

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
ELECTRONIC FRONTIER FOUNDATION,)	
)	
Plaintiff,)	
)	
v.)	Civ. Action No. 1:07-CV-00656 (JDB)
)	
DEPARTMENT OF JUSTICE,)	
)	
Defendant.)	
_____)	

DECLARATION OF DAVID M. HARDY

I, David M. Hardy, declare as follows:

(1) I am currently the Section Chief of the Record/Information Dissemination Section ("RIDS"), Records Management Division ("RMD"), at Federal Bureau of Investigation Headquarters ("FBIHQ") in Washington, D.C. I have held this position since August 1, 2002. Prior to joining the FBI, from May 1, 2001 to July 31, 2002, I was the Assistant Judge Advocate General of the Navy for Civil Law. In that capacity, I had direct oversight of Freedom of Information Act ("FOIA") policy, procedures, appeals, and litigation for the Navy. From October 1, 1980 to April 30, 2001, I served as a Navy Judge Advocate at various commands and routinely worked with FOIA matters. I am also an attorney who has been licensed to practice law in the state of Texas since 1980.

(2) In my official capacity as Section Chief of RIDS, I supervise approximately 201 employees who staff a total of ten (10) units and a field operational service center unit whose collective mission is to effectively plan, develop, direct and manage responses to requests for access to FBI records and information pursuant to the FOIA; Privacy Act; Executive Order

12958, as amended; Presidential, Attorney General and FBI policies and procedures; judicial decisions and other Presidential and Congressional directives. My responsibilities also include the review of FBI information for classification purposes as mandated by Executive Order 12958, as amended,¹ and the preparation of affidavits/declarations in support of Exemption 1 claims asserted under the FOIA.² I have been designated by the Attorney General of the United States as an original Classification Authority and a Declassification Authority pursuant to Executive Order 12958, as amended, §§ 1.3 and 3.1. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information from its files pursuant to the provisions of the FOIA, 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a. Specifically, I am aware of the treatment which has been afforded the March 12, 2007, FOIA request of plaintiff Electronic Frontier Foundation ("EFF") seeking access to records concerning the FBI's use of National Security Letters ("NSLs") in connection with the March 2007 report of the Office of the Inspector General, United States Department of Justice, entitled "A Review of the Federal Bureau of Investigation's Use of National Security Letters" ("OIG report"); and, more generally, internal FBI policies governing the use of NSLs.³ See

¹ 60 Fed. Reg. 19825 (1995) and 69 Fed. Reg. 15315 (2003).

² 5 U.S.C. § 552(b)(1).

³ In a letter dated March 12, 2007, plaintiff submitted a request to FBIHQ for the following records:

-
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

<http://www.usdoj.gov/oig/reports/FBI/index.htm>.

(4) Plaintiff's request is enormous in scope. It covers the five-year time period from January 1, 2003 to March 29, 2007,⁴ which is much longer than the three-year time-period from January 1, 2003 to December 31, 2005 covered in the OIG report.

(5) In addition, plaintiff's request covers ten broad categories of documents. For example, plaintiff seeks "all records discussing or reporting violations or potential violations" of "statutes, Attorney General guidelines, and internal FBI policies" governing the use of NSLs. Moreover, plaintiff requests "any guidance, memoranda, or communications" with regard to four categories of information. Plaintiff then requests an undefined number of "records" related to the Counterterrorism Division's Electronic Surveillance Operations and Sharing Unit ("EOPS").

(6) Because plaintiff's request is expansively worded to request "any guidance

Counterterrorism Division; and

10. Records related to the Counterterrorism Division's Electronic Surveillance Operations and Sharing Unit (EOPS).

See Exhibit A.

On March 12, 2007, plaintiff also submitted a request to the Office of Public Affairs ("OPA"), United States Department of Justice, for expedited processing of its FOIA request. See Exhibit B. On March 29, 2007, the FBI acknowledged receipt of the FOIA request, provided a request number, and indicated that the FBI was currently searching the indices to the central records system at FBI Headquarters for the requested information, and would inform plaintiff of the results as soon as possible. See Exhibit C. In a letter dated March 30, 2007, the FBI advised plaintiff that OPA had granted plaintiff's request for expedited processing. See Exhibit D.

