IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC FRONTIER FOUNDATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. _____
	)	
DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Pursuant to Fed. R. Civ. P. 65, Plaintiff Electronic Frontier Foundation respectfully moves for entry of a preliminary injunction to enjoin Defendant Department of Justice's unlawful attempts to impede Plaintiff's efforts to expeditiously obtain agency records concerning the Federal Bureau of Investigation's misuse of controversial investigative powers. Plaintiff seeks an order requiring Defendant to expedite the processing of Plaintiff's March 12, 2007 Freedom of Information Act request to the Bureau, to complete its processing within 20 days, and to serve on Plaintiff a *Vaughn* index 10 days thereafter.

The grounds for this motion are set forth in the accompanying memorandum of points and authorities. Plaintiff asks that the Court, pursuant to Local Rule 65.1(d), schedule a hearing on this application for a preliminary injunction at the Court's earliest convenience.

Respectfully submitted,

/s/ *Marcia Hofmann*
MARCIA HOFMANN
D.C. Bar No. 484136

DAVID L. SOBEL
D.C. Bar No. 360418

ELECTRONIC FRONTIER FOUNDATION
1875 Connecticut Avenue NW
Suite 650
Washington, DC 20009
(202) 797-9009

Counsel for Plaintiff

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MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Plaintiff Electronic Frontier Foundation ("EFF or Plaintiff") respectfully submits this memorandum of points and authorities in support of its motion for a preliminary injunction.

PRELIMINARY STATEMENT

This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, seeking the expedited processing and release of Department of Justice ("DOJ") records concerning the Federal Bureau of Investigation's ("FBI") misuse of legal power to issue National Security Letters to collect consumer records from telecommunications providers, financial institutions, and credit agencies. There has been widespread and exceptional media interest in this issue since the recent publication of a report by the DOJ Inspector General detailing the FBI's abuse of its NSL authority. Furthermore, numerous editorials and news articles have raised questions about the propriety and legality of the FBI's actions. Defendant DOJ acknowledges that the requested information fits squarely within the narrow category for which the agency has established a right to expedited

processing and, on March 30, 2007, purported to grant EFF's request for such expeditious treatment. Nonetheless, in violation of the FOIA and its own regulations, Defendant DOJ has failed to process Plaintiff's request even within the statutory time frame for a standard request that is not entitled to expedited treatment. DOJ's failure to process Plaintiff's request — or to even identify a date by which it expects to complete processing — clearly violates the law. Because time is at the essence of Plaintiff's rights and Defendant DOJ's obligations, Plaintiff seeks the Court's expedited consideration of this matter and entry of an order compelling Defendant DOJ to process and disclose the requested records immediately.

STATEMENT OF FACTS

I. The Ongoing Controversy Concerning National Security Letters and the FBI's Abuse of Its Investigative Authority

The FBI has for many years possessed a limited power in certain investigations to issue National Security Letters ("NSLs"), which are demands for customer account information and transactional records from third parties such as telephone companies, Internet service providers, financial institutions, and consumer credit agencies. *See* Right to Financial Privacy Act, 12 U.S.C. § 3414(a)(5); Fair Credit Reporting Act, 15 U.S.C. §§ 1681u, 1681v; Electronic Communications Privacy Act, 18 U.S.C. § 2709; National Security Act, 50 U.S.C. § 436. Signed into law shortly after the 9/11 terrorist attacks, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("PATRIOT Act") substantially expanded the FBI's preexisting legal authority to collect third-party records through NSLs. Pub. L. No. 107-56, 115 Stat. 272, §505 (2001). The NSL provision is one of the more

contentious aspects of a divisive statute;[1] as this Court has noted, "[e]ver since it was proposed, the Patriot Act has engendered controversy and debate." *American Civil Liberties Union v. Dep't of Justice*, 265 F. Supp. 2d 20, 24 (D.D.C. 2003).

