

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

**ELECTRONIC PRIVACY
INFORMATION CENTER
1718 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20009,**

Plaintiff,

v.

**FEDERAL BUREAU OF
INVESTIGATION
935 Pennsylvania Ave. NW
Washington, DC 20535**

Defendant.

Civil Action No. 17-121

COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(a) (2017), for injunctive and other appropriate relief, and seeking the expedited processing and disclosure of all agency records requested by Plaintiff Electronic Privacy Information Center (“EPIC”) from Defendant United States Federal Bureau of Investigation (“FBI”).

2. EPIC challenges the FBI’s failure to make a timely decision concerning EPIC’s request for expedited processing of the FOIA request (“EPIC’s FOIA Request”) for records about the Russian interference with the 2016 Presidential Election.

Jurisdiction and Venue

3. This Court has both subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 552, (a)(6)(E)(iii), (a)(4)(B). This Court has personal jurisdiction over Defendant FBI.

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

Parties

5. Plaintiff EPIC is nonprofit organization, incorporated in Washington, DC, established in 1994 to focus public attention on emerging privacy and civil liberties issues. Central to EPIC's mission is oversight and analysis of government activities. EPIC's Advisory Board includes distinguished experts in law, technology, public policy, and cybersecurity. EPIC routinely disseminates information to the public through the EPIC website, the EPIC Alert, and various other news organizations. EPIC is a representative of the news media. *EPIC v. Dep't of Def.*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

6. Defendant FBI is a federal agency within the meaning of the FOIA, 5 U.S.C. § 552(f)(1). Defendant FBI is headquartered in Washington, D.C.

Facts

FBI records of Russian interference with the 2016 Presidential Election

7. The Intelligence Community ("IC") has concluded Russia carried out a multi-pronged interference in the 2016 U.S. Presidential Election to "undermine public faith in the US democratic process."¹ This campaign included numerous cyberattacks on both the Democratic National Committee and the Republican National Committee.² Nonetheless, the press reported a lax response from the primary agency entrusted with protecting cybersecurity - the FBI.³ There is

¹ Office of the Dir. of Nat'l Intelligence, *Assessing Russian Activities and Intentions in Recent US Elections* ii (2017), https://www.dni.gov/files/documents/ICA_2017_01.pdf.

² Eric Lipton, David E. Sanger, & Scott Shane, *The Perfect Weapon: How Russian Cyberpower Invaded the U.S.*, N.Y. Times (Dec. 13, 2016), <http://www.nytimes.com/2016/12/13/us/politics/russia-hack-election-dnc.html>.

³ Ellen Nakashima & Adam Entous, *FBI and CIA Give Differing Accounts to Lawmakers on Russia's Motives in 2016 Hacks*, Wash. Post (Dec. 10, 2016), https://www.washingtonpost.com/world/national-security/fbi-and-cia-give-differing-accounts-to-lawmakers-on-russias-motives-in-2016-hacks/2016/12/10/c6dfadfa-bef0-11e6-94ac-3d324840106c_story.html.

an urgent need to make available to the public relevant information about the FBI's response to the Russian interference with the 2016 Presidential election and to ensure the immediate release of the records that has EPIC requested.

8. FBI calls itself "the lead federal agency for investigating cyber attacks by criminals, overseas adversaries, and terrorists."⁴ The Bureau's legal authority over cybersecurity is expressly provided for in Presidential Policy Directive-41.⁵

9. Initiating the "[b]oldest" influence effort in the U.S. yet, Russian intelligence obtained access to DNC networks in July 2015, according to the report of the Intelligence Community.⁶ However, news reports suggested a lax, possibly negligent, response from the FBI. The FBI first contacted the DNC about potential cyber threats in September 2015.⁷ Yet, until the FBI met with party officials in March 2016, the FBI's response was limited to one telephone call to an I.T. contractor and several voicemail messages.⁸ The head of CrowdStrike, the cybersecurity firm hired by the DNC in April 2016, said "he was baffled that the F.B.I. did not call a more senior official at the D.N.C. or send an agent in person to the party headquarters to try to force a more vigorous response."⁹

10. Shortly thereafter, EPIC filed the FOIA request with the FBI for information about the Bureau's response to the Russian interference with the 2016 Presidential election.