⁴ Although plaintiff's request states "to the present," March 29, 2007 is the FBI's search cut-off date because it is the date on which the FBI first ran a search of the Central Records System ("CRS") using the Automated Case Support System ("ACS").

memoranda, or communications," plaintiff's request involves tens of thousands of pages of potentially responsive e-mail trails, which, coupled with the tremendous amount of classified material covered by the request, creates an immense FOIA case.

(7) This declaration is being submitted in support of defendant's opposition to plaintiff's motion for a preliminary injunction seeking an order requiring the FBI "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."

BACKGROUND

A. Overview of how a FOIA request is processed in RIDS.

(8) The mission of RIDS is to effectively plan, develop, direct, and manage responses to requests for access to FBI records and information. RIDS currently employs approximately 201 people, most of whom are Legal Administrative Specialists ("LASs"), and who are assigned among the 11 units within RIDS. RIDS employees intake, review, process, and release information in response to FOIA and Privacy Act requests. To accomplish this mission, RIDS consists of the following 11 Units: one Service Request Unit ("SRU"), two Work Process Units ("WPU), three Classification Units ("CU"), four FOIPA Units ("FOIPA Disclosure Units"),⁵ and the Litigation Support Unit ("LSU").

(9) Service Request Unit: Among its various sections, the SRU includes the Negotiation Team, which works with individuals whose requests generate a large volume of

⁵ One of the four FOIPA Disclosure Units operates at an off-site location in Savannah, Georgia.

records in an attempt to narrow the scope of the responsive records and facilitate a more rapid response. Since 1995, this team has eliminated over 13 million pages from FOIA/Privacy Act requests.

(10) In this case, the FBI has not had the opportunity to use its Negotiation Team to narrow the request, nor has there been any attempt by this requester to narrow the time period covered by this request, even though doing so could potentially enable the FBI to process the request significantly faster. For example, narrowing the request to the three year period covered by the OIG report, would significantly accelerate the FBI's response. Likewise, narrowing the focus of the request to particular categories of material or certain types of documents would speed up the FBI's processing. Given that the plaintiff's request for expedition was only recently granted, on March 30, 2007, the FBI's negotiation team had not yet had the opportunity to contact plaintiff to initiate discussions of the possibility of narrowing the request before plaintiff initiated this litigation. However, if plaintiff indicates willingness to narrow the request, the processing time may still be reduced.

(11) Work Process Units: The WPU's handle various administrative tasks such as acknowledging requests and searching for identifiable documents. The WPU's are also responsible for preparing "perfected" requests for transfer to the four FOIPA Disclosure Units. A request is considered "perfected" when all administrative tasks have been completed and all responsive documents have been scanned into the FDPS.

(12) Classification Units: The three CU's are responsible for complying with the classification/declassification review of FBI records under Executive Order 12958, as amended. In addition, the CU's review and prepare classified material for review by the Department of

Justice Review Committee ("DRC").⁶

(13) FOIPA Units: After CU review is complete, the four FOIPA Disclosure Units prepare documents for disclosure pursuant to the provisions of the FOIA and Privacy Act. A page-by-page, line-by-line review of the responsive documents to determine which, if any FOIA and/or Privacy Act exemptions may apply. This includes redaction of the exempt material and notation of the applicable exemption(s) in the margin of each page and/or preparation of deleted page information sheets when pages are withheld in their entireties, which is now done electronically in the FOIPA Document Processing System ("FDPS"). The FOIPA Disclosure Units ensure that FOIA and/or Privacy Act exemptions have been applied properly, no releaseable material has been withheld, no material meriting protection has been released, and all necessary classification reviews have been completed. After both the Classification Units and the FOIPA Units have completed their work, the proposed release package is sent to the appropriate operational division(s) for a final review prior to release.

(14) Litigation Support Unit: The LSU is responsible for providing legal support and administrative assistance to the FBI's Office of the General Counsel and Chief Division Counsels and Assistant Division Counsels in the FBI's field offices, in all FOIA/Privacy Act requests that result in federal litigation.