In 2005, Congress held a series of hearings on legislation to reauthorize certain provisions of the PATRIOT Act, which were scheduled to sunset at the end of the year without further congressional action.[2] *See* Pub. L. No. 107-56, §224, 18 U.S.C. § 2510 note. In testimony at one hearing leading up to the passage of the legislation, the Attorney General stated that "[t]he track record established over the past three years has demonstrated the effectiveness of the safeguards of civil liberties put in place when the act was passed. There has not been one verified case of civil liberties abuse." *USA PATRIOT Act of 2001*: *Hearing Before the Senate Select Comm. on Intelligence*, 109th Cong. (2005) (testimony of Alberto Gonzales, Attorney General of the United States).

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[1] *See, e.g.*, Dan Eggen and Robert O'Harrow Jr., *U.S. Steps Up Secret Surveillance*, Washington Post, March 24, 2003 at A01; Editorial, *New Law Gives Feds Too Much Unchecked Power*, Detroit News, Dec. 31, 2003 at 10A; Editorial, *Curbing FBI Power*, Buffalo News (N.Y.), Oct. 17, 2004 at H4; Lynne Tuohy, *Librarians Resist Acts Secrecy*, Hartford Courant (Conn.), Sept. 1, 2005 at B1; Barton Gellman, *The FBI's Secret Scrutiny*, Washington Post, Nov. 6, 2005 at A01; Eric Lichtblau, *Lawmakers Call for Limits on F.B.I. Power to Demand Records in Terrorism Investigations*, NY Times, Nov. 7, 2005 at A20; Editorial, *Our Opinions: FBI Crosses the Line*, Atlanta Journal-Constitution, Nov. 11, 2005 at 18A; Editorial, *30,000 Secret Searches*, Courier-Journal (Ky.), Nov. 12, 2005 at 14A; Editorial, Robyn E. Blumner, *State of Secrets, State of Torture*, St. Petersburg Times (Fla.), Nov. 13, 2005 at 5P; Editorial, *Patriot Act: Compromise Not Worth Price*, Milwaukee Journal Sentinel, Dec. 15 2005 at A20; Richard Willing, *With Only a Letter, FBI Can Gather Private Data*, USA Today, July 6, 2006 at 1A.

[2] While the PATRIOT Act's NSL provision was not subject to sunset, it was a topic of frequent debate during the hearings, and was subsequently modified by the USA PATRIOT Improvement and Reauthorization Act of 2005 to allow, *inter alia*, a recipient of an NSL issued under any legal authority to seek judicial review of the request. Pub. L. No. 109-177, § 115 (2005).

Reflecting Congress's concern about the potential abuse of enhanced post-9/11 investigative powers, the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 119, directed the DOJ Inspector General to review "the effectiveness and use, including any improper or illegal use, of national security letters issued by the Department of Justice." Pursuant to this directive, the Inspector General publicly released a 126-page report on March 9, 2007, which found extensive misuse of NSL authority in a sample of four FBI field offices during calendar years 2003-2005. U.S. Dep't of Justice Office of the Inspector General, *A Review of the Federal Bureau of Investigation's Use of National Security Letters* (March 2007), *available at* http://www.usdoj.gov/oig/special/s0703b/final.pdf.

II. Plaintiff's FOIA Request and Request for Expedited Processing

By letter delivered by facsimile to the FBI and dated March 12, 2007, Plaintiff requested under the FOIA the following agency records (including, but not limited to, electronic records) from January 1, 2003 to the date of the request:

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).

Letter From Marcia Hofmann, Staff Attorney, Electronic Frontier Foundation to David Hardy, Chief, Records/Information Dissemination Section, Records Management Division, FBI 1-2 (March 12, 2007) (attached to Declaration of Marcia Hofmann (hereafter "Hofmann Decl.") as Exhibit 1).[3]

Also on March 12, 2007, Plaintiff delivered by facsimile to the DOJ's Director of

[3] For the FBI's convenience, Plaintiff also provided the Bureau a copy of its March 12, 2007 request for expedited processing submitted to the DOJ's Director of Public Affairs, discussed *infra*.

