



PRIVACY & CIVIL LIBERTIES OVERSIGHT BOARD

TRANSMITTED VIA EMAIL TO info@JudicialWatch.org

**BOARD
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James Dempsey

Patricia Wald

Tracking Number: PCLOB-FOIA-2013-005

September 30, 2013

Mr. Sean Dunagan
Judicial Watch
425 Third Street, S.W., Suite 800
Washington DC, DC 20024

Dear Mr. Dunagan,

The Privacy and Civil Liberties Oversight Board is in receipt of Judicial Watch's Freedom of Information Act request dated August 28, 2013, which was received by the Board on September 10th.

Your request seeks: "Any and all records of communication between any member of the Privacy and Civil Liberties Board and any of the following individuals: Mr. Richard A. Clarke, [], Mr. Michael J. Morrell, [], Professor Geoffrey Stone, [], Professor Cass Sunstein, [], Peter Swire. The time frame for this request is May 15, 2013 to the present."

Please be advised that the Privacy and Civil Liberties Oversight Board has located two responsive documents totaling five pages. Certain information has been deleted as it pertains to personal information regarding an individual in accordance with 5 U.S.C. 552(b)(6). This exemption protects from disclosure information that would constitute a clearly unwarranted invasion of personal privacy. In balancing the public interest for the information you request against the privacy interests involved, we have determined that the privacy interests sufficiently satisfy the requirements for the application of the (b)(6) exemption. The PCLOB has made redactions in 7 instances, 6 of which were for personal phone numbers. In addition, the Office of the Director of National Intelligence has requested additional redactions throughout the document and they are marked as "b(6) DNI", and any appeal on these redactions should be directed to the Office of the Director of National Intelligence Appeal Authority.

Since these deletions may be construed as a partial denial of your request, you are hereby advised of appeal procedures. Any person denied access to information may file an appeal to the PCLOB Freedom of Information Act Appeal Authority. The appeal must be postmarked no later than 60 calendar days from the date of this letter. The appeal must be in writing addressed to PCLOB Freedom of Information Act Appeal Authority, 2100 K Street NW, Suite 500, Washington DC 20427 or by email to info@pclob.gov. The appeal shall reference the initial denial of access and contain, in sufficient detail, the grounds upon which the appeal is based. The PCLOB Freedom of Information Act Appeal Authority will endeavor to respond to the appeal within 20 calendar days after receipt, absent any usual circumstances.

Thank you for your interest in our activities and mission. The Privacy and Civil Liberties Oversight Board is committed to making information available on its website located at www.pclob.gov. In the future if you cannot locate the information you desire on this website, please feel free to contact us by email at info@pclob.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Susan Reingold", with a large, stylized flourish at the end.

Susan Reingold
FOIA Officer and Chief Administrative Officer

----- Forwarded message -----

From: James Dempsey <jxdempsey@gmail.com>

Date: Mon, Jun 24, 2013 at 11:50 AM

Subject: Re: Would like to talk with you about FISA

To: [REDACTED] b(6) DNI

Assuming noon ET still works for you, please call me then at [REDACTED] b(6) PCLOB

Jim Dempsey
[REDACTED] (cell)

On Sun, Jun 23, 2013 at 3:51 PM, [REDACTED] wrote: b(6) DNI
I can do noon.

[REDACTED]
[REDACTED]
C. William O'Neill Professor of Law
Ohio State University
[REDACTED] b(6) DNI

Beginning August 2013:
[REDACTED]
Law and Ethics Program
Scheller College of Business
Georgia Institute of Technology

From: James Dempsey <jxdempsey@gmail.com>
Date: Sunday, June 23, 2013 12:23 PM b(6) DNI
To: [REDACTED]
Subject: Re: Would like to talk with you about FISA

Tomorrow, how about noon or 1 PM ET?

Jim Dempsey
[REDACTED] (cell) b(6) PCLOB

On Sun, Jun 23, 2013 at 9:55 AM, [REDACTED] wrote: b(6) DNI
Hi Jim:

I am very glad to try to help.

[REDACTED]

b(6)
DNI

Today at 5:00 does not work for me, I'm afraid.

[REDACTED]

BTW, I've spoken with [REDACTED] but not you since all of this broke. What an amazing time for the PCLOB to begin functioning at full steam. Super best of luck with that, and let me know how I can help.

