



ELECTRONIC FRONTIER FOUNDATION

Protecting Rights and Promoting Freedom on the Electronic Frontier

February 2, 2017

VIA EMAIL, FAX AND POSTAL SERVICE

Federal Bureau of Investigation
Attn: FOI/PA Request
Record/Information Dissemination Section
170 Marcel Drive
Winchester, VA 22602-4843
Email: foiparequest@ic.fbi.gov
Fax: (540) 868-4391/4997

RE: Freedom of Information Act Request and Requests for News Media Fee Status, and Public Interest Fee Waiver

Dear Ms. Day:

This letter constitutes a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and is submitted to the Federal Bureau of Investigation (FBI) on behalf of the Electronic Frontier Foundation (EFF).

In an order issued on December 19, 2016, U.S. District Judge Cormac J. Carney of the U.S. District Court for the Central District of California, Southern District, cited record evidence concerning the FBI's relationship with the electronics retailer Best Buy. *United States v. Rettenmaier*, SACR 14-00188-CJC (C.D. Cal.). Specifically, the Court stated that the Bureau cooperates with certain Best Buy employees in the conduct of investigations and designates them as "cooperating human sources" ("CHSs").

Through this request, EFF seeks the disclosure of the following agency records from the FBI:

- 1) All internal memoranda or other documentation regarding the use of informants and/or CHSs at any Best Buy facility;
- 2) All internal memoranda or other documentation regarding FBI training of Best Buy personnel in the detection and location of child pornography, or other material, on computers brought to Best Buy for repair;
- 3) All recruiting material from the FBI directed to Best Buy personnel; and
- 4) All memoranda, guidance, directives, or policy statements concerning the use of informants and/or CHSs at any computer repair facilities in the United States.

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EFF requests that, where appropriate, FBI provide the requested records in the native electronic format in which they were created or received. FOIA provides that agency records include records “maintained by an agency in any format, including electronic format.” 5 USC § 552(f)(2)(A). FOIA also provides that “an agency shall make reasonable efforts to search for the records in electronic form or format,” 5 USC § 552(a)(3)(C), and “shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.” 5 USC § 552(a)(3)(B).

Additionally, although FOIA has always presumed that government records are open to public inspection, the recently enacted FOIA Improvement Act of 2016, Pub. L. 114-185, prohibits agencies from withholding records unless (1) “disclosure is prohibited by law” or (2) “the agency reasonably foresees that disclosure would harm an interest protected by” one of FOIA’s exemptions. Codified at 5 U.S.C. § 552(a)(8)(A). Thus, in addition to FOIA favoring disclosure and requiring its exemptions to be narrowly construed, Section 552(a)(8)(A) prohibits agencies from using their discretion to broadly withhold records merely because they believe an exemption could technically apply.

Request for News Media Fee Status

EFF asks that it not be charged search or review fees for this request because EFF qualifies as a representative of the news media pursuant to the FOIA and 28 C.F.R. § 16.10(b)(6). A “[r]epresentative of the news media is any person or entity that actively gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” *Id.*

EFF is primarily engaged in disseminating the information it receives via FOIA to the general public. At the outset, we note that the Department of Homeland Security, as well as the National Security Agency, State Department and other agencies, have previously recognized that EFF qualifies as a “news media” requester, based upon the publication activities set forth below. Further, the U.S. Court of Appeals for the D.C. Circuit has stressed that different agencies must not “adopt inconsistent interpretations of the FOIA.” *Al-Fayed v. CIA*, 254 F.3d 300, 307 (D.C. Cir. 2001) (quoting *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1287 (D.C. Cir. 1983)).

EFF is a nonprofit public interest organization dedicated to defending civil liberties in the digital world.¹ One of EFF’s primary missions is to “educat[e] the press and the public through comprehensive analysis, educational guides, activist workshops,

¹ <https://www.eff.org/about>

and more.”² To accomplish this goal, EFF routinely and systematically disseminates information in several ways.

EFF maintains a frequently visited web site, which reports the latest developments and contains in-depth information about a variety of civil liberties and intellectual property issues.³ Also, EFF has regularly published an online newsletter, the EFFector, since 1990. The EFFector currently has more than 272,000 subscribers.⁴ Furthermore, EFF publishes a popular blog, Deeplinks, which highlights the latest news related to law, policy and technology.⁵

EFF staff members have presented research and in-depth analysis on technology issues in roughly 40 in-depth reports published since 2002.⁶ These reports provide information and commentary on such diverse issues as free speech, privacy, and intellectual property. EFF has specifically published reports related to searches of digital devices, including *Defending Privacy at the U.S. Border: A Guide for Travelers Carrying Digital Devices* (December 2011)⁷ and *Know Your Rights!* (October 2014).⁸

As described above, multiple government agencies have repeatedly recognized EFF as a member of the news media. Further, this request is intended only to inform the public and is not for commercial use. EFF is therefore eligible for a waiver of search, processing, and duplication for the first 100 pages.

Request for a Public Interest Fee Waiver

EFF is also entitled to a waiver of all fees related to this request because disclosure of the requested information is in the public interest within the meaning of 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.10(k)(2). EFF should be granted a public interest fee waiver of all fees because disclosure of the records “would shed light on the operations or activities of the government,” “would be likely to contribute significantly to public understanding of those operations or activities,” and disclosure is not “primarily in the commercial interest of the requester. *Id.* at (k)(2)(i)-(iii).

First, the subject matter of this request—FBI cooperation with Best Buy and other electronics retailers—will shed light on how the Bureau obtains the private and personal information of citizens.

² *Id.*

³ <https://www.eff.org>

⁴ A complete archive of past EFFectors is available at <https://www.eff.org/effector>.

⁵ <https://www.eff.org/deeplinks>

⁶ <https://www.eff.org/wp>

⁷ <https://www.eff.org/wp/defending-privacy-us-border-guide-travelers-carrying-digital-devices>

⁸ <https://www.eff.org/issues/know-your-rights>

Second, disclosure is likely to contribute to significant public understanding of these operations in both ways contemplated by 28 C.F.R. § 16.10(k)(2)(ii)(A)-(B). To EFF's knowledge, there has not been prior public disclosure of the FBI's relationship with Best Buy and other similar retailers. The public is thus likely to learn new things about those relationships. Moreover, disclosure will contribute to a meaningfully broad audience because, as a member of the news media, EFF plans to report on and publish the requested information.

Third, EFF does not have a primarily commercial interest in the disclosure of the requested records. EFF is a 501(c)(3) nonprofit organization, and will derive no commercial benefit from the information requested here.

Because EFF is requesting that all records be provided in their native electronic format and are seeking fee waivers, we do not anticipate that there should be any significant fees generated by this request. Should FBI choose not to waive fees for this request, EFF agrees to incur legally assessable processing fees not to exceed \$100. If you anticipate that processing fees may exceed \$100, please promptly notify EFF.

In the event that you determine that some responsive material might be exempt from disclosure under FOIA, please indicate the specific exemption(s) and/or statutory or regulatory provisions upon which the agency relies.

Thank you for your consideration of this request. If you have any questions or concerns, please do not hesitate to contact me. As the statute requires, we anticipate a response to this request within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i).

I certify that, to the best of my knowledge and belief, all information within this request is true and correct.

Sincerely,

_____/s/

David Greene
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