⁴ *What We Investigate, Cyber Crime*, FBI.gov, <https://www.fbi.gov/investigate/cyber> (last visited Jan. 12, 2017).

⁵ Directive on United States Cyber Incident Coordination ("PPD 41"), 2016 Daily Comp. Pres. Doc. 495 (July 26, 2016) (setting forth the FBI's legal authority for cybersecurity threat response).

⁶ Office of the Dir. of Nat'l Intelligence, *supra* note 2, at 2, 5.

⁷ Ian Kullgren, *Brazile: Democrats' Emails Were 'Weaponized' Against Them*, Politico (Dec. 18, 2016), <http://www.politico.com/story/2016/12/donna-brazile-democratic-emails-232784>.

⁸ Lipton, Sanger, & Shane, *supra* note 3.

⁹ *Id.*

11. Since the filing of the EPIC FOIA Request, new details of the Russian threat to American democracy have emerged, intensifying the public's necessity for the requested documents. On December 29, 2016, a joint report by the Department of Homeland Security ("DHS") and FBI provided a high-level technical review of Russian the cyber attacks and mitigation strategies.¹⁰ Next, the Office of the Director of National Intelligence ("ODNI") released a joint IC report on January 6, 2017, boldly concluding that the Russians intended to "undermine public faith in the US democratic process" and "aspired to help President-elect Trump's election chances."¹¹ The IC stated it expects Russia to continue to threaten democratic institutions domestically and abroad.¹²

12. Upon convening, the new Congress immediately turned to the Russian interference in the 2016 Presidential election.

13. On January 5, 2017, the Senate Armed Services Committee held a hearing on "Foreign Cyber Threats to the United States."¹³ Chairman John McCain (R-AZ) stated "our intelligence agencies concluded unanimously that 'the Russian Government directed . . . compromises of e-mails from U.S. persons and institutions, including from U.S. political organizations.'"¹⁴ Senator McCain further stated, "Every American should be alarmed by Russia's attacks on our nation.

¹⁰ Dep't of Homeland Sec. & Fed. Bureau of Investigation, GRIZZLY STEPPE – Russian Malicious Cyber Activity (2016), https://www.us-cert.gov/sites/default/files/publications/JAR_16-20296A_GRIZZLY%20STEPPE-2016-1229.pdf.

¹¹ Office of the Dir. of Nat'l Intelligence, *supra* note 2, at ii.

¹² *Id.* at 5.

¹³ *Foreign Cyber Threats to the United States*, U.S. S. Comm. on Armed Servs., <http://www.armed-services.senate.gov/hearings/17-01-05-foreign-cyber-threats-to-the-united-states> (listing notice of hearing Jan. 5, 2017).

¹⁴ *Foreign Cyber Threats to the United States: Hearing before the S. Comm. On Armed Servs.*, 115th Cong. 2 (2017) (statement of Chairman John McCain).

There is no national security interest more vital to the United States of America than the ability to hold free and fair elections without foreign interference.”¹⁵

14. In response to questions from Senator John McCain regarding the Russia’s role in the 2016 Presidential election, Defense Secretary nominee General James Mattis responded that the U.S. should “recognize the reality” of dealing with the Russian government.¹⁶

15. Senator Lindsey Graham (R-NC) urged the incoming President-elect to “push back” on Russia’s actions with new sanctions.¹⁷ Legislation stepping up sanctions against Russia has been introduced in both the House and the Senate.¹⁸

16. Last week, unverified reports alleged ties between the President-elect and Russia.¹⁹ The report include allegations that Foreign Intelligence Surveillance Court order was issued to monitor members of the Trump team.²⁰ The Director of National Intelligence, James Clapper, issued a statement that neither affirmed nor refuted the reliability of the reports.²¹

¹⁵ *Id.*

¹⁶ *Defense secretary nominee Mattis warns world order under historic threat*, Fox News (Jan. 12, 2017), <http://www.foxnews.com/politics/2017/01/12/mattis-vows-to-strengthen-military-if-confirmed-for-top-pentagon-job.html>.

