

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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AMERICAN CIVIL LIBERTIES UNION)		
FOUNDATION OF MASSACHUSETTS,)		
)		
Plaintiff,)		
)		
v.)	Civil Action No.:	
)		
FEDERAL BUREAU OF INVESTIGATION;)		
AND CARMEN ORTIZ, U.S. ATTORNEY)		
FOR THE DISTRICT OF MASSACHUSETTS,)		
)		
Defendants.)		
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COMPLAINT FOR INJUNCTIVE RELIEF

1. This is a lawsuit under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, seeking the immediate processing and release of records that describe how the Federal Bureau of Investigation (“FBI”) collaborates with Massachusetts state and local police. The suit centers on three categories of documents. First, it seeks documents concerning the number and type of investigations carried out by the Boston FBI Field Office. Second, the suit seeks documents concerning the Massachusetts Joint Terrorism Task Force (“JTTF”), including how it functions, how its authority is divided and shared, and what safeguards are in place to ensure the civil liberties of the persons it targets. Third, the suit seeks documents concerning one notable subject of the FBI’s recent work: Ibragim Todashev.

2. The federal government’s collaboration with Massachusetts state and local police, especially through the JTTF, has for years been shrouded in secrecy. According to the FBI, JTTFs are run out of the agency’s field offices and conduct investigations, together with local

agencies, into actual or potential terrorist threats. The Massachusetts JTTF conducts hundreds of investigations in Massachusetts every year.

3. Yet little is known about their structure and function. For example, there is no publicly available list of agencies that participate in the Massachusetts JTTF, and it is unclear what protocols and chain of authority govern local police officers when they work with this federal task force.

4. The shooting of Todashev, and the subsequent investigation of the incident, demonstrate problems inherent in this lack of knowledge. When law enforcement officials kill someone in his own home, the public deserves to know who was there, why and under what authority. But the JTTF's opacity prevents the public from getting these answers.

5. Todashev was shot and killed while reportedly being questioned by a "Massachusetts Investigative Team" comprised of a Boston FBI Special Agent and two Massachusetts State Police Troopers, at least one of whom may have been assigned to the JTTF. The Team reportedly questioned Todashev about a September 2011 triple homicide in Waltham, Massachusetts, and about the April 2013 bombings at the Boston Marathon.

6. There have been conflicting media reports about Todashev's death, many of which cited law enforcement sources. Meanwhile, the government's public statements about the shooting have been conclusory and unsupported by any meaningful disclosure of documents.

7. For example, on March 25, 2014, the U.S. Department of Justice's Civil Rights Division released a "Report on the Death of Ibragim Todashev," which concluded that "the evidence does not reveal a violation of federal criminal civil rights statutes or warrant further federal criminal investigation." Yet this 16-page report disclosed only one document: a drawing of the first floor of Todashev's apartment.

8. The public and the media have posed serious questions about whether the killing of Todashev was justified. Just as important, and even if deadly force was justified, the public and the media have raised concerns about the overall transparency, functioning, and oversight of the agencies involved in the investigation. Those broader questions do not intrude on any investigation. And they are crucially important.

9. To put it mildly, the government's disclosure of a 16-page report, supported by only a single drawing, does not answer the public's questions about the Massachusetts JTTF in general or about its involvement with Todashev in particular.

10. In December 2013, the American Civil Liberties Union Foundation of Massachusetts ("ACLUM") submitted FOIA requests to defendants Carmen M. Ortiz and the FBI seeking documents that would shed light on these secretive government practices ("the Requests," attached as Exhibits A and B). The Requests sought documents relating to (1) the structure of the Massachusetts JTTF ("Massachusetts JTTF Request"); (2) the types and numbers of investigations and assessments done by the Boston FBI Field Office ("FBI Boston Request"); and (3) the FBI's involvement with Ibragim Todashev ("Todashev Request").

11. The FBI denied the Todashev Request and has yet to provide records responsive to the other Requests. The U.S. Attorney has not responded to the Requests at all.

12. ACLUM is entitled to the timely release of the requested records. These records will contribute significantly to the public's understanding of how the Massachusetts JTTF functions and the government's involvement in the death of Ibragim Todashev. The government may no longer claim that releasing the Todashev documents would harm an ongoing law enforcement effort because the Department of Justice has concluded its investigation into Todashev's death and determined that no further criminal investigation is warranted.

JURISDICTION AND VENUE

13. This Court has both subject matter jurisdiction of the FOIA claim and personal jurisdiction over the parties under 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction under 28 U.S.C. § 1331.

