

# **Exhibit 1**

*Electronic Frontier Foundation v. Department of Justice*

Plaintiff's Motion for a Preliminary Injunction



March 12, 2007

**BY FACSIMILE — (202) 324-3752**

David M. Hardy, Chief  
Record/Information Dissemination Section  
Records Management Division  
Federal Bureau of Investigation  
Department of Justice  
935 Pennsylvania Avenue NW  
Washington, DC 20535-0001

**RE: Freedom of Information Act Request and Request for Expedited Processing**

Dear Mr. Hardy:

This letter constitutes an expedited 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”). We make this request as part of EFF’s FOIA Litigation for Accountable Government (“FLAG”) Project, which works to obtain government documents and make them widely available to the public.

By separate letter to the Department of Justice’s Director of Public Affairs, we have requested the expedited processing of this request pursuant to 28 C.F.R. § 16.5(d)(1)(iv). For your convenience, we are including a copy of that letter here (without attachments).

In a report issued on March 9, 2007, the Department of Justice’s Inspector General documented numerous instances of the FBI’s “improper or illegal use” of National Security Letter (“NSL”) authority. Specifically, the Inspector General “found that the FBI used NSLs in violation of applicable NSL statutes, Attorney General Guidelines, and internal FBI policies.” U.S. Department of Justice, Office of the Inspector General, “A Review of the Federal Bureau of Investigation’s Use of National Security Letters” (March 2007), at xlvii.

We are seeking the following agency records (including but not limited to electronic records) from January 1, 2003 to the present:

1. All records discussing or reporting violations or potential violations of statutes, Attorney General guidelines, and internal FBI policies governing the use of NSLs, including, but not limited to:
  - a. Correspondence or communications between the FBI and the Privacy and Civil Liberties Oversight Board concerning violations or potential violations of statutes, Attorney General guidelines, and internal FBI policies governing the use of NSLs; and

- b. Correspondence or communications between the FBI and Department of Justice Office of the Inspector General concerning violations or potential violations of statutes, Attorney General guidelines, and internal FBI policies governing the use of NSLs;
2. Guidelines, memoranda or communications addressing or discussing the integration of NSL data into the FBI's Investigative Data Warehouse;
3. Contracts between the FBI and three telephone companies (as referenced in page 88 of the Inspector General's report), which were intended to allow the Counterterrorism Division to obtain telephone toll billing data from the communications industry as expeditiously as possible;
4. Any guidance, memoranda or communications discussing the FBI's legal authority to issue exigent letters to telecommunications companies, and the relationship between such exigent letters and the FBI's authority to issue NSLs under the Electronic Communications Privacy Act;
5. Any guidance, memoranda or communications discussing the application of the Fourth Amendment to NSLs issued under the Electronic Communications Privacy Act;
6. Any guidance, memoranda or communications interpreting "telephone toll billing information" in the context of the Electronic Communications Privacy Act;
7. Any guidance, memoranda or communications discussing the meaning of "electronic communication" in the context of the Electronic Communications Privacy Act;
8. Copies of sample or model exigent letters used by the FBI's Counterterrorism Division;
9. Copies of sample or model NSL approval requests used by the FBI's Counterterrorism Division; and
10. Records related to the Counterterrorism Division's Electronic Surveillance Operations and Sharing Unit (EOPS).

We believe that records responsive to this request are likely to be located within the FBI's Office of General Counsel, National Security Law Branch, and Counterterrorism Division.

### **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. § 16.11(b)(6). In requesting this classification, we note that both the Department of Homeland Security and the National Security Agency have recognized that EFF qualifies as a "news media" requester, based

upon the publication activities set forth below (see DHS stipulation and NSA letter, attached hereto). We further note that 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 non-profit public interest organization that works “to protect and enhance our core civil liberties in the digital age.”<sup>1</sup> One of EFF’s primary objectives is “to educate the press, policymakers and the general public about online civil liberties.”<sup>2</sup> To accomplish this goal, EFF routinely and systematically disseminates information in several ways.

First, EFF maintains a frequently visited web site, <http://www.eff.org>, which received 40,042,510 hits in February 2007 — an average of 59,587 per hour. The web site reports the latest developments and contains in-depth information about a variety of civil liberties and intellectual property issues.

EFF has regularly published an online newsletter, the EFFector, since 1990. The EFFector currently has more than 77,000 subscribers. A complete archive of past EFFectors is available at <http://www.eff.org/effector/>.

Furthermore, EFF publishes a blog that highlights the latest news from around the Internet. DeepLinks (<http://www.eff.org/deeplinks/>) reports and analyzes newsworthy developments in technology. It also provides miniLinks, which direct readers to other news articles and commentary on these issues. DeepLinks had 451,585 hits in February 2007.<sup>3</sup>

In addition to reporting hi-tech developments, EFF staff members have presented research and in-depth analysis on technology issues in no fewer than eighteen white papers published since 2002. These papers, available at <http://www.eff.org/wp/>, provide information and commentary on such diverse issues as electronic voting, free speech, privacy and intellectual property.

