

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

CATO INSTITUTE,)	
)	
Plaintiff,)	
)	1:24-cv-00378-TSC
v.)	
)	
U.S. DEPARTMENT OF JUSTICE,)	
)	
Defendant.)	

PLAINTIFF’S MOTION FOR PRELIMINARY INJUNCTION

This case involves a Freedom of Information Act request for audit records detailing potential violations of Section 702 of the Foreign Intelligence Surveillance Act by the FBI. Compl. Ex. 1. In anticipation of the April 19, 2024 expiration of Section 702 absent Congressional reauthorization, Plaintiff requested these records from the Justice Department in June 2023, but has still received no determination or any records. Compl. Ex. 2. FISA Section 702 is now set to expire in less than two months, and various reauthorization bills with different approaches to any reforms have been introduced.

These records are relevant to the public debate on Section 702, and they will lose their value as part of that debate if they are not processed quickly. Therefore, in accordance with prevailing case law, Plaintiff files this motion requesting that the records be processed and released, subject to any permissible exemptions, by no later than March 29, 2024. Plaintiff requests a hearing within 21 days unless the Court earlier rules on the motion. *See* LCvR 65.1(d).¹

¹ Counsel for the parties conferred about this motion on February 21, 2024. The motion is opposed.

LEGAL STANDARDS

In a suit against the government, a plaintiff is entitled to a preliminary injunction where (1) the plaintiff is likely to succeed on the merits; (2) the plaintiff is likely to suffer irreparable harm; and (3) the injunction is in the public interest. *E.g. Nken v. Holder*, 556 U.S. 418, 435 (2009); *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011). “On numerous occasions, federal courts have entertained motions for a preliminary injunction in FOIA cases and, when appropriate, have granted such motions.” *Elec. Privacy Info. Ctr. v. Dep’t of Justice*, 416 F. Supp. 2d 30, 35 (D.D.C. 2006).

PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS

FOIA requires that determinations be issued on non-expedited requests within 20 working days unless the criteria for “unusual circumstances” apply. 5 U.S.C. § 552(a)(6)(A)(i), (a)(6)(B)(i). Records must be made available “promptly” thereafter. 5 U.S.C. § 552(a)(3)(A), (a)(6)(C)(i). The D.C. Circuit has explained that this typically means that records must be produced “within days or a few weeks of a determination, not months or years.” *Citizens for Resp. & Ethics in Washington v. Fed. Election Comm’n*, 711 F.3d 180, 188 (D.C. Cir. 2013) (cleaned up). Plaintiff’s June 2023 request to DOJ has now been pending without any determination or production of records for eight months and counting, in violation of FOIA’s deadlines.

PLAINTIFF WILL SUFFER IRREPARABLE HARM

Irreparable harm in FOIA cases results when the records lose some or all of their value after some upcoming event has occurred. *Heritage Found. v. EPA*, No. CV 23-748 (JEB), 2023 WL 2954418 (D.D.C. Apr. 14, 2023) (“Courts in our district have generally found irreparable harm in FOIA preliminary-injunction cases only where the requested documents are time-sensitive and highly probative, or even essential to the integrity, of an imminent event, after which event the utility of the records would be lessened or lost.” (cleaned up)); *Am. Oversight v. Dep’t of State*,

414 F. Supp. 3d 182, 186-87 (D.D.C. 2019) (finding irreparable harm where records pertained to important issue being debated in Congress and where delay would extend beyond the anticipated timeline of that debate).

The requested records are relevant to public debate and potential Congressional action on whether to reauthorize FISA Section 702, and if so, how to reform it. Eddington Decl. ¶¶ 5-12. Put simply, both the public and members of Congress would consider informative to this debate the extent to which the FBI has violated Section 702 and how it has done so. *Id.* ¶ 11. The timely release of this information is also critical to Plaintiff's mission. *Id.* ¶ 13. Unless the records are produced sufficiently in advance of any Congressional action before the April 19, 2024 expiration, they will lose their value in the Section 702 debate. *Id.* ¶ 12.

THERE IS A STRONG PUBLIC INTEREST IN PROMPT RELEASE OF THESE RECORDS

FISA Section 702 has generated significant public debate and public interest. Eddington Decl. ¶ 8. Arguments and op-eds for or against reauthorization or various reforms have been made by the White House, the Justice Department, and organizations ranging from the ACLU to the National Review. *Id.* This demonstrates that this factor, and all the factors, support Plaintiff's motion.

V. CONCLUSION

For these reasons, Plaintiff's motion for preliminary injunction should be granted. A proposed order is attached.

DATED: February 22, 2024

Respectfully Submitted,

/s/ Matthew Topic

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CERTIFICATE OF SERVICE

I, Matthew Topic, an attorney, hereby certify that on February 22, 2024, I caused the foregoing to be served via ECF and also via email to Brian J. Levy, Assistant United States Attorney, U.S. Attorney's Office, District of Columbia, Brian.Levy2@usdoj.gov

/s/ Matthew V. Topic