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

PARTIES

15. Plaintiff the American Civil Liberties Union Foundation of Massachusetts is a nonprofit organization founded in 1920 and dedicated to the principles of liberty and equality embodied in the Constitution and laws of the United States. ACLUM is committed to principles of transparency and accountability in government, and seeks to ensure that the American public is informed about the conduct of the government in matters affecting civil liberties. Obtaining information about governmental activity, analyzing that information, and widely publishing and disseminating it to the press and the public are critical and substantial components of ACLUM's work and among its primary activities.

16. Defendant Carmen Ortiz is the U.S. Attorney for the District of Massachusetts. Her office is in Boston, Massachusetts. Defendant Ortiz co-chairs the Anti-Terrorism Advisory Committee ("ATAC"), together with the Boston FBI Agent-in-Charge. The Massachusetts JTTF is the operational arm of ATAC.

17. Defendant Federal Bureau of Investigation is a component of the U.S. Department of Justice and is an agency within the meaning of 5 U.S.C. § 552(f)(1). The FBI is headquartered

in Washington, D.C., and has a field office in Boston, Massachusetts. The Boston FBI and the Department of Justice lead the Massachusetts JTTF.

FACTUAL BACKGROUND

The JTTF and federal-local collaboration

18. For more than three decades, the federal government has implemented programs to enhance coordination between federal, state and local law enforcement agencies in the form of Joint Terrorism Task Forces (“JTTFs”).

19. After Sept. 11, 2001, the federal government dramatically increased its efforts to work with state and local law enforcement agencies. This collaboration became the subject of sustained media interest and raised questions about JTTFs’ effectiveness and scope.

20. In 2008, the FBI released new guidelines that relaxed the standards required to open investigations on individuals and groups, including investigations and what the FBI termed “assessments.” Under the new rules, the FBI and JTTFs may open assessments on individuals without any factual indication of wrongdoing or threat to national security. In the assessment stage of an investigation, law enforcement agents can use intrusive investigative techniques such as informants, interviews under false pretenses, and unlimited physical surveillance—techniques previously reserved for investigations supported by some factual predicate.

21. The FBI retains the data it collects about assessment targets, even if the investigation reveals no evidence of wrongdoing. This practice raises questions about the civil liberties of innocent people subjected to assessments based on the minimum criteria established by the FBI. It also raises questions about the effectiveness of such assessments.

22. According to public records uncovered by the New York Times, from 2009 to 2011 the FBI opened 82,325 assessments on individuals and groups. In 2011, the Massachusetts JTTF alone conducted more than 1,000 assessments, according to the FBI's public statements.

23. Despite the FBI's investigation into thousands of people every year and its recruitment of over 600 state, local, and federal agencies as JTTF participants, little is publicly known about how JTTFs function. Recent events have highlighted the need for such information.

24. On April 15, 2013, two bombs detonated at the finish line of the Boston Marathon. The FBI assumed responsibility for the investigation almost immediately, receiving help from city, state, and federal agencies.

25. Three days after the bombings, the FBI disclosed pictures of two suspects: Tamerlan and Dzhokhar Tsarnaev. Tamerlan Tsarnaev subsequently died in a firefight with police. After a multi-agency manhunt, Dzhokhar Tsarnaev was found and apprehended in Watertown, Massachusetts.

26. The JTTF's use of assessments received heightened public attention in the aftermath of the Boston Marathon bombings. News outlets reported that the FBI had conducted an assessment of Tamerlan Tsarnaev in June 2011, following a tip from the Russian government.

27. In testimony before the U.S. House of Representatives Homeland Security Committee, then-Boston Police Commissioner Edward Davis stated that although the Boston police worked with the FBI on a JTTF, they were not informed about the Russian tip or the subsequent assessment. "[W]hen information is out there that affects the safety of my community, I need to know that," Davis said.

28. The FBI publicly disputed Davis's account, stating that the Boston Police had a full-time representative assigned to the JTTF that conducted the 2011 assessment.

29. U.S. Representative Michael McCaul, chairman of the House Homeland Security Committee, commented that a failure to share information between agencies may have contributed to the Boston Marathon bombings. “My fear is that the Boston bombers may have succeeded because our system failed,” Rep. McCaul said.

Ibragim Todashev

30. On May 22, 2013, Ibragim Todashev was shot and killed in his Florida home while being interviewed by a Boston-based FBI agent and two Massachusetts State Troopers, one of whom may have been assigned to the JTTF. A local Florida officer was also present, but outside the apartment.

31. The government’s initial silence surrounding the shooting raised questions about whether of the use of deadly force was warranted. A lengthy investigation by Boston Magazine and an hour-long feature on the nationally-acclaimed radio program This American Life, laid out many of the unanswered questions. *See* Susan Zalkind, *The Murders Before the Marathon*, Boston Magazine, March 2014; *This American Life: Dead Men Tell No Tales*, Chicago Public Radio (March 7, 2014).

