

QUESTIONS AND ANSWERS ABOUT SECTION 215 OF THE USA PATRIOT ACT

As part of the USA PATRIOT Act, Congress enacted Section 215, which states,

Access to certain business records for foreign intelligence and international terrorism investigations

(a)(1) The Director of the Federal Bureau of Investigation or a designee of the Director (whose rank shall be no lower than Assistant Special Agent in Charge) may make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.

(2) An investigation conducted under this section shall

(A) be conducted under guidelines approved by the Attorney General under Executive Order 12333 (or a successor order); and

(B) not be conducted of a United States person solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

(b) Each application under this section

(1) shall be made to--

(A) a judge of the court established by section 1803(a) of this title; or

(B) a United States Magistrate Judge under chapter 43 of Title 28, who is publicly designated by the Chief Justice of the United States to have the power to hear applications and grant orders for the production of tangible things under this section on behalf of a judge of that court; and

(2) shall specify that the records concerned are sought for an authorized investigation conducted in accordance with subsection (a)(2) of this section to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities.

(c)(1) Upon an application made pursuant to this section, the judge shall enter an ex parte order as requested, or as modified, approving the release of records if the judge finds that the application meets the requirements of this section.

(2) An order under this subsection shall not disclose that it is issued for purposes of an investigation described in subsection (a).

(d) No person shall disclose to any other person (other than those persons necessary to produce the tangible things under this section) that the Federal Bureau of Investigation has sought or obtained tangible things under this section.

(e) A person who, in good faith, produces tangible things under an order pursuant to this section shall not be liable to any other person for such production. Such production shall not be deemed to constitute a waiver of any privilege in any other proceeding or context.

Q: Does this section permit the F.B.I. to engage in unconstitutional searches?

This provision permits the F.B.I. to obtain orders from a judge under certain limited circumstances. Production of tangible items, such as records, to a court or an investigative agency at a future date has been not considered by the courts to be a "search" covered by the Fourth Amendment. Thus, there is no requirement to establish that there is probable cause that the item to be produced is evidence of a crime. Similar to the court orders governed by Section 215 are administrative subpoenas and grand jury subpoena which do not require a probable cause showing.

Q: What can happen to me if I notify someone that the F.B.I. has sought or obtained tangible things in response to a court order?

Section (d) prohibits a person who is served with a court order under this section from disclosing "to any other person (other than those persons necessary to produce the tangible things under this section) that the Federal Bureau of Investigation has sought or obtained tangible things under this section." The statute does not set forth a sanction if this non-disclosure directive is violated. Nevertheless, violations of a court order generally are punishable as contempt of court. This is covered by 18 U.S.C. 401, which states,

A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as—

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command

ACLU Sect. 215-2180

There is no prescribed sentence for a person found guilty of contempt of court. The judge should impose a sentence that is commensurate with the nature of the contempt.

Q: What safeguards does Section 215 have to prevent the wholesale production of records or other tangible things?

- ◆ **This production order must be signed by a judge or magistrate only upon a proper application.**
- ◆ **A production order is limited to investigations**
 - To obtain foreign intelligence information not concerning a United States person or**
 - To protect against international terrorism or clandestine intelligence activities**
- ◆ **The application may only be made by the Director of the Federal Bureau of Investigation or a designee of the Director (whose rank shall be no lower than Assistant Special Agent in Charge). The applicant must specify**
 - 1) That the records concerned are sought for an authorized investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities; and**
 - 2) That the investigation is conducted under guidelines approved by the Attorney General under Executive Order 12333 (or a successor order); and**
 - 3) That the investigation is not be conducted of a United States person solely upon the basis of activities protected by the first amendment to the Constitution of the United States.**

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Q: Does this statute treat a non-citizen differently than a citizen?

Yes. To justify an investigation for a non-citizen, it is necessary that the investigation be for the purpose of obtaining foreign intelligence information. If the investigation concerns a citizen, the standards are higher: the purpose of the investigation must be protection against international terrorism or clandestine intelligence activities.

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