[REDACTED]

b(6) DNI

[REDACTED]

C. William O'Neill Professor of Law
Ohio State University

[REDACTED]

b(6) DNI

Beginning August 2013:

[REDACTED]

b(6) DNI

Law and Ethics Program
Scheller College of Business
Georgia Institute of Technology

From: James Dempsey <jxdempsey@gmail.com>
Date: Saturday, June 22, 2013 6:07 PM
To: [REDACTED]
Subject: Would like to talk with you about FISA

b(6)
DNI

[REDACTED] would you be able to talk about FISA at 5 PM ET on Sunday, or on Monday at 10 AM ET?

Jim Dempsey

[REDACTED]

(cell)

b(6) PCLOB

b(6)
ODNI

Re: Database Access Under Section 215

[REDACTED] b(6) DNE

Sat 7/27/2013 9:14 AM

To: David Medine;

...
David:

In retrospect, perhaps it is too bad that I was so pessimistic about how 215 would be interpreted.

That article has been pretty widely read, though. I recently did a search in the SSRN database for "FISA," and it was the second most downloaded article.

As written, the article makes it harder to say we are shocked today that 215 would be read so broadly. The 2004 view of that law professor seems broadly consistent with the reading they used later to justify the phone records program.

[REDACTED] 7

:-)

[REDACTED]

b(6) DNE

[REDACTED]

Ohio State University

[REDACTED]

Beginning August 2013:

[REDACTED]

Law and Ethics Program
Scheller College of Business
Georgia Institute of Technology

From: David Medine <david.medine@pclob.gov>
Date: Saturday, July 27, 2013 8:58 AM
To: [REDACTED]
Subject: Re: Database Access Under Section 215

[REDACTED] b(6) DNE

Glad I caught you at a good moment. [REDACTED]

b(6) DNE

Your recollections about Section 215 are very helpful in trying to piece together the legislative history, both formal and informal, of that provision, as well as the way it was predicted that the Executive Branch would interpret it.

Once again, best wishes [REDACTED]

b(6) DNI

David

David Medine
Chairman
Privacy and Civil Liberties Oversight Board
David.medine@pclob.gov
(202) 331-1986 (office)
[REDACTED] (cell)

b(6)
PCLOB

From: [REDACTED]
Date: Thursday, July 25, 2013 8:28 PM
To: [REDACTED] Medine <david.medine@pclob.gov>
Subject: Re: Database Access Under Section 215

b(6)
DNI

Hi David:

Your email caught me at a good moment. [REDACTED]

b(6)
DNI

I re-read those words recently, and asked myself the same question. To the best of my imperfect memory, there were two sources: (1) my reading of the text; and (2) conversations and/or having read testimony by [REDACTED] and others who were worried about Section 215 from the day it started. It is possible that I had already had conversations by then with DOJ people about how they were interpreting the Patriot Act in general.

b(6)
DNI

I think by 2004 I assumed that the administration would take aggressive positions on statutory text. If one assumes that approach to a legislative authority, then that gets you to what I said.

As some other background, I was quite involved in fly-specking language of provisions during passage of the Patriot Act. Two or three of the provisions that I criticized actually got pared back during the legislative process. I think one was giving CIA access to essentially any records held elsewhere in the government. Another was a criminal provision that could have put low-level IT managers in jail for ten years if a terrorist used their system, or something like that.

The point of those stories is that DOJ was being super-aggressive in seeking authorities, and in interpreting authorities. I assumed they would do the same with 215 if they thought it would help them.

I don't know if that will help, but what I wrote was based on dozens of off-the-record interviews on the history of FISA. I felt at the time I had a pretty good feel for how those on the inside were thinking.

b(6)
DNI

[Redacted]
Ohio State University
[Redacted]

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b(6) DNI

Beginning August 2013:
[Redacted]
Law and Ethics Program
Scheller College of Business
Georgia Institute of Technology

1

From: David Medine <david.medine@pclub.gov>
Date: Thursday, July 25, 2013 3:57 PM
To: [Redacted]
Subject: Database Access Under Section 215

b(6) DNI

[Redacted] b(6) DNI

[Redacted]
[Redacted]
[Redacted]

b(6)
PCLOB

In 2004, you wrote an article, ³The System of Foreign Intelligence Surveillance Law², 72 Geo. Wash. L. Rev. 1306 (2004), in which you made the now quite relevant comment: "Similarly, by permitting the order to cover records of all persons, the literal terms of Section 215 would permit an entire database to be the subject of a FISA order." I was wondering what it was about the wording of Section 215 that led you to this conclusion and whether you were influenced by anything else, such as the legislative history, in reaching the conclusion.

Best wishes,

David

David Medine
Chairman
Privacy and Civil Liberties Oversight Board
david.medine@pclub.gov
(202) 331-1986 (office)
[Redacted] (cell)

b(6)
PCLOB