

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CATO INSTITUTE,	.	
	.	
Plaintiff,	.	CA No. 24-0378 (TSC)
	.	
v.	.	
	.	
U.S. DEPARTMENT OF JUSTICE,	.	Washington, D.C.
	.	Friday, March 15, 2024
Defendant.	.	1:06 p.m.
.	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE TANYA S. CHUTKAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Plaintiff:	STEPHEN STICH MATCH, ESQ. Loevy & Loevy 311 North Aberdeen Street Suite 3rd Floor Chicago, IL 90035
For Defendant:	BRIAN J. LEVY, ESQ. U.S. Attorney's Office 601 D Street NW Washington, DC 20530
Court Reporter:	BRYAN A. WAYNE, RPR, CRR U.S. Courthouse, Room 4704-A 333 Constitution Avenue NW Washington, DC 20001

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Transcript produced by computer-aided transcription.

P R O C E E D I N G S

(Via Videoconference)

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2
3 THE DEPUTY CLERK: This is Civil Action 24-378,
4 Cato Institute versus U.S. Department of Justice.

5 Counsel, please state your appearances for the record.

6 MR. MATCH: Stephen Stich Match for plaintiff
7 Cato Institute.

8 MR. LEVY: Brian Levy for defendant Department of
9 Justice. Good afternoon, Your Honor.

10 THE COURT: Good afternoon. Is it Mr. Match?

11 MR. MATCH: Correct. Thank you.

12 THE COURT: And Mr. Levy, good afternoon.

13 All right. So we're here to discuss plaintiff's motion for
14 preliminary injunction, which is ECF No. 5. Let me go over the
15 timeline in this case.

16 Cato submitted a FOIA request on June 8, 2023, to DOJ for a
17 Foreign Intelligence Surveillance Act, FISA, §702 query audits
18 from January 1, 2021, to the date of the request.

19 On February 8, 2024, Cato filed its FOIA action against
20 DOJ, as it had not yet issued a determination or produced the
21 requested documents.

22 This matter was assigned to me on February 12, and on
23 February 22 Cato filed a motion for preliminary injunction
24 asking that the records detailing personal -- potential
25 violations of 702 of FISA by the FBI, asking that those records

1 be processed and released no later than March 29, 2024, which
2 is in two weeks, in anticipation of Section 702's April 19th
3 expiration.

4 So the parties filed a joint status report on March 4
5 indicating that defendants contended it would be impracticable
6 to produce the requested documents by March 29, and the parties
7 both agreed that mediation would not be helpful given the
8 limited timeline.

9 So a scheduling order has been issued, I received the
10 parties' briefing, and that's where we are. I don't intend to
11 rule on the motion for preliminary injunction at this hearing
12 today, but I do want to ask the parties some clarifying
13 questions before I make a decision.

14 So I understand that §702 is scheduled to expire on
15 April 19, but has there been any indication from Congress on
16 whether there will be another extension?

17 MR. MATCH: So, yesterday, Speaker Johnson --

18 THE COURT: Can you say who you are, because we're
19 going by Zoom. Thank you.

20 MR. MATCH: Oh, sorry. This is plaintiff's counsel,
21 Stephen Match.

22 Yesterday, Speaker Johnson told *Politico* that he intended
23 to bring the matter to the House on the week of April 8, which I
24 think is consistent with at least an attempt on his part to have
25 a bill be voted on before the reauthorization --

1 THE COURT: I'm sorry, your voice was distorted. You
2 said Speaker Johnson told *Politico* that he intended to what?

3 MR. MATCH: To bring the matter to the House for a
4 vote the week of April 8, which I think --

5 THE COURT: A vote on an extension?

6 MR. MATCH: On a -- I don't think it was a vote on an
7 extension; I think it was a vote on substantively reauthorizing
8 FISA §702.