B. Expedited processing.

(15) Prior to receipt of plaintiff's FOIA request in this case, the FBI had two requests that were subject to expedited processing and remain pending to date. Because these expedited

⁶ The DRC is the FBI's appellate authority with regard to the implementation and administration of Executive Order 12958, as amended, and related directives and guidelines concerning classified information. See 28 C.F.R. § 17.14.

cases pre-date plaintiff's request, plaintiff's request may not receive priority over these previous expedited requests, particularly in light of RIDS's limited resources. In the first of these requests, Gerstein v. CIA, et al., Civ. A. No. 06-4643 (N.D. Cal.), plaintiff seeks, inter alia, access to all documents related to criminal referrals submitted to the U.S. Department of Justice or the FBI since January 1, 2001 regarding unauthorized disclosures of classified information to the press or public. The court in that case has ordered the FBI to expedite plaintiff's request. See Exhibit E (Order Granting Plaintiff's Motion to Compel Responses to FOIA Requests; Setting Deadline for Production; Denying Without Prejudice Request for Vaughn Index; Vacating Hearing (November 29, 2006)). This expedition order has resulted in the FBI's intense search and identification of approximately 6,000 pages of potentially responsive records, most of which are classified. Processing has been demanding. The number of employees working on Gerstein at any given time has varied. Twenty-six employees are now working on it, and 106 hours of overtime have been used. The FBI sought and received an additional 120 days from the original January 5, 2007 date initially ordered by the Court to complete its review and processing of this material. The FBI must now complete its review, processing, and release approximately 6,000 pages by April 27, 2007.

(16) The second expedited case involves a FOIA request submitted on behalf of a requester convicted of capital murder and who is on death row. The FBI has identified approximately 4,200 responsive pages. The FBI granted expedited processing based on a finding that the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of the subject of the records. Approximately 3,000 more pages need to be processed in this request.

(17) RIDS is in the process of relocating from FBIHQ to Frederick County, Virginia. Many employees have chosen not to transfer with their unit functions, choosing either to retire or find other jobs rather than relocate to Frederick County, Virginia. Unfortunately, many of these employees were among the most senior and experienced in their area of expertise. Since RMD announced its off-site relocation plans, a total of 58 RIDS employees have either resigned, retired, or found other jobs in the Washington, D.C. Metropolitan area, rather than relocate with their unit. To date, a total of 64 RIDS employees from FBIHQ have relocated with their unit to Frederick County, Virginia.

(18) The FBI is engaged in aggressive and intense recruitment and hiring efforts in the Frederick County, Virginia area. The new RIDS employees who have less experience are in various stages of professional development, but none yet operating as experienced employees. It takes an average of three years to adequately train a new employee in the FOIA/Privacy Act process to be able to work independently in a productive, efficient, and effective manner. Accordingly, RIDS has only a limited number of experienced employees processing FOIA/Privacy Act requests at this time.

(19) To promote administrative efficiency, RIDS employees work on more than one case at a time. Sometimes, processing may be halted midstream. This can occur for a variety of reasons, including the resolution of classification issues or the location of additional records. In the interest of efficiency during this waiting period, the RIDS employees may work on other requests. Accordingly, the shortfall of RIDS employees limits the resources available for expedited cases as well as non-expedited cases at any given time. The FBI therefore has only a limited quantity of resources available for plaintiff's expedited request.

(20) Due to the volume of material that must be reviewed and processed in response to this request, the FBI intends to process and release documents on a rolling basis. As soon as the WPU completes the administrative work on a significant number of documents, the Classification Unit and FOIPA Disclosure Unit will begin the processing for release. The FBI expects to be able to more accurately assess the amount of time necessary to expeditiously process plaintiff's request, and when it will be able to begin its rolling release of responsive records, within 120 days of the date of this declaration.

SEARCH FOR RECORDS RESPONSIVE TO PLAINTIFF'S FOIA REQUEST

(21) In this case, the FBI has employed several mechanisms as part of its search to identify documents responsive to plaintiff's request. As a threshold matter, it is important to note that, due to the extraordinary breadth and depth of plaintiff's FOIA request, the request does not lend itself readily or naturally to the searches that the FBI routinely conducts in response to FOIA requests seeking access to FBI investigative files.