Public Affairs a copy of its FOIA request to the FBI, and formally requested that the processing of the request be expedited because it involves a "matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence" under 28 C.F.R. § 16.5(d)(1)(iv). Letter From Marcia Hofmann, Staff Attorney, Electronic Frontier Foundation to Tasia Scolinos, Director of Public Affairs, DOJ (March 12, 2007) (attached to Hofmann Decl. as Exhibit 2).[4]

On March 29, 2007, the FBI acknowledged receipt of Plaintiff's request. Letter From David Hardy, Chief, Records/Information Dissemination Section, Records Management Division, FBI, to Marcia Hofmann, Staff Attorney, Electronic Frontier Foundation (March 29, 2007) (attached to Hofmann Decl. as Exhibit 3). The next day, the FBI informed Plaintiff that the DOJ's Director of Public Affairs had granted Plaintiff's request for expedited processing. Letter From David Hardy, Chief, Records/Information Dissemination Section, Records Management Division, FBI, to Marcia Hofmann, Staff Attorney, Electronic Frontier Foundation (March 30, 2007) (attached to Hofmann Decl. as Exhibit 4).

Notwithstanding Defendant DOJ's purported decision to expedite the processing of Plaintiff's FOIA request, to date, the FBI has neither completed the processing of the request nor informed Plaintiff of an anticipated date when the processing will be completed. Not only has the FBI failed to expedite the processing of Plaintiff's request,

[4] For the convenience of the Director of Public Affairs, Plaintiff also provided Ms. Scolinos a copy of EFF's March 12, 2007 FOIA request to the FBI, discussed *supra*.

it has also exceeded the generally applicable 20-working-day deadline for the processing of *any* FOIA request. 5 U.S.C. § 552(a)(6)(A).

ARGUMENT

The issue raised in this motion is simple and straightforward. Although Defendant DOJ has acknowledged Plaintiff's legal entitlement to expedited processing, the agency has failed to comply with not only the FOIA's provisions for expedited processing, but also the statute's mandated time frame of 20 working days for responding to a standard, non-expedited request. The agency's failure to process Plaintiff's requests constitutes a continuing impediment to EFF's (and the public's) ability to examine the FBI's misuse of its authority to issue NSLs. The agency's action is clearly unlawful and should be enjoined.

I. The Court has Jurisdiction to Grant the Requested Relief

The Court's jurisdiction to consider this matter and grant appropriate relief is clear. The FOIA provides, in pertinent part:

> On complaint, the district court of the United States . . . in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo . . . .

5 U.S.C. § 552(a)(4)(B). *See Al-Fayed v. CIA*, 254 F.3d 300, 304 (D.C. Cir. 2001). The statute further provides that

> [a]ny person making a request to any agency for records . . . shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph.

5 U.S.C. § 552(a)(6)(C). *See Oglesby v. Dep't of the Army*, 920 F.2d 57, 62 (D.C. Cir. 1990) ("If the agency has not responded within the statutory time limits, then . . . the requester may bring suit.").

Here, notwithstanding the DOJ's agreement to "expedite" Plaintiff's request, the FBI has failed to respond within the generally applicable 20-working-day time limit established by 5 U.S.C. § 552(a)(6)(A). Plaintiff's claim is thus ripe for adjudication, as all applicable administrative remedies have been exhausted.

II. Plaintiff is Entitled to Entry of a Preliminary Injunction

In considering Plaintiff's request for the entry of a preliminary injunction compelling the FBI to expeditiously complete the processing of Plaintiff's FOIA request, the Court must assess "[t]he familiar factors affecting the grant of preliminary injunctive relief — 1) likelihood of success on the merits, 2) irreparable injury to the plaintiff, 3) burden on . . . others' interests, and 4) the public interest." *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1066 (D.C. Cir. 1998) (quoting *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995); *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 57 (D.C. Cir. 1977) (citing *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *see also Electronic Privacy Information Center v. Dep't of Justice*, 416 F. Supp. 2d 30, 35-36 (D.D.C. 2006); *Bancoult v. McNamara*, 227 F. Supp. 2d 144, 140 (D.D.C. 2002). These factors are measured "on a sliding scale and must be balanced against each other." *Electronic Privacy Information Center*, 416 F. Supp. 2d at 36 (quoting *Serono Lab, Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998). The Court's consideration of these factors in this case firmly establishes Plaintiff's entitlement to injunctive relief.