9 THE COURT: Okay.

10 Mr. Levy, do you have anything you want to add to that?

11 MR. LEVY: No, Your Honor.

12 THE COURT: So there's the possibility that §702 will
13 be reauthorized; is that correct? Is that what you're saying,
14 Mr. Match?

15 MR. MATCH: Reauthorized in some form. There's
16 competing bills that are being floated. A bill was introduced
17 in the Senate yesterday that would make some reforms to the
18 querying standards. That was introduced by Senators Durbin and
19 Lee, and I think it was cosponsored by several others.

20 But as I understand it, that's something that Congress is
21 actively discussing: whether, and if so, how to reauthorize the
22 statute before the 19th of April.

23 THE COURT: Okay. Now, Mr. Levy, nine days after the
24 government received Cato's complaint, the division transmitted
25 the potentially responsive documents to the FBI. Why was that?

1 What was the reason for that delay, when in fact it appears that
2 Mr. Tiernan, whose declaration was attached to the opposition
3 brief, told Mr. Eddington in October that he had the records?
4 So why weren't the records transmitted back then, in October?

5 MR. LEVY: Sure. So, because of the severe staffing
6 shortage that is detailed in Mr. Tiernan's declaration, there
7 just were too many balls in the air, and so the consultation
8 didn't go out as planned. It took a little while to figure that
9 out.

10 THE COURT: That's not very specific.

11 MR. LEVY: Sure.

12 THE COURT: Is that the most you can give me?

13 MR. LEVY: No, Your Honor. So it's my understanding
14 that Mr. Tiernan delegated it to a staff member and the staff
15 member just didn't follow through. And then it took some time
16 to figure out that that happened, which is unfortunate and
17 explains --

18 THE COURT: Yeah.

19 MR. LEVY: Yes, Your Honor. And it explains the
20 January email in which Mr. Tiernan said he thought it had gone
21 out. And I talked and it's attributable to -- I'm sorry,
22 Your Honor, that there were supposed to be five staff members,
23 and they're down to two.

24 THE COURT: See -- I mean, look. We get a lot of FOIA
25 cases in this court, and I've never seen a matter where the

1 government responded within 20 days with the required documents.
2 I guess it wouldn't be in front of me if it had. So, I mean,
3 you know, I'm not saying that the DOJ -- I'm not here giving the
4 DOJ a hard time because they didn't turn over the records in
5 20 days, but there seems to me there has been a lapse; and for
6 some reason the request sort of fell through the cracks, and it
7 has apparently been picked up now, and I don't know if the
8 filing of this complaint refocused the DOJ's attention on this
9 or it was the PI.

10 I understand the government's argument that everybody's
11 gotta wait in line and Cato shouldn't jump the line by virtue of
12 filing a motion for preliminary injunction, but it does seem to
13 me that given basically somebody's failure to do what they were
14 supposed to do, through no fault of their own, Cato's request
15 languished longer than it should have.

16 So why shouldn't I order the DOJ to therefore make up for
17 that by moving faster than they normally would?

18 MR. LEVY: So I think that there are two reasons,
19 Your Honor, which is, first, when you say "DOJ," we're talking
20 about two different components here. So NSD failed to send the
21 consultation out, but FBI just received these documents. And
22 they have a real heavy, substantive lift to make their
23 determination, and it would be -- and it sounds a little simple,
24 but unfair to make them try to make up for this unfortunate
25 oversight. And --

1 THE COURT: Well, I'm not saying that they -- I mean,
2 the result -- tell me if I'm wrong, but it seems to me the
3 practical consequence of this would be not that FBI staff would
4 have to, say, work overtime, but that they would have to take
5 resources away from other requests to fulfill this -- to review
6 the documents. Is that right?

7 MR. LEVY: So, Your Honor, I can't speak to whether
8 or not that's right, but I can say when we, say, take resources
9 away, those are other matters where there are court-ordered
10 deadlines, where there are production schedules. And the
11 expedited processing request, right, is the statutory, regulatory,
12 authorized way of ensuring that the agency can take that into
13 account, can rebalance. So it's not just jumping ahead of the
14 line but figuring out where to jump ahead of the line at a very
15 late stage.