32. These unanswered questions were complicated by conflicting media reports that purported to rely on law enforcement sources. According to the Boston Globe, “Anonymous sources have leaked conflicting accounts to the media, inflaming the controversy surrounding the death of Todashev. Some accounts say he was armed; others said he was not. The FBI has said that Todashev injured an agent.” Maria Sacchetti, *Fla. Report on Fatal Shooting of Todashev to be Released Tuesday*, Boston Globe, March 20, 2014.

33. A *Washington Post* editorial on May 30, 2013, highlighting the limited and inconsistent information circulating about Todashev’s death, observed that “the last thing the

U.S. government needs to do is fuel wild conspiracy theories by releasing too little information or investigating too slowly.”

34. Recently released reports by the U.S. Department of Justice and the State Attorney for Florida’s Ninth Circuit have provided some new information. But they leave many questions unanswered, including: Why did the officers fail to abide by their collective decision to keep three officers in the room at all times? Why did no one canvass Todashev’s neighbors until more than six months after the shooting? Why was the Florida investigator prevented from talking to the FBI agent?

35. Moreover, the reports raise additional questions about who was in charge that evening. For example, both of the Massachusetts State Troopers recorded portions of the interrogation. However, according to the report, neither the FBI officer nor the Massachusetts Assistant District Attorney who was receiving updates about the interrogation knew about the recordings until several days later. To this day, the chain of command and oversight during this investigation remains unclear.

ACLUM’s FOIA Requests

36. On December 9, 2013, ACLUM submitted FOIA Requests to U.S. Attorney Carmen M. Ortiz, the U.S. Attorney for the District of Massachusetts, and the Federal Bureau of Investigation. The Requests sought information on the structure of the Massachusetts JTTF, the FBI’s Boston Field Office Investigations, and the involvement of the Massachusetts JTTF with Ibragim Todashev.

37. Although ACLUM submitted the Requests four months ago, Defendants have failed to release the requested records. Nor have they processed the Requests either “promptly” or in an “expedited” fashion, as required by 5 U.S.C. §§ 552(a)(3)(A)(ii); 552(a)(6).

38. Due to the widespread media interest and ACLUM's view that the records are urgently needed to inform the public about actual or alleged government activity, ACLUM sought expedited processing under 5 U.S.C. § 552(a)(6) and 28 C.F.R. § 16.5(d).

39. The Requests also included an application for a waiver or limitation of fees because releasing the records is in the public interest and not in any commercial interest of ACLUM, 28 C.F.R § 16.11(k)(1)(i)-(ii), and because ACLUM is a representative of the news media for purposes of 28 C.F.R. § 16.11(b)(6) and (d).

Defendants' Response

40. The FBI acknowledged receipt of the Request in three letters dated January 2, 2014 (attached as Exhibit C). The FBI separated Plaintiff's Request into three distinct requests, each with a different request number: Request No. 1246012-0 (Massachusetts JTTF Request), Request No. 1246014-0 (FBI Boston Request); and Request No. 1246017-0 (Todashev Request).

41. The letters of January 2 indicated that the Request had been received at FBI Headquarters for processing, the FBI was searching for responsive information, and the fee waiver was under consideration.

42. In a letter dated January 14, 2014 (attached as Exhibit D), the FBI denied the release of the material requested in the Todashev Request, claiming that it was located in an investigative file that is exempt from disclosure pursuant to 5 U.S.C. § 552(b)(7)(A) because there was "a pending or prospective law enforcement proceeding relevant to these responsive records, and the release of the information in these responsive records could reasonably be expected to interfere with enforcement proceedings."

43. In two letters dated January 16, 2014, the FBI approved the requests for expedited processing with regard to the Massachusetts JTTF Request and the FBI Boston Request.

44. As of the date of this Complaint, the U.S. Attorney's Office for the District of Massachusetts has not responded to the Request. In a phone call to the U.S. Attorney's Office, ACLUM received confirmation on February 28, 2014, that the Request was received in December and subsequently transferred to Washington, DC.

45. Because the FBI has not produced records responsive to the Massachusetts JTTF Request and the FBI Boston Request, ACLUM has exhausted its administrative remedies with respect to those requests to the FBI.

46. In a letter to the Director of the FBI's Office of Information Policy dated March 12, 2014, ACLUM filed an administrative appeal of the FBI's denial of the Todashev Request. As of the date of this Complaint, the FBI has not responded to ACLUM's appeal.

47. Accordingly, ACLUM has exhausted its administrative remedies with regard to the FBI's denial of the Todashev Request.

48. Because the U.S. Attorney's Office for the District of Massachusetts' failed to respond to or acknowledge the Request in its entirety, ACLUM has exhausted its administrative remedies with respect to its request to that Office.