EFF has also published several books to educate the public about technology and civil liberties issues. *Everybody’s Guide to the Internet* (MIT Press 1994), first published electronically as *The Big Dummy’s Guide to the Internet* in 1993, was translated into several languages, and is still sold by Powell’s Books (<http://www.powells.com>). EFF also produced *Protecting Yourself Online: The Definitive Resource on Safety, Freedom & Privacy in Cyberspace* (HarperEdge 1998), a “comprehensive guide to self-protection in the electronic frontier,” which can be purchased via Amazon.com (<http://www.amazon.com>). Finally, *Cracking DES: Secrets of Encryption Research, Wiretap Politics & Chip Design* (O’Reilly 1998) revealed technical details on encryption security to the public. The book is available online at <http://cryptome.org/cracking-des.htm> and for sale at Amazon.com.

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<sup>1</sup> Guidestar Basic Report, Electronic Frontier Foundation, <http://www.guidestar.org/pqShowGsReport.do?npId=561625> (last visited March 10, 2007).

<sup>2</sup> *Id.*

<sup>3</sup> These figures include hits from RSS feeds through which subscribers can easily track updates to DeepLinks and miniLinks.

Most recently, EFF has begun broadcasting podcasts of interviews with EFF staff and outside experts. *Line Noise* is a five-minute audio broadcast on EFF's current work, pending legislation, and technology-related issues. A listing of *Line Noise* podcasts is available at [feed://www.eff.org/rss/linenoisemp3.xml](http://feed://www.eff.org/rss/linenoisemp3.xml) and [feed://www.eff.org/rss/linenoiseogg.xml](http://feed://www.eff.org/rss/linenoiseogg.xml). These podcasts were downloaded more than 2,700 times from EFF's web site last month.

These extensive publication activities show that EFF is a "representative of the news media" under the FOIA and agency regulations.

### **Request for a Public Interest Fee Waiver**

EFF is entitled to a waiver of duplication fees 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. § 16.11(k). To determine whether a request meets this standard, Department of Justice components determine whether "[d]isclosure of the requested information is likely to contribute significantly to public understanding of the operations or activities of the government," and whether such disclosure "is not primarily in the commercial interest of the requester." 28 C.F.R. §§ 16.11(k)(i), (ii). This request clearly satisfies these criteria.

First, the FBI's issuance of NSLs concerns "the operations or activities of the government." 28 C.F.R. § 16.11(k)(2)(i). The agency's interpretation and use of legal authority to issue NSLs unquestionably constitutes government operations or activities.

Second, disclosure of the requested information will "contribute to an understanding of government operations or activities." 28 C.F.R. § 16.11(k)(2)(ii) (internal quotation marks omitted). EFF has requested information that will shed light on how the FBI exercises its power to issue NSLs.

Third, the requested material will "contribute to public understanding" of the FBI's use of NSL authority. 28 C.F.R. § 16.11(k)(2)(iii) (internal quotation marks omitted). This information will contribute not only to EFF's understanding of the way that the FBI exercises its power to issue NSLs, but to the understanding of a reasonably broad audience of persons interested in the subject. EFF will make the information it obtains under the FOIA available to the public and the media through its web site and newsletter, which highlight developments concerning privacy and civil liberties issues, and/or other channels discussed more fully above.

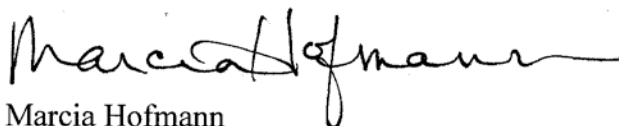
Fourth, the disclosure will "contribute significantly" to the public's knowledge and understanding of the FBI's use of its authority to collect investigative data through NSLs. 28 C.F.R. § 16.11(k)(2)(iv) (internal quotation marks omitted). Disclosure of the requested information will help inform the public about the FBI's interpretation of the laws and policies that govern issuance of NSLs, as well as contribute to the public debate about how this authority should be exercised.

Furthermore, a fee waiver is appropriate here because EFF has no commercial interest in the disclosure of the requested records. 28 C.F.R. § 16.11(k)(3). EFF is a 501(c)(3) nonprofit

organization, and will derive no commercial benefit from the information at issue here.

Thank you for your consideration of this request. As applicable Department regulations provide, we will anticipate your determination within ten (10) calendar days. 28 CFR 16.5(d)(1). Please be advised that, given the urgency of this matter, EFF intends to seek immediate judicial relief if a response to this request for expedition is not issued in a timely manner.

Sincerely,

A handwritten signature in black ink, appearing to read "Marcia Hofmann". The signature is fluid and cursive, with a long horizontal stroke at the end.

Marcia Hofmann  
Staff Attorney

Attachments