16 THE COURT: Well, if the division had given the FBI
17 documents in October 2023, isn't it possible that FBI could have
18 processed those documents before April 19 and not at their
19 current anticipated date of June 7?

20 MR. LEVY: Your Honor, it's possible, but I don't know
21 their workload. So it might have been that FBI was busier then.

22 THE COURT: Let me ask you, Mr. Match: The government,
23 in its opposition, pointed out that at no point did Cato ever
24 request expedited processing, even though the act was scheduled
25 to expire. And you responded to that in your reply brief that

1 that was because it was clear that Congress was going to
2 temporarily reauthorize Section 2 into 2024 and therefore,
3 and I quote, "It was reasonable to wait until 2024 to press
4 for documents."

5 But you never filed a request for expedited processing.
6 And if it was reasonable for you to wait until 2024, why did you
7 wait to file this motion for preliminary injunction until the
8 end of February, just a month before your deadline? Why didn't
9 you file that in January? Why didn't you request expedited
10 processing?

11 MR. MATCH: So I'll address the preliminary injunction
12 point and then expedited processing, because I think the answers
13 are somewhat different.

14 With respect to the preliminary injunction, we have been
15 asking DOJ for more information about how long it was going to
16 take to complete the request, and they wouldn't tell us. They
17 said in August initially they knew that the records were going
18 to have to go out for consult; in October they reiterated that;
19 in January they said they had already gone out for consult.

20 And so we had quite little information to work with in
21 terms of timing this motion. I think if we had had more
22 information, we would have been able to time this motion into
23 a more convenient time, but because we're at a preliminary
24 injunction posture, we had to balance filing too early but
25 filing too late, because if we had filed too early, DOJ could

1 have argued that irreparable harm is -- or any harm from delay
2 is insufficiently imminent to qualify as irreparable.

3 So that was a tightrope that we had to walk; and we made a
4 calculation, and I think we acted as reasonably as we could in
5 the circumstances with respect to the timing of this motion.

6 On the Court's question about expedited processing, Cato
7 filed this request in early June of last year and was entitled,
8 under the ordinary, prompt production timelines that the statute
9 envisions and as the D.C. Circuit has construed it in *Crew* and
10 *Judicial Watch*, it was entitled to a production within, you
11 know, days or a few weeks of the 20 business-day determination,
12 which is well before any of these timelines.

13 THE COURT: All right. But Mr. Match -- excuse me,
14 let me interrupt you. You know as an experienced practitioner
15 that that 20 days is not frequently followed. Isn't that right?

16 MR. MATCH: I mean, the 20 days --

17 THE COURT: Maybe a response.

18 MR. MATCH: I'm sorry? I didn't hear you.

19 THE COURT: Maybe a response. I mean, oftentimes
20 there's a response if not the requested records.

21 MR. MATCH: Yes. I mean, we know that sometimes the
22 20 business-day deadline isn't followed. I mean, often what is
23 not followed the agency will invoke unusual circumstances to
24 extend that deadline, which it did not do here, it still hasn't
25 done here, and I think what we prefer to do in these types of

1 situations, rather than immediately file a lawsuit, is to try to
2 get more information from the agency about how long it's going
3 to take. And that's exactly what Mr. Eddington did several
4 times before we ultimately ended up filing the lawsuit.

5 THE COURT: Well, what about the response with regard
6 to you could have -- I mean, even though you didn't request
7 expedited processing at the outset, could you not have requested
8 it as it became clearer that this was beyond the 20 days as the
9 deadline for expiration of the act drew closer?

