

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION;
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION,

Plaintiffs,

v.

DEPARTMENT OF JUSTICE,

Defendant.

Civil Action No. 08-cv-
01157-JR

AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Preliminary Statement

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 & 2202, seeking the immediate processing and release of agency records requested by plaintiffs American Civil Liberties Union and American Civil Liberties Union Foundation (collectively “ACLU”) from defendant Department of Justice (“DOJ”).

2. On November 29, 2007, the ACLU filed FOIA requests (“Requests”) with the Drug Enforcement Administration (“DEA”) and the Executive Office for United States Attorneys (“EOUSA”), which are part of DOJ. The ACLU asked for expedited processing of its Requests, which sought records about the government’s tracking of the location of individuals’ mobile phones without first obtaining a warrant based on probable cause. Specifically, the Requests sought the release of all

records pertaining to defendant's policies, procedures and practices followed to obtain mobile phone location information for law enforcement purposes and, in particular, information on criminal prosecutions of individuals who were tracked using mobile phone location data where the government did not first secure a warrant based on probable cause.

3. The ACLU submitted the Requests after court decisions and media reports revealed that defendant claims not to need probable cause to obtain real-time tracking information and that some EOUSA field offices were violating a DOJ "internal recommendation" that "federal prosecutors seek warrants based on probable cause to obtain precise location data in private areas."¹ News reports raised the possibility that on at least some occasions, law enforcement officers obtain tracking data directly from mobile carriers without any court involvement. Media reports and court decisions indicated that the DEA has utilized cell phone location tracking on numerous occasions.

4. The information now in the public domain suggests that defendant may be engaging in unauthorized and potentially unconstitutional tracking of individuals through their mobile phones. Information pertaining to the DOJ's procedures for obtaining real-time tracking information is vital to the public's understanding of the privacy risks of carrying a mobile phone and of, more generally, the government's expansive view of its surveillance powers. The limited information currently

¹ Ellen Nakashima, *Cellphone Tracking Powers on Request*, Washington Post, Page A01, Nov. 23, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/22/AR2007112201444.html?hpid=topnews>.

available about the government's tracking practices raises serious questions about whether the government is complying with the law and the Constitution.

5. Plaintiffs are entitled to a response to their Requests and to a timely release of the records sought. DEA ignored the ACLU's request for expedited processing. EOUSA declined to expedite the processing of plaintiffs' request. Although it has been nine months since the initial filing of the Requests, plaintiffs have only received an incomplete response and defendant has failed to release the records requested.

Jurisdiction and Venue

6. This Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. §§ 552(a)(4)(A)(vii), 552(a)(4)(B), and 552(a)(6)(E)(iii). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. §§ 2201(a) & 2202. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B).

Parties

7. The American Civil Liberties Union is a nationwide, non-profit, non-partisan organization with over 500,000 members dedicated to the constitutional principles of liberty and equality.

8. The American Civil Liberties Union Foundation ("ACLUF") is a separate 501(c)(3) organization that educates the public about civil liberties and employs lawyers who provide legal representation free of charge in cases involving civil liberties.

9. Defendant DOJ is a Department of the Executive Branch of the United States Government. The DOJ is an agency within the meaning of 5 U.S.C. § 552(f)(1). EOUSA and DEA are components of defendant DOJ.

Background

10. Recent court decisions and media reports reveal that law enforcement officers, frequently from the Drug Enforcement Administration, are routinely asking courts to compel mobile carriers to provide them with information that enables them to locate individuals through their cell phones. Ellen Nakashima, *Cellphone Tracking Powers on Request*, Washington Post, Page A01, Nov. 23, 2007. Known as real-time tracking, this procedure allows officials to home in on individuals by tracking their mobile phones, capable of pinpointing the target to within 30 feet. *Id.*

11. Over the past few years, the government's tactics in obtaining real-time tracking information have garnered increasing attention. Specifically, news reporters and legal experts have indicated growing concern that the government is circumventing legal procedures for obtaining warrants based on probable cause when enlisting telephone companies to furnish information.² On November 29,