¹⁷ *Republican Lindsey Graham Urges Trump to Defend Democracy with Russian Sanctions*, Chi. Trib. (Jan. 8, 2017), <http://www.chicagotribune.com/news/nationworld/politics/ct-russia-hacking-donald-trump-20170108-story.html>.

¹⁸ SECURE Our Democracy Act of 2017, H.R. 530, 115th Cong. (2017); Counteracting Russian Hostilities Act of 2017, S. 94, 115th Cong. (2017).

¹⁹ Julian Borger, *John McCain passes dossier alleging secret Trump-Russia contacts to FBI*, Guardian (Jan. 11, 2017), <https://www.theguardian.com/us-news/2017/jan/10/fbi-chief-given-dossier-by-john-mccain-alleging-secret-trump-russia-contacts>.

²⁰ *Id.*

²¹ Press Release, James Clapper, Dir. of Nat’l Intelligence, DNI Clapper Statement on Conversation with President-elect Trump (Jan. 11, 2017), <https://www.dni.gov/index.php/newsroom/press-releases/224-press-releases-2017/1469-dni-clapper-statement-on-conversation-with-president-elect-trump>.

17. The Senate Intelligence Committee has also initiated a bipartisan investigation.²² Last Friday, Senator Richard Burr (R-NC), Chairman of the Senate Select Committee on Intelligence, and Senator Mark Warner (D-VA), Vice Chairman, stated that the Committee will review of “any intelligence regarding links between Russia and individuals associated with political campaigns,” and plans to use “subpoenas if necessary to compel testimony.”²³

18. Just today, Senators questioned the nominee for U.N. ambassador, Governor Nikki Haley, concerning the interference;²⁴ the Governor responded, “We are aware that it has happened. We don’t find it acceptable. And we are going to fight back.”²⁵

19. Meanwhile, controversy over the FBI response to the Russian interference has continued. The DNC deputy communications director Eric Walker alleged that the “FBI never requested access to the DNC’s computer servers” for review.²⁶ The FBI contests this account, stating instead the agency “repeatedly stressed to DNC officials the necessity of obtaining direct access to servers and data, only to be rebuffed until well after the initial compromise had been mitigated.”²⁷ Members of the House Judiciary Committee recently insisted the FBI reveal any investigation of ties between Russia and the president.²⁸ In their letter to FBI Director James

²² Press Release, Sen. Richard Burr, Chairman of the Senate Select Comm. on Intelligence, and Sen. Mark Warner, Vice Chairman, Joint Statement on Comm. Inquiry into Russian Intelligence Activities (Jan. 13, 2017), <https://www.burr.senate.gov/press/releases/joint-statement-on-committee-inquiry-into-russian-intelligence-activities>.

²³ *Id.*

²⁴ Nahal Toosi, *Nikki Haley breaks with Trump on Russia*, Politico (Jan. 18, 2017), <http://www.politico.com/story/2017/01/nikki-haley-un-confirmation-hearing-233757>.

²⁵ *Id.*

²⁶ Lily Hay Newman, *FBI Says the Democratic Party Wouldn’t Let Agents See Hacked Email Servers*, Wired (Jan. 5, 2017), <https://www.wired.com/2017/01/fbi-says-democratic-party-wouldnt-let-agents-see-hacked-email-servers/>.

²⁷ *Id.*

²⁸ Letter from Members of the House Judiciary Comm. to James B. Comey, Dir. of the Fed. Bureau of Investigation (Jan. 12, 2017), <https://democrats->

Comey, the Members cited multiple unanswered inquiries concerning the FBI response to the Russian interference.²⁹ The Chairman of the Senate Intelligence Committee has announced that he will investigate possible links between Russia and the Trump campaign.³⁰

20. There are upcoming federal elections in Europe. The French national election is scheduled for April 23, 2017. The German national election is September 24, 2017.

21. For these reasons, there is a profound and urgent public interest in the release of the FBI records sought by EPIC, concerning the Russian interference with the 2016 Presidential Election. The release of these records is necessary for the public to evaluate the FBI response to the Russian interference, assess threats to American democratic institutions, and to ensure the accountability of the federal agency with the legal authority to safeguard the American people against foreign cyber attacks.