(22) The standard FBI search for responsive records pursuant to a FOIA request involves using terms indexed in the FBI's Central Records System ("CRS"), which is an investigative tool primarily managed and used by Special Agents to aid them in investigations. The files are indexed by Special Agents with terms useful to an investigation such as names of individuals, organizations, companies, publications, activities, or foreign intelligence matters (or programs). The index therefore may not contain terms that one would use in a more generalized search such as the search in this case for NSL-related material.

(23) The FBI has conducted a standard search of the CRS. On March 29, 2007, the WPU staff initiated a search in the CRS to find records responsive to plaintiff's requests. The

specific search inquiry in CRS included the following search terms: "National Security Letters," "National Security Letters and Business Records Requests," "NSL Authorized Issued by Other Field Offices," "NSL Control files," "NSL," "Cingular Wireless," "NSL Guidance," and "NSL Letters." The date parameters for the search were January 1, 2003 to March 29, 2007 -- the search cut-off date of the current request. This search located no FBIHQ main files.

(24) The WPU staff also conducted an individualized inquiry (outside of the CRS system) of the offices at FBIHQ which are reasonably likely to have potentially responsive records. On April 5, 2007, the WPU prepared and circulated an Electronic Communication ("EC") (internal memorandum) to FBIHQ divisions most likely to possess responsive records, including the Director's Office, National Security Branch, Counterterrorism Division, Inspection Division, and Office of the General Counsel. The EC requested the personnel of the designated divisions to conduct a thorough search of any documents in their possession, including e-mails, responsive to plaintiff's request.

(25) Preliminary responses to the EC from the Director's Office, Inspection Division, and the Office of General Counsel indicate that potentially responsive material includes an enormous amount of electronic material, including numerous lengthy e-mail trails, that is difficult and time-consuming to retrieve.

(26) To date, the FBI estimates that approximately 25% of the potentially responsive material has been located. This material consists of twelve file drawers full of documents containing approximately 41,000 pages (approximately 3,400 pages per drawer) of potentially responsive information and fifteen CDs found to contain a total of approximately 2,254 pages of potentially responsive material. This potentially responsive material contains a significant

amount of classified information.

(27) The FBI therefore currently anticipates locating approximately 172,000 pages of material potentially responsive to plaintiff's request.

EXPEDITED PROCESSING OF PLAINTIFF'S FOIA REQUEST

(28) The documents that have been located to date are currently being reviewed for responsiveness. A team of ten RIDS employees is currently working full-time to determine whether particular documents fall into any of the ten categories of documents requested by plaintiff. This team of employees will continue reviewing documents for responsiveness until all the documents have been reviewed.

(29) The next step will be to scan the responsive documents into the FOIPA Document Processing System ("FDPS") which provides for online processing. Priority scanning will occur shortly after documents are reviewed for responsiveness.

(30) Scanned documents are ready for processing, which is accomplished in three stages. First, the Classification Unit will conduct a separate, and time-intensive, review to ensure that all documents are appropriately classified in accordance with the current Executive Order, E.O. 12958, as amended. Even though some of the documents that are responsive to plaintiff's request have been provided to the OIG, pursuant to an agreement with the OIG, the documents provided to the OIG did not first undergo a classification review. Generally, one Classification Unit employee reviews documents at a rate of approximately 1,000 pages per person per month.

(31) The second stage involves a page-by-page, line-by-line review of the responsive documents to determine which, if any, FOIA, exemptions may apply. This includes redaction of the exempt material and notation of the applicable exemption(s) in the margin of each page

and/or preparation of deleted page information sheets when pages are withheld in their entireties, which is now done electronically in FDPS. Depending on the flow of material from the Classification Unit, one to eight FOIPA Disclosure Unit employees will process the responsive documents. Generally, 800 pages of material per month can be reviewed by one FOIPA Disclosure Unit employee.

(32) The final stage of processing includes review of the proposed release packages by the operational division which has substantive equities in the material to ensure that no processing errors have been made and that no improper disclosures are made. Due to the sensitive nature of the documents related to NSLs in this case, the FBI anticipates that several different divisions at FBI Headquarters with equities in the documents will need to review the release packages. The particularly sensitive and classified nature of the documents necessitates a review by senior FBI personnel prior to any release.