A. Plaintiff is Likely to Prevail on the Merits

Given the clarity of Plaintiff's entitlement to the expedited processing of its request, Plaintiff's likelihood of prevailing on the merits is extremely high. In assessing Plaintiff's likelihood of success, the Court must consider one discrete issue: whether defendant has processed EFF's FOIA request in an expedited manner within the time frame provided in the FOIA and DOJ regulations. Plaintiff is likely to prevail on this issue.

According to the FOIA and DOJ regulations, the agency is generally required to "determine within 20 days (except Saturdays, Sundays, and legal public holidays) after the receipt of . . . [a] request whether to comply with such request and shall immediately notify the person making such request of such determination[.]" 5 U.S.C. § 552(a)(6)(A)(i); *see also* 28 C.F.R. § 16.6(b). If the agency grants expedited treatment, it is obligated to process the request "as soon as practicable." 5 U.S.C. § 552(a)(6)(E)(iii); 28 C.F.R. § 16.5(d)(4). This Court has determined that "the phrase 'as soon as practicable,' in the context of a provision of FOIA allowing for *expedited* processing, cannot be interpreted to impose a lower burden on the agency than would otherwise exist." *Electronic Privacy Information Center*, 416 F. Supp. 2d at 39 (emphasis in original). Therefore, an agency is presumed to have violated the "expedited processing" provisions of the FOIA when it fails to comply with the generally applicable 20-working-day deadline imposed by the FOIA for processing a non-expedited request. *Id.* Once the 20-working-day deadline has passed, the agency bears the burden of proving that it is in fact processing the expedited request "as soon as practicable." *Id.* n.8.

Here, Defendant DOJ determined that Plaintiff's request was entitled to expedited

processing. Exhibit 4 ("We have been advised that the Director of [the Office of Public Affairs] has concluded that the subject of your request is in fact a 'matter of widespread and exceptional media interest in which there exists possible questions about the government's integrity which affects [sic] public confidence,' and has therefore concluded that your request for expedited processing should be granted.").[5] There is no indication in the record, however, that the FBI has done anything more than pay lip service to Plaintiff's entitlement to expedition. In fact, the only statement that the Bureau has made with respect to the anticipated timing of its response to Plaintiff's FOIA request suggests the likelihood of open-ended delay: "[W]e have begun to conduct a search for potentially responsive records. Once the FBI completes its search for all records potentially responsive to your FOIA request, you will be advised as to the outcome of this search effort." Exhibit 4.

Although it is undisputed that Plaintiff's request is legally entitled to expedited treatment, the FBI has failed to comply with the 20-day time frame required by the FOIA and DOJ regulations for issuing a determination on a *standard* FOIA request. Therefore, Plaintiff is entitled to the immediate processing and release of the requested records.

[5] The FBI's letter to Plaintiff indicates that the agency determined that Plaintiff is entitled to expedited processing under a standard unique to DOJ, which requires expedition for requests that involve a "matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." 28 C.F.R. § 16.5(d)(1)(iv). Determinations of eligibility under the latter standard are made by DOJ's Office of Public Affairs ("OPA"). *Id.* § 16.5(d)(2). In its March 30 letter, the FBI stated that the Director of Public Affairs had granted Plaintiff's request for expedited processing. Exhibit 4.

B. Plaintiff Will Suffer Irreparable Injury in the Absence of the Requested Injunctive Relief

Unless DOJ's unlawful failure to comply with its obligation to expedite the processing of Plaintiff's FOIA request is immediately enjoined, Plaintiff will suffer irreparable harm.[6] The very nature of the right that Plaintiff seeks to vindicate in this action — expedited processing — depends upon timeliness, since "stale information is of little value." *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988); *Electronic Privacy Information Center*, 416 F. Supp. 2d at 40-41. This Court has recognized that the requisite injury is present, and preliminary injunctive relief is appropriate, in cases expedited FOIA processing is at issue and where time thus is of the essence, because delay "constitutes a cognizable harm." *Electronic Privacy Information Center*, 416 F. Supp. 2d at 40. *See also, e.g.*, *United States v. BNS, Inc.*, 858 F.2d 456, 465 (9th Cir. 1988); *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982). Under the statutory scheme Congress established in the FOIA, it is clear that timing is critical and that any further delay in the processing of Plaintiff's request will cause irreparable injury. Unless Defendant DOJ is ordered to process Plaintiff's request

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[6] Given the strength of Plaintiff's position on the merits, even "a relatively slight showing of irreparable injury" is adequate to justify the issuance of a preliminary injunction. As the D.C. Circuit has held:

> The test is a flexible one. "If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak." We have often recognized that injunctive relief may be justified, for example, "where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury."