² See, e.g., Brendan I. Koerner, *Your Cellphone is a Homing Device*, Legal Affairs, July/August 2003; William B. Baker, *New York Case Tests Law of Surveillance on Cell Phone Location Data*, Privacy in Focus, Sept. 2005; Declan McCullagh, *Police Blotter: Cell Phone Tracking Rejected*, CNET News.com, Sept. 2, 2005, at http://www.news.com/Police-blotter-Cell-phone-tracking-rejected/2100-1030_3-5846037.html; Al Gidari, *Yet Another Court Rules that Disclosure of Cell Site/Location Information Requires Probable Cause Showing*, Digestible Law: Perkins Coie's Internet Case Digest, Oct. 21, 2005; Ryan Singel, *U.S. Cell-Phone Tracking Clipped*, Wired, Oct. 27, 2005; Anita Ramasastry, *Every Move You Make, Part Three: Why Law Enforcement Should Have to Get a Warrant Before Tracking Us Via our Cell Phones*, FindLaw.com, Nov. 10, 2005, at: <http://writ.news.findlaw.com/ramasastry/20051110.html>; Matt Richtel, *Live Tracking of Mobile Phones Prompts Court Fights on Privacy*, New York Times, Dec. 10, 2005, at A1; Neal Conan, *NPR Talk of the Nation: Surveillance Via Cell Phone*, National Public Radio, Dec. 14, 2005; Tresa Baldas, *Feds' Cell Phone Tracking Divides the Courts*, The National Law Journal, Jan. 19, 2006; Scott Cameron, *Your Cell Phone is Homing Beacon – Should the Government Be Allowed to*

2007, a report in the *Washington Post* indicated that officers regularly seek court authorization based on an evidentiary showing less burdensome than probable cause and, in some cases, obtain tracking data directly from mobile carriers without any court involvement, sparking extensive media interest and speculation. Nakashima, *supra*, at A01.³

12. The *Washington Post* article revealed that such requests for court orders run counter to the Justice Department's own "internal recommendation" that "federal prosecutors seek warrants based on probable cause to obtain precise location data in private areas." *Id.*

Use It Without Showing Probable Cause?, The IP Law Blog, April 12, 2006; Stephen V. Treglia, *Trailing Cell Phones: Courts Grapple with Requests from Prosecutors Seeking Prospective Tracking*, New York Law Journal, July 18, 2006; Daniel R. Sovovool & Kristin Jamberdino, *Tracking a User's Location Via Cell Phone*, ipFrontline.com, Nov. 16, 2006, at:

<http://www.ipfrontline.com/depts/article.asp?id=9633&deptid=5>; Linda Coady, *Government May Track Cell Phone Movements*, *N.Y. Court Says*, Privacy Litigation Reporter, Vol. 4:3, Nov. 17, 2006; Kim Janssen, *Keeping Track of Your Every Move*, Southtown Star, Feb. 10, 2008; Jason Cato, *Prosecutors in Pittsburgh Appeal Ruling of Denying Cell Phone Tracking*, Pittsburgh Tribune Review, Mar. 10, 2008; Caryn Tamber, *Md. Court of Special Appeals: Police Can Track Suspect Through GPS, cell signals*, Daily Record (Baltimore, MD), Feb. 19, 2008; Editorial, *Government Tracking: One for the Constitution*, Pittsburgh Tribune Review, Mar. 14, 2008, at http://www.pittsburghlive.com/x/pittsburghtrib/opinion/archive/s_557160.html; Ronald Spinner, *I Always Feel Like Somebody's Tracking Me*, Michigan Telecommunications and Technology Law Review, Feb. 13, 2008, at <http://blog.mttr.org/2008/02/i-always-feel-like-somebodys-tracking.html#spinnerfn26anc>; David Lazarus, *Consumer Confidential: Cellphones to Keep Track of Your Purchases – and You*, Los Angeles Times, March 16 2008; Declan McCullagh, *Police Blotter: E911 Rules Aid Police in Tracking Cell Phones*, CNET News.com, Feb. 8, 2008, at http://news.cnet.com/Police-Blotter-E911-rules-aid-police-in-tracking-cell-phones/2100-1030_3-6229805.html.

³ Newspapers around the country deemed the Washington Post article sufficiently important that it was reprinted in the Charlotte Observer, Chicago Tribune, Cincinnati Post, Houston Chronicle, Lexington Herald-Leader, Pittsburgh Post-Gazette, Seattle Times, South Florida Sun-Sentinel, and St. Paul Pioneer Press. See also: *Justice Department Defends Use of Cell-Phone Tracking Data*, Fox News, Nov. 24, 2007, at <http://www.foxnews.com/story/0,2,933,312647,00.html>; *Feds Push for Real-Time Cell-Phone Tracking Data*, San Jose Mercury News, Nov. 23, 2007, at 4a; *Phone Tech Raises Privacy Concerns*, United Press International, Nov. 23, 2007; Cable News Network, Kelli Arena interviews Mark Rotenberg, Nov. 23, 2007 transcript available at 2007WLNR 23221490; Fox coverage, Nov. 23, 2007, transcript available at 2007 WLNR 23256527; Editorial, *Probable Abuse*, Albany Times Union, Nov. 27, 2007; Editorial, *Privacy Threat, Congress and the Judiciary Should Promulgate Tighter Rules for Government Access to Cell Phone Data*, Houston Chronicle, Nov. 25, 2007; Editorial, *Tracking You Down*, Syracuse Post-Standard, Nov. 25, 2007.