(33) As described above, due to the volume of the material, which includes a substantial amount of classified information as well as lengthy e-mail trails all of which needs to be carefully reviewed prior to release, the FBI intends to release documents on a rolling basis. As the processing of a significant number of documents is complete, the FBI will make regular periodic releases until the production is complete, rather than delay the releases until the entire production is ready.

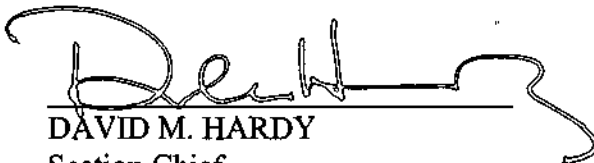
CONCLUSION

(34) The FBI is in the process of conducting a thorough search designed to uncover all documents potentially responsive to plaintiff's request. In light of the number of pages the FBI has located to date, and its continuing search and review efforts the FBI requires an additional

120 days from the date of this declaration in which to more accurately assess the amount of time it will take to expeditiously respond to plaintiff's FOIA request.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, and that Exhibits A-E attached hereto are true and correct copies.

Executed this 24th day of April, 2007.



DAVID M. HARDY
Section Chief
Record/Information Dissemination
Section
Records Management Division
Federal Bureau of Investigation
Washington, D.C.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC FRONTIER FOUNDATION,)
)
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Defendant.)

Civ. Action No. 1:07-CV-00656 (JDB)

EXHIBIT A



Electronic Frontier Foundation
Protecting Rights and Promoting Freedom on the Electronic Frontier

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."¹ One of EFF's primary objectives is "to educate the press, policymakers and the general public about online civil liberties."² 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 2007.³

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.

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

² *Id.*

³ 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 and 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,



Marcia Hofmann
Staff Attorney

Attachments

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC FRONTIER)
FOUNDATION)
)
Plaintiff,)
)
v.)
)
DEPARTMENT OF HOMELAND)
SECURITY,)
)
Defendant.)
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Civil Action No. 06-1988 (ESH)

STIPULATED DISMISSAL OF PLAINTIFF'S SECOND CAUSE OF ACTION

Plaintiff Electronic Frontier Foundation (EFF) and Defendant Department of Homeland Security (DHS), by counsel, hereby stipulate and agree as follows:

1. Defendant DHS has granted news media status to Plaintiff EFF based on the representations contained in EFF's FOIA requests, which demonstrate that EFF is an "entity that is organized and operated to publish or broadcast news to the public." 6 C.F.R. § 5.11(b)(6). Defendant DHS will continue to regard Plaintiff EFF as a "representative of the news media" absent a change in circumstances that indicates that EFF is no longer an "entity that is organized and operated to publish or broadcast news to the public." 6 C.F.R. § 5.11(b)(6).
2. Accordingly, the parties herewith agree to the dismissal of Plaintiff EFF's Second Cause of Action, related to EFF's status as a "representative of the news media."
3. The parties further agree that each will pay its own fees and costs for work on the dismissed claim.

SO STIPULATED AND AGREED this 27th day of February, 2007.

Case 1:06-cv-01988-ESH Document 15 Filed 02/27/2007 Page 2 of 2

/s/ David L. Sobel

DAVID L. SOBEL
D.C. Bar 360418

MARCIA HOFMANN
D.C. Bar 484136

ELECTRONIC FRONTIER FOUNDATION
1875 Connecticut Avenue, N.W.
Suite 650
Washington, D.C. 20009
(202) 797-9009

Counsel for Plaintiff

PETER D. KEISLER
Assistant Attorney General

JEFFREY A. TAYLOR
United States Attorney

ELIZABETH J. SHAPIRO
D.C. Bar 418925
Assistant Branch Director
U.S. Department of Justice
Civil Division, Federal Programs Branch

/s/ John R. Coleman

JOHN R. COLEMAN
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW, Room 6118
Washington, D.C. 20530
(202) 514-4505

Counsel for Defendant



NATIONAL SECURITY AGENCY
CENTRAL SECURITY SERVICE
FORT GEORGE G. MEADE, MARYLAND 20755-6000

FOIA Case: 52276
6 February 2007

Ms. Marcia Hofmann
Electronic Frontier Foundation
1875 Connecticut Avenue, NW
Suite 650
Washington, DC 20009

Dear Ms. Hofmann:

This is an initial response to your Freedom of Information Act (FOIA) request submitted via facsimile on 23 January 2007, which was received by this office on 24 January 2007, for all agency records (including, but not limited to, electronic records) related to the NSA's review of and input on the configuration of the Microsoft Windows Vista operating system ("Vista"). Your request has been assigned Case Number 52276.

