 C.F.R. § 16.5(d)(1)(ii). Plaintiff also requested expedited processing because the
2 requests involve a “matter of widespread and exceptional media interest in which there exist
3 possible questions about the government’s integrity which affect public confidence.” 5 U.S.C.
4 § 552(a)(6)(E)(i)(II); 28 C.F.R. § 16.5(d)(1)(iv). Plaintiff further requested a waiver of all fees
5 associated with the processing of the request because EFF is a representative of the news media,
6 pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 28 C.F.R. §16.22(b)(6), (d)(1), and because the
7 request was in the public interest, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R.
8 § 16.11(k)(1).

9 **OLC’s Response to Plaintiff’s FOIA Request**

10 16. By letter dated June 15, 2011, OLC acknowledged receiving Plaintiff’s FOIA
11 request, described in paragraphs 14 & 15, on June 3, 2011.

12 17. In its June 15 letter, OLC granted Plaintiff’s request for expedited processing. OLC
13 did not make a determination on Plaintiff’s fee waiver request.

14 18. To date, OIP has not produced any records responsive to Plaintiff’s FOIA request.

15 **OIP’s Response to Plaintiff’s FOIA Request**

16 19. By letter dated June 13, 2011, OIP acknowledged receiving Plaintiff’s FOIA
17 request, described in paragraphs 14 & 15, on June 3, 2011.

18 20. In its June 13 letter, OIP granted Plaintiff’s request for expedited processing. OIP
19 did not make a determination on Plaintiff’s fee waiver request.

20 21. By letter dated June 29, 2011, OIP informed Plaintiff that no records responsive to
21 Plaintiff’s FOIA request were located within the Office of Legal Policy. OIP informed Plaintiff that
22 the Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, and
23 Legislative Affairs were continuing their search.

24 22. To date, OIP has not produced any records responsive to Plaintiff’s FOIA request.

25 **NSD’s Response to Plaintiff’s FOIA Request**

26 23. By letter dated June 6, 2011, NSD acknowledged receiving Plaintiff’s FOIA
27 request, described in paragraphs 14 & 15, on June 6, 2011.

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2 47. Plaintiff is entitled to injunctive relief with respect to the release and disclosure of
3 the requested documents.

4 **Violation of the Freedom of Information Act for Failure to Grant Plaintiff's Fee Waiver**

5 48. Plaintiff repeats and realleges paragraphs 1-39.

6 49. Defendant has wrongfully failed to grant Plaintiff's request for a public interest fee
7 waiver.

8 50. Plaintiff has exhausted the applicable administrative remedies with respect to
9 Defendant's failure to grant Plaintiff's public interest fee waiver.

10 51. Plaintiff is entitled to a waiver of all fees associated with the processing and release
11 of the requested records.

12 **REQUESTED RELIEF**

13 WHEREFORE, Plaintiff prays that this Court:

- 14 1. order Defendant and its components to process immediately the requested records in
15 their entirety;
- 16 2. order Defendant and its components, upon completion of such expedited processing,
17 to disclose the requested records in their entirety and make copies available to
18 Plaintiff;
- 19 3. order Defendant and its components to waive all fees associated with the processing
20 and release of the requested records;
- 21 4. provide for expeditious proceedings in this action;
- 22 5. award Plaintiff its costs and reasonable attorneys fees incurred in this action; and
23 6. grant such other relief as the Court may deem just and proper.

24 DATED: November 3, 2011

25 By: /s/ Jennifer Lynch
26 Jennifer Lynch, Esq.
27 ELECTRONIC FRONTIER FOUNDATION
28 454 Shotwell Street
San Francisco, CA 94110
Attorneys for Plaintiff
ELECTRONIC FRONTIER FOUNDATION

PROOF OF SERVICE

I, Stephanie Shattuck, do hereby affirm that I am over the age of 18 years and not a party to the within action. My business address is 454 Shotwell Street, San Francisco, California 94110.

On November 3, 2011, I served the following document:

- FIRST AMENDED COMPLAINT FOR INJUNCTIVE RELIEF FOR VIOLATION OF THE FREEDOM OF INFORMATION ACT, 5 U.S.C. § 552

on the person(s) below as follows:

By United States Registered Mail- I enclosed the documents in a sealed envelope addressed to:

UNITED STATES ATTORNEYS OFFICE
Federal Courthouse
450 Golden Gate Avenue
San Francisco, CA 94102

DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

ATTORNEY GENERAL OF THE UNITED STATES
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

and deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid. I am a resident of the county where the mailing occurred. The envelope was placed in the mail at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on November 3, 2011.


Stephanie Shattuck