CSX Transportation, Inc. v. Williams, 406 F.3d 667, 670 (D.C. Cir. 2005), quoting *CityFed Financial Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995). Nonetheless, plaintiff's showing of harm here is substantial.

immediately, Plaintiff's right to expedition under the FOIA will be irretrievably lost.

In addition to the loss of its clearly established statutory right, any further delay in the processing of Plaintiff's FOIA request will irreparably harm Plaintiff's ability, and that of the public, to obtain in a timely fashion information vital to the current and ongoing debate surrounding the FBI's improper use of NSLs. Hofmann Decl. ¶¶ 10-11. As Defendant DOJ has acknowledged, that debate has already garnered extraordinary media interest. *See* Exhibit 4. It also has been the subject of testimony in several hearings before congressional committees.[7] In such circumstances, this Court has held, "the public interest is particularly well-served by the timely release of the requested documents." *Electronic Privacy Information Center*, 416 F. Supp. 2d at 42. Furthermore, legislation introduced in response to the Inspector General's findings has placed the issue of NSL reform squarely before the House of Representatives. H.R. 1739, 110th Cong. (introduced March 28, 2007). This Court has found that the existence of pending legislation related to the subject of a FOIA request weighs in favor of a grant of expedited processing. *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005); *American Civil Liberties Union v. Dep't of Justice*, 321 F. Supp. 2d 24, 31 (D.D.C. 2004) ("*American Civil Liberties Union v. Dep't of Justice II*").

Furthermore, if there is to be a meaningful public debate on this issue, the

[7] *National Security Letters: Hearing of the H. Select Comm. on Intelligence*, 110th Cong. (March 28, 2007); *Oversight of the Federal Bureau of Investigation: Hearing of the S. Comm. on the Judiciary*, 110th Cong. (March 27, 2007); *Misuse of PATRIOT Act Powers: The Inspector General's Findings of Improper Use of National Security Letters by the FBI: Hearing of S. Comm. on the Judiciary*, 110th Cong. (March 21, 2007); *The Inspector General's Independent Report on the Federal Bureau of Investigation's Use of National Security Letters: Hearing of the H. Comm. on the Judiciary*, 110th Cong. (March 20, 2007).

examination "cannot be based solely upon information that the Administration voluntarily chooses to disseminate." *Electronic Privacy Information Center*, 416 F. Supp. 2d at 41 n.9. Indeed, the public oversight mechanism provided by the FOIA is central to open and democratic debate on critical policy issues such as the FBI's misuse of NSL authority. As the Supreme Court has observed, the Act is "a means for citizens to know 'what the Government is up to.' This phrase should not be dismissed as a convenient formalism. *It defines a structural necessity in a real democracy*." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171-172 (2004) (emphasis added; citation omitted). As this Court has noted, "Not only is public awareness a necessity, but so too is *timely* public awareness." *Electronic Privacy Information Center*, 416 F. Supp. 2d at 40 (emphasis in original).

It is clear that the information Plaintiff seeks, if it is to contribute to the public debate on the FBI's improper issuance of NSLs, must be disclosed expeditiously. Because time is of the essence in this matter, Plaintiff will be irreparably harmed unless the Court acts now, "when it [is] still possible to grant effective relief," and before "all opportunity to grant the requested relief [is] foreclosed*." Local Lodge No. 1266, Int'l Ass'n of Machinists and Aerospace Workers v. Panoramic Corp.*, 668 F.2d 276, 290 (7th Cir. 1981).[8]

[8] This Court has recognized that delay in the processing of FOIA requests "may well result in disclosing the relevant documents after the need for them in the formulation of national . . . policy has been overtaken by events." *Natural Resources Defense Council v. Dep't of Energy,* 191 F. Supp. 2d 41, 43 (D.D.C. 2002) *("NRDC")* (granting motion for release of documents).