13. Nonetheless, a growing number of reports reveal that the government claims not to need probable cause to obtain real-time tracking information. Publicly available court decisions disclose that federal officials who do petition a court for an order are frequently using a standard lower than probable cause, replacing it with a “reasonable relevance” standard, which requires only a simple showing of “articulable relevance to an ongoing investigation.” *E.g., In Re U.S. Order Dir. A Prov. Of Elec. Commun.*, 534 F. Supp. 2d 585, 587 (W.D. Pa. 2008) (concluding that the ‘reasonable relevance’ standard was unconstitutional and that officials must show probable cause).⁴

14. Information on government practices and procedures in obtaining real-time tracking data is lacking. It is not publicly known whether the government routinely obtains mobile phone location information without any court supervision. Yet, the implications for the public are vast: over 240 million Americans carry mobile phones and the number is steadily increasing. CTIA—The Wireless Association—Survey Results June 2007, available at <http://www.ctia.org/media/press/body.cfm/prid/1717>.

15. The limited information currently available about the government’s tracking practices raises serious questions about whether the government is complying with the law and the Constitution. Several courts have held that the government lacks authority to track individuals without first obtaining a warrant based on probable cause.⁵

⁴ See also, e.g. Nakashima, *supra* note 1, at A01; Ramasastry, *supra* note 2, at 1; Sovocool and Jamberdino, *supra* note 2, at 2.

16. Disclosure of the requested information is vital to the public understanding of the privacy risks of carrying a mobile phone.

The FOIA Request

17. On November 29, 2007, the ACLU filed FOIA requests with the DEA and the EOUSA seeking the release of records relating to government use of information from mobile carriers to track the location of individuals' mobile phones. Specifically, plaintiffs sought records reflecting the policies, procedures and practices followed to obtain mobile phone location information for law enforcement purposes ("Question 1"); the "internal recommendation" that "federal prosecutors seek warrants based on probable cause to obtain precise location data in private areas," as described in the *Washington Post* article, *supra*, at A01 ("Question 2"); any violations of the "internal recommendation" ("Question 3"); the number of times the government has applied for a court order, based on less than probable cause, authorizing it to obtain mobile phone location information, and whether such applications were successful ("Question 4"); and records reflecting the case name, docket number, and court of all criminal prosecutions, current or past, of individuals who were tracked using mobile location data, where the government did not first

⁵ See, e.g., *In Re U.S. Order Dir. A Prov. Of Elec. Commun.*, 534 F. Supp. 2d 585, 587, (W.D. Pa 2008); *In the Matter of the Application of the UNITED STATES of America for ORDERS AUTHORIZING the INSTALLATION and Use of PEN REGISTERS and Caller Identification Devices on Telephone Numbers [Sealed] and [Sealed]*, 416 F. Supp. 2d 390, 391 (D. Md. 2006) ("Unless and until Congress takes further action, the court may only authorize disclosure of prospective cell site information upon a showing of probable cause pursuant to Rule 41."); *In the Matter of an APPLICATION OF THE UNITED STATES FOR AN ORDER (1) AUTHORIZING THE USE OF A PEN REGISTER AND A TRAP AND TRACE DEVICE and (2) Authorizing Release of Subscriber Information and/or Cell Site Information*, 396 F. Supp. 2d 294, 295 (E.D.N.Y. 2005) ("[E]xisting law does not permit the government to obtain the requested information on a prospective, real-time basis without a showing of probable cause.").

secure a warrant based on probable cause of such data (“Question 5”). In its request with the EOUSA, the ACLU asked that 18 offices be searched.⁶

18. Plaintiffs requested expedited processing under the applicable provisions of the FOIA and defendant DOJ’s regulations. They also sought both a limitation of processing fees as a “representative of the news media” and a waiver of all costs on the grounds that disclosure of the requested information in this case would contribute to the public understanding of the privacy risks of carrying a mobile phone and of the “operations and activities of the government” in tracking individuals through cell phones.

Agency Responses

19. On May 30, 2008, plaintiffs received a letter from DEA denying their Request. On July 24, 2008, plaintiffs timely filed an administrative appeal. Plaintiffs have yet to receive a response. DEA is in violation of 5 U.S.C. § 552(a)(6)(A)(ii), which requires that all agencies make a determination with respect to any appeal within twenty days.

20. The EOUSA responded on December 7, 2007. It denied the ACLU’s request for expedited processing. The letter stated that the agency had divided the Request into 19 parts⁷ and that each of the 18 offices indicated by the ACLU were directed to reply to Questions 2-4 of the Request. A separate assignment number was given to what the EOUSA called “Third Party Tracking Cases,” which dealt

⁶ Office of Legal Programs, General Counsel’s Office, Directors’ Office, Southern District of California, Northern District of California, Central District of California, Eastern District of California, the District of Columbia, Northern District of Indiana, Southern District of Indiana, Eastern District of Louisiana, Western District of Louisiana, Middle District of Louisiana, District of New Jersey, Northern District of Florida, Middle District of Florida, Southern District of Florida, and District of Nevada.