CAUSES OF ACTION

COUNT I

Failure to Make Reasonable Effort – Violation of FOIA 5 U.S.C. § 552(a)(3)

49. Defendants have failed to make reasonable efforts to search for records sought by the Requests, in violation of FOIA 5 U.S.C. § 552(a)(3) and corresponding regulations.

COUNT II

Failure to Promptly Make Records Available – Violation of FOIA 5 U.S.C. § 552(a)(6)(A)

50. Defendants have failed to produce or make available any records responsive to the Requests.

51. Accordingly, Defendants have failed to promptly make responsive records available, in violation of FOIA 5 U.S.C. § 552 (a)(6)(A) and corresponding regulations.

COUNT III

Failure to Process Requests as Soon as Practicable – Violation of FOIA 5 U.S.C. § 552(a)(6)(E)

52. The FBI granted expedited processing for the Massachusetts JTTF Request and the FBI Boston Request, yet has failed to produce or make available any responsive records.

53. The U.S. Attorney has failed to produce any responsive records.

54. Accordingly, Defendants have failed to process the expedited Requests as soon as practicable, in violation of FOIA 5 U.S.C. § 552 (a)(6)(A) and corresponding regulations.

COUNT IV

Failure to Grant Fee Waiver – Violation of FOIA 5 U.S.C. § 552(a)(4) and (a)(6)

55. ACLUM included an application for a fee waiver or limitation of fees in the Requests because releasing the records is in the public interest and not in any commercial interest of ACLUM, 28 C.F.R § 16.11(k)(1)(i)-(ii), and because ACLUM is a representative of the news media, 28 C.F.R. § 16.11(b)(6) and (d).

56. No fee waiver has been granted.

57. Accordingly, Defendants have wrongfully failed to grant ACLUM's request for a waiver of search, review and duplication fees, in violation of FOIA 5 U.S.C. § 552 (a)(4), (a)(6) and corresponding regulations.

COUNT V

Failure to Grant Limitation of Fees – Violation of FOIA 5 U.S.C. § 552(a)(4) and (a)(6)

58. ACLUM included an application for a fee waiver or limitation of fees in the Requests because releasing the records is in the public interest and not in any commercial interest of ACLUM, 28 C.F.R § 16.11(k)(1)(i)-(ii), and because ACLUM is a representative of the news media, 28 C.F.R. § 16.11(b)(6) and (d).

59. No limitation of fees has been granted.

60. Accordingly, Defendants have wrongfully failed to grant ACLUM's request for a limitation of fees, in violation of FOIA 5 U.S.C. § 552 (a)(4), (a)(6) and corresponding regulations.

COUNT VI

Failure to Estimate Volume of Records Denied – Violation of FOIA 5 U.S.C. § 552(a)(7)(F)

61. When the FBI denied the Todashev Request, it made no effort to estimate the volume of the responsive records.

62. Accordingly, the FBI failed to make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, as required by FOIA 5 U.S.C. § 552(a)(7)(F).

COUNT VII

Failure to Provide Responsive Records – Violation of FOIA 5 U.S.C. § 552 (a)(3)

63. The Defendants have failed to provide a single record responsive to the Requests.

64. Defendants' failure to provide all responsive records and material violates FOIA generally and specifically 5 U.S.C. § 552(a)(3).

COUNT VIII
Appeal of Todashev Denial

65. The FBI denied the Todashev Request based on its view that the disclosure of the responsive materials “could reasonably be expected to interfere with [law] enforcement proceedings” within the meaning of 5 U.S.C. § 552(b)(7)(A).

66. The FBI’s decision to withhold materials responsive to the Todashev Request is improper. The FBI and the Department of Justice have concluded their investigation into Todashev’s shooting and determined that no further investigation is warranted. Even if some records responsive to the Todashev Request are properly withheld pursuant to § 552(b)(7)(A), Defendants have an obligation to release segregable portions of otherwise exempt material.

67. The FBI’s failure to provide all responsive records and materials violates FOIA generally and specifically 5 U.S.C. § 552(a)(3).

PRAYER FOR RELIEF

WHEREFORE, the ACLU Foundation of Massachusetts respectfully requests that this Court:

- A. Order Defendants to immediately process and make available all records responsive to the Requests;
- B. Enjoin Defendants from charging ACLUM search, review or duplication fees for the processing of the Requests;
- C. Award ACLUM costs and reasonable attorneys’ fees incurred in this action; and
- D. Grant such other relief as the Court may deem just and proper.

Dated: April 10, 2014
Boston, Massachusetts

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF MASSACHUSETTS

By their attorneys,

/s/ Laura E. Deck

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