C. Injunctive Relief Will Not Burden Others' Interests

Defendant DOJ cannot be said to be "burdened" by a requirement that it comply with the law. The immediate relief Plaintiff seeks will require nothing more of the government than what the law already mandates — the expedited processing of Plaintiff's FOIA request. Nor will the requested relief burden the interests of other parties who have submitted FOIA requests to the DOJ in any manner beyond that foreseen by Congress. In providing for expedited processing of qualifying requests, Congress intended that such requests would take precedence over those that do not qualify for such treatment. Fulfillment of the legislative intent cannot be characterized as a burden on any party's interests.

D. The Public Interest Favors the Requested Relief

The final criterion for the issuance of a preliminary injunction is also satisfied in this case. The D.C. Circuit has long recognized that "there is an overriding public interest . . . in the general importance of an agency's faithful adherence to its statutory mandate." *Jacksonville Port Authr.*, 556 F.2d at 59 (D.C. Cir. 1977); *Electronic Privacy Information Center*, 416 F. Supp. 2d 42. Likewise, it is "axiomatic that an 'agency is required to follow its own regulations.'" *Edmonds v. FBI*, No. 02-1294, 2002 U.S. Dist. LEXIS 26578, at *9 n.3, 2002 WL 32539613, at *3 n.3 (D.D.C. Dec. 3, 2002) (quoting *Cherokee National of Okla. v. Babbitt*, 117 F.3d 1489, 1499 (D.C. Cir. 1997)).

Such adherence is all that Plaintiff seeks here. The public interest will also be served by the expedited release of the requested records, which will further the FOIA's core purpose of "shedding light on an agency's performance of its statutory duties." *Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773

(1989). As this Court has noted, "[t]here is public benefit in the release of information that adds to citizens' knowledge" of government activities. *Ctr. to Prevent Handgun Violence v. Dep't of the Treasury*, 49 F. Supp. 2d 3, 5 (D.D.C. 1999). The public interest favors the issuance of an order directing Defendant DOJ to immediately process and release the requested information.

III. The Court Should Order Defendant DOJ to Process Plaintiff's FOIA Request Immediately

While Plaintiff recognizes that preliminary injunctive relief is not the norm in FOIA cases, Plaintiff nonetheless submits that such relief is appropriate when, as in this case, an agency has but failed to implement a well-founded request for expedited processing. *Electronic Privacy Information Center*, 416 F. Supp. at 35 n.4 ("the court may use its equitable power to prevent agency delay, even when exercise of such authority is preliminary in nature.") Congress expressly required agencies to make determinations on requests for expedited processing within 10 calendar days, 5 U.S.C. § 552(a)(6)(E)(ii)(I), and provided for immediate judicial review of adverse determinations, 5 U.S.C. § 552(a)(6)(E)(iii), demonstrating an intent that the courts should act quickly to vindicate the right to expedition. *See, e.g., American Civil Liberties Union v. Dep't of Justice II*, 321 F. Supp. 2d at 28-29 (complete exhaustion of administrative remedies not a prerequisite to judicial review of agency expedition decisions). Congress's mandate that disputes concerning expedited processing should be quickly resolved would be frustrated if aggrieved requesters were required to remain idle for 20 days after initiating suit before moving for partial summary judgment. Fed. R. Civ. P. 56(a). As such, claims involving entitlement to expedited processing are appropriately addressed through motions for preliminary relief. *Electronic Privacy Information Center*, 416 F. Supp. at

35. *See also Aguilera v. FBI*, 941 F. Supp. 144, 152-153 (D.D.C. 1996) (granting preliminary injunction FOIA lawsuit for expedited processing); *Cleaver v. Kelley*, 427 F. Supp. 80, 81-82 (D.D.C. 1976) (same); *American Civil Liberties Union v. Dep't of Defense*, 339 F. Supp. 2d 501, 503 (S.D.N.Y. 2004) (same).