⁷ Although the letter itself claims to divide the request into 16 parts, there are actually 19 parts, each given its own assignment number.

solely with Question 5 of the FOIA request seeking records regarding criminal prosecutions.

21. By letter of December 12, 2007, the EOUSA responded specifically to the “Third Party Tracking Cases” request. In the letter, the EOUSA declined to respond to the question, claiming that, pursuant to EOUSA policy, the office could neither “confirm nor deny that records concerning living third parties exist” on the grounds that the disclosure of such information would constitute an “unwarranted invasion of personal privacy.” On February 6, 2008, the ACLU appealed this decision but has yet to receive a response. The EOUSA is in violation of 5 U.S.C. § 552(a)(6)(A)(ii) requiring that all agencies make a determination with respect to any appeal within twenty days.

22. By letter of January 24, 2008, the EOUSA responded to the request assigned to the District of Nevada, 07-4136. In the letter, the EOUSA denied the ACLU’s request for a fee reduction, determining that the ACLU did not meet the requirements to be designated a “media requester for FOIA fee purposes.” It further denied the request for a fee waiver, concluding that disclosure of the information requested would not “contribute significantly to public understanding of the operations and activities of the government.” Based on these conclusions, the EOUSA demanded an advance payment in order to continue processing the request for the District of Nevada. On March 12, 2008, the ACLU appealed the EOUSA’s decision regarding request 07-4136, but has yet to receive a response. The EOUSA is in violation of 5 U.S.C. § 552(a)(6)(A)(ii) requiring that all agencies make a determination with respect to any appeal within twenty days.

23. Three offices—the Eastern District of Louisiana, Southern District of Florida, and District of New Jersey—denied plaintiffs’ Request, stating that they had no responsive records. Plaintiffs timely filed administrative appeals, but received no responses. These components are in violation of 5 U.S.C. § 552(a)(6)(A)(ii), which requires that all agencies make a determination with respect to any appeal within twenty days.

24. As of the date that plaintiffs filed suit, five offices failed to respond to plaintiffs’ request.⁸

25. With regard to the five offices that did not respond by the time plaintiffs filed suit (the Northern District of California, the Central District of California, the District of Columbia, the Middle District of Louisiana and the Northern District of Indiana) and the six requests the denial of which the ACLU appealed (the DEA and, with regard to EOUSA, Question 5, the District of Nevada, the Eastern District of Louisiana, the Southern District of Florida, and the District of New Jersey), defendant is improperly withholding the records sought by plaintiffs’ Request.

26. Nine offices denied plaintiffs’ Request in whole or in part and plaintiffs chose not to appeal.⁹ These requests are not before this Court.

Cause of Action

27. Defendant’s failure to make promptly available the records sought by plaintiffs’ Requests violates the FOIA, 5 U.S.C. § 552(a)(3)(A), and defendant’s corresponding regulations.

⁸ The Northern District of California, Central District of California, District of Columbia, the Middle District of Louisiana, and the Northern District of Indiana.

⁹ These offices are the Office of Legal Programs, General Counsel’s Office, Southern District of California, Eastern District of California, Southern District of Indiana, Western District of Louisiana, the Director’s Office, the Northern District of Florida, and the Middle District of Florida.

28. Defendant's failure to timely respond to plaintiffs' Requests violates the FOIA, 5 U.S.C. § 552(a)(6)(A), and defendant's corresponding regulations.

29. Defendant's failure to grant plaintiffs' request for expedited processing violates the FOIA, 5 U.S.C. § 552(a)(6)(E), and defendant's corresponding regulations.

30. Defendant's failure to grant plaintiffs' request for a waiver of fees violates the FOIA, 5 U.S.C. § 552(a)(4)(A)(iii), and defendant's corresponding regulations.

31. Defendant's failure to grant plaintiffs' request for a limitation of fees violates the FOIA, 5 U.S.C. § 552(a)(4)(A)(ii)(II), and defendant's corresponding regulations.

Requested Relief

WHEREFORE, plaintiffs pray that this Court:

A. Order defendants immediately to process and provide all outstanding requested records;

B. Enjoin defendants from charging plaintiffs fees for the processing of their Request;

C. Issue a declaration that the ACLU qualifies as a "representative of the news media" for purposes of fee assessments under the FOIA;

D. Award plaintiffs their costs and reasonable attorneys' fees incurred in this action; and

E. Grant such other relief as the Court may deem just and proper.

September 11, 2008

Respectfully submitted,

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