10 MR. MATCH: I mean, I suppose that would have been
11 possible to do, but I would just point out that the prompt
12 production requirement is sort of -- is operative here. If
13 this were a case where the lawsuit was filed shortly after the
14 request, I think that would be a sort of stronger argument for
15 the government. That's what was the case, for example, in the
16 *Electronic Frontier Foundation* case we've cited, where the
17 request is filed about two months before the PI motion, and
18 there I think it was probably -- it probably would have been
19 necessary.

20 I mean, I would just stress here that we did everything
21 we could to find out what was going on with the request. And
22 the documents are really important for the public to see before
23 the April 19th deadline, essentially for the reasons we've
24 articulated in our brief. So I would also point out that if
25 the Court thinks we should have filed an expedited processing

1 request sooner, I mean, there's still the irreparable harm and
2 the public interest to consider here.

3 THE COURT: And actually, that's where I'm headed to
4 next, since we're on the topic. In order for this court to
5 grant preliminary injunction, one of the factors I have to find
6 is whether you would face irreparable harm. And given the
7 proffer you made at the beginning of the hearing that we never
8 know what Congress is actually going to do, but Congress intends
9 to take up the issue of this statute or its equivalent, either
10 reauthorizing it or passing an equivalent, given that fact,
11 given the fact that there have been previous extensions, how do
12 you prevail on irreparable harm?

13 MR. MATCH: So the temporary extension in 2023 was
14 only for a few months, and as far as I'm aware, we have no
15 reason to believe that there's going to be such a temporary
16 extension again. In the past, FISA's been reauthorized for
17 several years. The last one, I think, was in 2018. So that's
18 about a five-year window. And courts in this district have
19 found irreparable harm when documents are necessary for the
20 public to debate imminent and really significant congressional
21 action.

22 So *American Oversight* is an example of that. Although not
23 in this district, I think *Electronic Frontier Foundation* is
24 exactly on point where it held that the public would suffer
25 irreparable harm from not being able to review documents that

1 were important to a prior round of FISA --

2 THE COURT: Well, let me ask you about that. I mean,
3 you talk about the public's right to see these documents, the
4 public's right to know about what's going on, but what about --
5 I mean, how will Cato be irreparably harmed, because that's far
6 more specific than the -- I mean, you say that the public has
7 the right to this information before the act expires, and that
8 may be true, but I'm not sure your argument on irreparable harm
9 is moved forward by the public's right to know.

10 How does this affect Cato, and how does this irreparably
11 harm Cato?

12 MR. MATCH: So Cato is, you know, as Mr. Eddington's
13 first declaration explained, is very involved in the sort of
14 public discussion surrounding FISA §702 reauthorization. And as
15 a member of the public, it has -- that's entitled to file FOIA
16 requests, it has an interest in seeing this information and
17 being able to discuss it before the statute -- before Congress
18 makes a decision on the statute.

19 I mean, because a FOIA requester is, in a sense, a sort
20 of stand-in for a member of the public, I think the irreparable
21 harm and public-interest factors in a FOIA case probably
22 dovetail more than they would in your sort of standard
23 preliminary injunction case. But Cato is a member of the
24 public, to which Congress has given the right to file FOIA
25 requests and use the documents.

1 THE COURT: But the thing is, I mean -- yeah, this is
2 Washington. There are any number of public interest
3 organizations, and every single one of them claim to advance
4 the public's interest in knowing what's going on. And that's
5 not wrong.

6 But this is -- the public interest and the irreparable harm
7 factors may dovetail, but they're not the same. And whether the
8 public may have an interest in getting this information and
9 being informed on the matter before the expiration of the
10 statute, what's the irreparable harm?

11 I mean, yes, the statute may expire before the public gets
12 to see this information, but can you articulate it any further
13 the irreparable harm that would accrue to Cato or to the public
14 as a result of not being able to see the material before the
15 expiration?

