

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

ELECTRONIC PRIVACY INFORMATION CENTER

Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE

Defendant.

No. 18-1814 (TNM)

PLAINTIFF’S MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

Plaintiff Electronic Privacy Information Center (“EPIC”) hereby moves the Court for leave to file an Amended Complaint pursuant to Federal Rule of Civil Procedure 15(a)(2). In support, EPIC states:

1. Following the filing of EPIC’s Complaint, ECF No. 1, new facts have emerged regarding the Department of Justice’s practices related to the processing of EPIC’s requests for 2703(d) surveillance applications.
2. EPIC has attempted over the last year to work with the Justice Department to develop a search methodology that can locate records responsive to EPIC’s FOIA requests concerning surveillance applications. *See* Joint Status Reports, ECF No. 7, 8, 12, 13. Yet, despite EPIC efforts to assist, the Justice Department has stated that it is unable to search for records responsive to EPIC’s requests, even though the agency does not deny that responsive records exist or that the agency is in possession of responsive records.

3. First, in the fall of 2018, the Justice Department agreed to attempt an initial search in the U.S. Attorney's Office for the Southern District of New York ("USAO-SDNY").

4. On February 7, 2019, the Justice Department provided EPIC with a statement from the USAO-SDNY. In the statement, the Office claimed that "it is impossible for the USAO-SDNY to comply with this request" because it is impossible to use criminal clerk logs, manual search methods, or a system-wide digital search to locate responsive records.

5. EPIC reviewed the agency's response and provided a revised search proposal on February 15, 2019.

6. Under EPIC's revised proposal, the Justice Department agreed to contact three specific U.S. Attorney's Offices to determine whether those offices could conduct searches for responsive records.

7. The Justice Department contacted specified U.S. Attorney Offices with small, medium, and large staff sizes (respectively): the Eastern District of Oklahoma, the Eastern District of Pennsylvania, and the Southern District of California

8. On April 25, 2019, the Justice Department stated that all three offices responded that they "do not track" the information EPIC requested. The Eastern District of Oklahoma "reported that they do not have access to orders regarding cell site locations." And the offices indicated that "[t]hey would have to manually search all of their case files for the designated time period to find cases in which a 2703(d) order was requested and granted." The offices refused to conduct a manual search.

9. On July 2, 2019, EPIC submitted a third FOIA request seeking the same type of records in its original two requests for 2017 to present day. EPIC requested fee waiver status and expedited processing.

10. EPIC has not received a response regarding expedited processing or fee waiver status.
11. The Justice Department has not produced any records in response to any of EPIC's FOIA requests or provided an anticipated date of release.
12. The Justice Department's did not inform EPIC that it would refuse to conduct searches for records responsive to EPIC's FOIA requests until after EPIC filed its Complaint in this case.
13. Under Federal Rule of Civil Procedure 15(a)(2), a complaint may be amended "with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2); *Jewell v. BestBus Co.*, 319 F. Supp. 3d 323, 326 (D.D.C. 2018).
14. "[J]ustice requires the Plaintiff be permitted to amend the operative complaint" when the amendments are "based on evidence not available to the Plaintiff" at the time the operative complaint was filed. *Mattiaccio v. DHA Grp., Inc.*, 293 F.R.D. 229, 234 (D.D.C. 2013).
15. EPIC proposes to amend the complaint to allege that the Justice Department has engaged in a "policy or practice" that "constitutes an ongoing failure to abide by the terms of the Freedom of Information Act." *Muttitt v. Dep't of State*, 926 F. Supp. 2d 284, 293 (D.D.C. 2013) (quoting *Payne Enters. v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1988)).
16. The proposed amendment to EPIC's Complaint is based on evidence that was not available to the EPIC on Aug. 1, 2018, when the Complaint was filed. The patterns and practices of the Justice Department, namely, the agency's refusals to conduct searches for responsive records, were only revealed by the Justice Department after the Complaint was filed.
17. In accordance with Local Civil Rule 7(m), EPIC contacted opposing counsel regarding this motion and counsel indicated that they would not consent to the filing of a motion for leave to file an amended complaint.

18. On July 26, 2019, this Court ordered EPIC to file its Motion for Leave to Amend the complaint by August 26, 2019.

WHEREFORE, EPIC respectfully requests that the Court grant EPIC's motion to for leave to file an amended complaint. A Proposed Order and a copy of the proposed First Amended Complaint are attached.

Respectfully Submitted,
MARC ROTENBERG, D.C. Bar #422825
EPIC President and Executive Director

/s/ Alan Butler
ALAN BUTLER, D.C. Bar #1012128
EPIC Senior Counsel

ELECTRONIC PRIVACY
INFORMATION CENTER
1519 New Hampshire Avenue NW
Washington, D.C. 20036
(202) 483-1140 (telephone)
(202) 483-1248 (facsimile)

Attorneys for Plaintiff EPIC