EPIC's FOIA Request

22. On December 22, 2016, EPIC submitted a FOIA Request to the FBI's Record/Information Dissemination Section via email.

23. EPIC's FOIA Request sought records about the Russian interference with the 2016 Presidential Election. Specifically, EPIC sought:

1. All records including, but not limited to, memos, reports, guidelines, procedures, summaries, and emails pertaining to the FBI's investigation of Russian-sponsored cyber attack on the RNC, DNC, and DCCC.
2. All records of communications to the RNC, DNC, and DCCC regarding the threat of Russian interference in the 2016 Presidential election.
3. All records of communications with other federal agencies regarding Russian interference in the 2016 Presidential election.

judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/HJUD%20Dems%20to%20Director%20Comey%201.13.17.pdf.

²⁹ *Id* at 1.

³⁰ Elana Schor, *Intelligence Committee Will Investigate Possible Russia-Trump Links*, Politico (Jan. 13, 2016), <http://www.politico.com/story/2017/01/burr-says-intel-panel-will-investigate-possible-russia-trump-links-233621>.

4. All records including, but not limited to, memos, reports, guidelines, and procedures pertaining to the FBI's procedure to notify targets of cyber attacks.
24. EPIC sought "news media" fee status under 5 U.S.C. § 552(4)(A)(ii)(II), and a waiver of all duplication fees under 5 U.S.C. § 552(a)(4)(A)(iii).
25. EPIC also sought expedited processing under 5 U.S.C. §§ 552(a)(6)(E)(i), (a)(6)(E)(v)(II).
26. In an email dated December 22, 2016, FBI Public Information Officer, David P. Sobonya, acknowledged receipt of EPIC's FOIA Request.
27. The FBI has not made a determination concerning EPIC's request for expedited processing, or any other determination concerning EPIC's FOIA Request

EPIC's Constructive Exhaustion of Administrative Remedies

28. It has been 27 days since the FBI received EPIC's FOIA Request.
29. The FBI has failed to make a determination regarding EPIC's FOIA Request within the time period prescribed by 5 U.S.C. § 552(a)(6)(E)(ii)(I).
30. The FBI's failure to make a determination within the statutory limit violates the FOIA.
31. EPIC has constructively exhausted all administrative remedies under 5 U.S.C. § 552(a)(6)(C)(i).

Count I

Violation of FOIA: Failure to Timely Respond to Request for Expedited Processing

32. Plaintiff asserts and incorporates by reference paragraphs 1–31.
33. Defendant FBI has failed to make a determination regarding EPIC's request for expedited processing within ten days, and has thus violated the deadline under 5 U.S.C. § 552(a)(6)(E)(ii)(I) and 28 C.F.R. § 16.5(e)(4) (2017).

34. Plaintiff has constructively exhausted all applicable administrative remedies with respect to EPIC's FOIA Request under 5 U.S.C. § 552(a)(6)(C)(i).

Count II

Violation of FOIA: Failure to Grant Request for Expedited Processing

35. Plaintiff asserts and incorporates by reference paragraphs 1–31.

36. Defendant's failure to grant plaintiff's request for expedited processing violated the FOIA, 5 U.S.C. § 552(a)(6)(E)(i).

Count III

Violation of FOIA: Unlawful Withholding of Agency Records

37. Plaintiff asserts and incorporates by reference paragraphs 1–31.

38. Defendant has wrongfully withheld agency records requested by Plaintiff.

39. Plaintiff has constructively exhausted applicable administrative remedies with respect to Defendant's withholding of the requested records. 5 U.S.C. § 552(a)(6)(C)(i).

40. Plaintiff is entitled to injunctive relief with respect to the release and disclosure of the requested records.

Requested Relief

WHEREFORE, Plaintiff requests that this Court:

- A. Order Defendant to immediately conduct a reasonable search for all responsive records;
- B. Order Defendant to grant EPIC's request for expedited processing;
- C. Order Defendant to disclose to Plaintiff all responsive, non-exempt records;
- D. Order Defendant to produce the records sought without the assessment of search fees;
- E. Order Defendant to grant EPIC's request for a fee waiver;
- F. Award EPIC costs and reasonable attorney's fees incurred in this action; and

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

Respectfully Submitted,

/s/ Alan Butler

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