16 MR. MATCH: Well, I think there's a question of what
17 the harm is, and there's a question of what makes the harm
18 irreparable. So the harm, in general, is sort of not being able
19 to use documents that the government has in its possession for
20 sort of public debate purposes. What makes it irreparable is,
21 as several courts have found, that the information will lose a
22 substantial amount of its value after a date certain, and that
23 date certain in this case is, we think, roughly around April 19,
24 which is when Congress will have had to make its decision on
25 whether to reauthorize FISA.

1 So it's not like any requester can come in and file a
2 preliminary injunction motion because it has an interest in
3 documents. It's specifically tied to particular congressional
4 action that has to happen at a specific time.

5 I mean, in *American Oversight*, for example, Judge Cooper
6 found that with respect to an impeachment that was scheduled for
7 a particular set of dates; *Electronic Frontier Foundation* found
8 that with respect to a set of votes on FISA amendments. So I
9 think what makes it irreparable is that it's tied to like a
10 specific imminent congressional action on a matter of profound
11 public importance.

12 THE COURT: All right. Mr. Levy, do you want to
13 respond? Mr. Levy? I think it's frozen.

14 MR. MATCH: It's frozen for me too.

15 (Pause.)

16 THE COURT: Okay. We're trying to get him back.

17 (Pause.)

18 THE DEPUTY CLERK: Mr. Match, do you have a telephone
19 number for Mr. Levy? It doesn't seem as if the telephone number
20 that's listed on ECF is correct.

21 MR. MATCH: I can look. I actually sent him an email
22 a couple of minutes ago, but I'll see if I can find a phone
23 number for him.

24 THE DEPUTY CLERK: Okay. Thank you.

25 MR. MATCH: So I do have a number for him. I'm

1 not sure if it's different from the ECF number, but I have
2 (202) [REDACTED].

3 THE DEPUTY CLERK: Yeah, that's the number I have for
4 him. Okay. He's back. He just joined.

5 MR. LEVY: My apologies to both of you, and thank you
6 very much to Stephen for checking in. I lost connection to the
7 VPN, and it took a while to get back and --

8 THE COURT: That's okay. I figured it wasn't anything
9 you -- I figured you were trying to get back. Obviously, it was
10 technical, not your fault. That's fine.

11 All right. So I'll ask again: Do you have anything you
12 wish to say in response to Mr. Match's arguments?

13 MR. LEVY: So I'm not sure I heard all of it, but for
14 irreparable injury, I think what's missing is these particular
15 documents -- so we hear a lot that the public needs documents
16 because it's about a time-sensitive matter, but there's really
17 three limiting factors about these documents.

18 The first is going to be time, which is that now we're at a
19 point where there's not really time to get the documents out by
20 the deadline they're requesting. And I want to put a finer
21 point: It's not just that they didn't ask for expedited
22 processing, but at no point did they say, we need these
23 documents by, in the first instance, December or April.

24 There were questions about, you know, is there going to be
25 an estimated date of completion, but all FOIA requesters would

1 like an estimated date of completion. So there was no sense to
2 the agency that these documents need to be done at a particular
3 time, which now, comes back here, and we're at this big rush at
4 the end and there's a question of how much can be done.

5 Then there's another question about how much is going to be
6 withheld or redacted, and that was the *Nation Magazine* --

7 THE COURT: I suspect a lot --

8 MR. LEVY: Right.

9 THE COURT: -- given that it involves the FISA court,
10 or the act.

11 MR. LEVY: Exactly. And then the last part is, well,
12 what's left, is that really going to matter given the overall
13 body of §702 knowledge. And plaintiff in their reply made the
14 good point that I had a really overzealous heading when I said
15 that there's nothing there, and that's not what I meant. I
16 think the body is more accurate.

17 And the question is, so we have the top-line results,
18 right, we have the numbers from this audit as to what is and
19 wasn't, I believe, appropriate searches or founded searches, and
20 we have all of these other reports and the FISC court opinions.
21 And so the question is not just is there a ticking clock, but
22 when we see this, assuming we could see this before the ticking
23 clock rings, or whatever the ticking clock does, will this
24 matter, the amount that's left over.