As we began to process your request, we realized that the first page of the actual request was missing from your 18-page facsimile package. On 1 February 2007, a member of my staff contacted you to advise you of this fact. As a result, you submitted another facsimile of your original five-page request, which we received and have begun to process. There is certain information relating to this processing about which the FOIA and applicable Department of Defense (DoD) and NSA/CSS regulations require we inform you.

For purposes of this request and based on the information you provided in your letter, you are considered a representative of the media. Unless you qualify for a fee waiver or reduction, you must pay for duplication in excess of the first 100 pages. Your request for a fee waiver has been granted. In addition, please be advised your request for expedited treatment has been accepted. We are currently in the process of searching for responsive documents and will notify you of the status of your request as soon as that search has been completed.

Correspondence related to your request should include the case number assigned to your request, which is included in the first paragraph of this letter. Your letter should be addressed to National Security Agency, FOIA Office

FOIA Case: 52276

(DC34), 9800 Savage Road STE 6248, Ft. George G. Meade, MD 20755-6248 or may be sent by facsimile to 443-479-3612. If sent by fax, it should be marked for the attention of the FOIA office. The telephone number of the FOIA office is 301-688-6527.

Sincerely,

for *Marianne Stepan*

PAMELA N. PHILLIPS
Chief
FOIA/PA Office

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC FRONTIER FOUNDATION,

Plaintiff,

v.

DEPARTMENT OF JUSTICE,

Defendant.

Civ. Action No. 1:07-CV-00656 (JDB)

EXHIBIT B



Electronic Frontier Foundation
Protecting Rights and Promoting Freedom on the Electronic Frontier

March 12, 2007

BY FACSIMILE – (202) 514-5331

Tasia Scolinos
Director of Public Affairs
Office of Public Affairs
U.S. Department of Justice
Room 1128
950 Pennsylvania Avenue, N.W.
Washington DC 20530-0001

RE: Request For Expedited FOIA Processing

Dear Ms. Scolinos:

This is a request for expedited processing of a Freedom of Information Act (“FOIA”) request, made pursuant to 28 C.F.R. § 16.5(d)(1). By separate letter (attached hereto), the Electronic Frontier Foundation (“EFF”) today submitted an FOIA request to the Federal Bureau of Investigation (“FBI”) seeking the disclosure of FBI records about policies, procedures and practices concerning the Bureau’s issuance of National Security Letters (“NSLs”).

We believe this request meets the criteria for expedited processing under 28 C.F.R. § 16.5(d)(1)(iv), as “[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).

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 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.

There can be no question that the FBI’s “improper or illegal use” of NSL authority has engendered “widespread and exceptional media interest” since the Inspector General’s report was released three days ago. According to a search of the Lexis-Nexis “News, Most Recent 90 Days” database, more than 125 articles containing the terms “FBI” and “National Security Letters” appeared in the first three days since the report was released (search results attached hereto). A search of Google News using the same terms indicates that 1,235 online articles have appeared during the same period (search results listing first 50 hits attached hereto).

Lest there be any doubt that there has been “widespread and exceptional media interest” in the issue, we note that FBI Director Mueller convened a press conference to answer questions about the IG’s report less than two hours after it was released. See http://www.fbi.gov/pressrel/pressrel07/nsl_transcript030907.htm. In addition, the FBI’s homepage currently features a link to the Bureau’s “response to the DOJ Inspector General’s report on the use of National Security

Letters and our answers to questions about their use and investigative value" (image of FBI homepage attached hereto).

It is equally clear that "there exist possible questions about the government's integrity which affect public confidence." Such questions are exemplified in the following exchange at Director Mueller's press conference:

QUESTION: Director, you talked about how critically important these letters are to the mission of the FBI. And we also know that the FBI's allowed to do this without seeking a court order for the information. Is part of your frustration that this is about trust; that Congress gives you this authority to go out and do this, (inaudible) in dealing with these issues?