The appropriate form of relief is clear. The applicable DOJ regulations dictate the manner in which FOIA requests requiring expedition must be processed. The regulations provide that DOJ components "ordinarily shall respond to requests according to their order of receipt," 28 C.F.R. § 16.5(a), but that requests "will be taken out of order and given expedited treatment whenever it is determined that they [meet the criteria for expedited processing]." *Id.* § 16.5(d)(1). "If a request for expedited treatment is granted, the request shall be given priority and shall be processed as soon as practicable." *Id.* § 16.5(d)(4). Defendant DOJ concedes that Plaintiff's request qualifies for expedited treatment. Therefore, the Court should order Defendant DOJ to complete the processing of Plaintiff's FOIA request immediately.

In several recent cases, this Court and others have imposed specific processing deadlines on agencies, requiring the prompt delivery of non-exempt records to FOIA requesters. In *Judicial Watch, Inc. v. Dep't of Energy*, 191 F. Supp. 2d 138 (D.D.C. 2002), the Court ordered the Commerce Department and the Transportation Department to process, respectively, 9000 and 6000 pages of material; to complete the processing within 60 days; and to provide the requester with a *Vaughn* index within 72 days. *Id.* at 141. It is worth noting that the FOIA requests at issue in that case were *not* claimed to be entitled to expedited processing. Similarly, in *NRDC*, the Court ordered the Energy Department to process 7500 pages of material; to complete the processing of the "vast

majority" of the material within 32 days; to complete all processing within 48 days; and to provide the requester with a *Vaughn* index within 63 days. 191 F. Supp. 2d at 43-44. Again, the FOIA request in *NRDC*, unlike the requests at issue here, had not been granted expedited treatment.

More recently, in *American Civil Liberties Union v. Dep't of Defense*, a case involving an expedited request, the court ordered a variety of agencies to "produce or identify all responsive documents," and to provide the requesters with a *Vaughn* index, within 30 days. 339 F. Supp. 2d at 505. Furthermore, in *Electronic Privacy Information Center v. Dep't of Justice*, this Court ordered the FBI to "complete the processing of 1500 pages every 15 calendar days, and provide to Plaintiff all responsive non-exempt pages contained therein, until processing is complete," after the agency had granted a request for expedited processing but failed to produce any responsive records. Civ. No. 05-845, 2005 U.S. Dist. LEXIS 40318, at **5-6 (D.D.C. Nov. 16, 2005) *("Electronic Privacy Information Center II")*. Likewise, in another case between the same parties, this Court ordered Defendant to process the plaintiff's request, which had been granted expedited treatment, within 20 days of the date of the Court's order, and produce a *Vaughn* index accounting for any withholdings within 10 days thereafter. *Electronic Privacy Information Center,* 416 F. Supp. 2d at 43.

Recognizing the extraordinary public interest in the records at issue here, and in order to facilitate the informed participation of Plaintiff, and the American people, in the current and ongoing debate over the FBI's abuse of NSL authority, the Court should direct Defendant DOJ to complete the processing of Plaintiff's request, and produce or identify all responsive records, within 20 days of the issuance of the order Plaintiff seeks.

The Court should further order Defendant DOJ to serve on Plaintiff a *Vaughn* index 10 days later.[9]

CONCLUSION

For the foregoing reasons, Plaintiff's motion for a preliminary injunction should be granted. Plaintiff asks that the Court, pursuant to Local Rule 65.1(d), schedule a hearing on this motion at the Court's earliest convenience.

Respectfully submitted,

/s/ *Marcia Hofmann*
MARCIA HOFMANN
D.C. Bar No. 484136

DAVID L. SOBEL
D.C. Bar No. 360418

ELECTRONIC FRONTIER FOUNDATION
1875 Connecticut Avenue NW
Suite 650
Washington, DC 20009
(202) 797-9009

Counsel for Plaintiff

[9] Judicial resolution of the expedited processing issue would not resolve all issues raised in the complaint. Once the question of processing time is resolved, the Court would retain jurisdiction to review the completeness and propriety of DOJ's substantive determination of plaintiff's FOIA requests. *See Open America v. Watergate Special Prosecution Force*, 547 F. 2d 605 (D.C. Cir. 1976).