25 THE COURT: All right. I think this is one of these

1 cases where there's some blame to go around in addition to the
2 normal length of delay that accrues in these kinds of cases
3 where documents need to be reviewed because of national security
4 concerns. I do think the Department of Justice did drop the
5 ball, and had they not, you know, the documents might well have
6 been at least reviewed and processed in advance of the deadline.

7 On the other hand, it does also appear that Cato Institute
8 did not necessarily press the issue and make it clear that there
9 was an impending deadline that was fast approaching until it
10 filed its motion for preliminary injunction. You know, I know
11 there were communications made by them to determine when this
12 was going to get done.

13 I'll take a look again. I'll consider what I've heard in
14 this argument today, and I will try and get a ruling out as
15 quickly as possible on the motion. Is there anything else you
16 want me to consider at this time?

17 MR. MATCH: The only thing that I would add is just
18 a response to one of the things that Mr. Levy mentioned which
19 involves the redactions and the public interest here -- or I'm
20 sorry -- and what these audits might add to the public knowledge.

21 We're not contesting that there are going to be some
22 redactions to this. I would just point the court to the fact
23 that the FISC opinions that deal with similar issues were
24 released in a form that was very useful to the public debate,
25 and we would expect that a similar amount and degree of

1 information could be released in these documents. And the
2 reason I think that is because the FISC opinions were discussing
3 the results of what I think are some of these audits here.

4 So they didn't release information about specific
5 investigations, but we did learn from them some specifics.
6 Like we learned, for example, that the FBI made noncomplying
7 queries of senators and a state judge. And that, I think,
8 probably was what inspired some of the suggestions in the bill
9 that was proposed just yesterday by Senators Durbin and Lee,
10 which would require increased scrutiny of queries that involve
11 elected officials.

12 The FISC opinions, we don't think they're cumulative or
13 merely cumulative of these audits because, number one, they
14 predate the request's end of-the-date range by a couple of
15 months and, because they're quite long, I assume were written
16 based on materials filed a few months before that.

17 But also, the FISC opinions don't purport to give a sort
18 of comprehensive analysis of everything that could be in these
19 audits. It's not clear that the FISC actually saw the audits
20 themselves rather than summaries of them. That's what I could
21 glean from reading the citations in those.

22 And while we do have some top-line results from the audits,
23 I think for the reasons we discuss in our briefs, we think that
24 probably the most important information is going to be information
25 that the FBI would not voluntarily release. We didn't learn

1 about any of the specifics -- I'm sorry. Mr. Levy dropped off,
2 so maybe I should stop talking.

3 THE COURT: Oh, boy.

4 (Pause. 1:40 p.m.)

5 THE DEPUTY CLERK: He can call in. I just gave him
6 the phone number.

7 THE COURT: Okay.

8 (Pause. 1:42-1:45.)

9 THE COURT: I mean, if you want to file a supplement,
10 Mr. Match, to state what you were saying before we lost
11 Mr. Levy, we could probably do that as well. I don't know how
12 long it's going to be. This has not been a very productive
13 session so far in terms of technology.

14 MR. MATCH: Your Honor, I think I would just reiterate
15 what's in our reply brief. I think I was going to largely
16 mirror what we said there, so --

17 THE COURT: All right.

18 MR. MATCH: -- I don't think a supplement will be
19 necessary.

20 THE COURT: All right. Thank you all. You can let
21 Mr. Levy know we have ended the hearing.

22 MR. MATCH: Thank you, Your Honor.

23 THE COURT: Thank you. Have a good weekend.

24 THE DEPUTY CLERK: This court is adjourned.

25 (Proceedings adjourned at 1:45 p.m.)

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CERTIFICATE

I, BRYAN A. WAYNE, Official Court Reporter, certify that the foregoing pages are a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Bryan A. Wayne
Bryan A. Wayne