MUELLER: Well, I think Congress and the American people should have a lot of trust in the FBI. Occasionally, there are areas where we need to admit mistakes that we've made - this is one of them; areas where we should've done a better job - this is one of them. And I think Congress and ourselves should both trust but also verify.

Similarly, in remarks made shortly after the release of the IG report, the Attorney General acknowledged that "we must act quickly and decisively to restore the public's confidence." Prepared Remarks of Attorney General Alberto R. Gonzales at the International Association of Privacy Professionals Privacy Summit Washington, D.C., March 9, 2007 (available at http://www.usdoj.gov/ag/speeches/2007/ag_speech_070309.html).

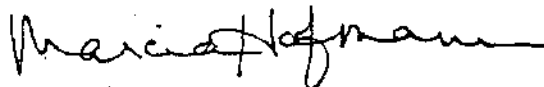
In addition, editorials in the country's leading newspapers are raising questions about "integrity" and "public confidence." See, e.g., The Washington Post, "Abuse of Authority; The FBI's gross misuse of a counterterrorism device," March 11, 2007, p. B6 ("The report depicts an FBI cavalierly using its expanded power to issue 'national security letters' without adequate oversight or justification."); The New York Times, "The Failed Attorney General," March 11, 2007, p. 13, Section 4 ("[The] inspector general exposed the way the Federal Bureau of Investigation has been abusing yet another unnecessary new power . . .").

The American public is deeply concerned about potential government intrusions into personal affairs, particularly those involving (as some NSLs do) private communications. While the Inspector General, Attorney General and FBI Director have acknowledged and addressed these concerns, there is no substitute for the disclosure of internal agency records detailing the policies, procedures and practices concerning the Bureau's issuance of NSLs. Indeed, the very purpose of the FOIA is to lessen the public's dependence on official agency statements and open the underlying documentation to public scrutiny. This is clearly an instance in which expedited processing of an FOIA request is warranted.

Thank you for your consideration of this request. As applicable Department regulations provide, we will anticipate your determination within ten (10) calendar days. 28 C.F.R. § 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.

Under penalty of perjury, I hereby affirm that the foregoing is true and correct to the best of my knowledge and belief.

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

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC FRONTIER FOUNDATION,)
)

Plaintiff,)
)

v.)

DEPARTMENT OF JUSTICE,)
)

Defendant.)
)

Civ. Action No. 1:07-CV-00656 (JDB)

EXHIBIT C



U.S. Department of Justice

Federal Bureau of Investigation

Washington, D.C. 20535

March 29, 2007

MS. MARCIA HOFMANN
ELECTRONIC FRONTIER FOUNDATION
SUITE 650
1875 CONNECTICUT AVENUE, N.W.
WASHINGTON, DC 20009

Request No.: 1073946-000
Subject: NATIONAL SECURITY LETTERS

Dear Requester:

- This acknowledges receipt of your Freedom of Information-Privacy Acts (FOIPA) request to the FBI. The FOIPA number listed above has been assigned to your request.
- For an accurate search of our records, please provide the complete name, alias, date and place of birth for the subject of your request. Any other specific data you could provide such as prior addresses, or employment information would also be helpful. If your subject is deceased, please include date and proof of death.
- To make sure information about you is not released to someone else, we require your notarized signature or, in place of a notarized signature, a declaration pursuant to Title 28, United States Code 1746. For your convenience, the reverse side of this letter contains a form which may be used for this purpose.
- If you want the FBI's Criminal Justice Information System (CJIS) to perform a search for your arrest record, please follow the enclosed instructions in Attorney General Order 556-73. You must submit fingerprint impressions so a comparison can be made with the records kept by CJIS. This is to make sure your information is not released to an unauthorized person.
- We are searching the indices to our central records system at FBI Headquarters for the information you requested, and will inform you of the results as soon as possible.
- Processing delays have been caused by the large number of requests received by the FOIPA. We will process your request(s) as soon as possible.

Your request has been assigned the number indicated above. Please use this number in all correspondence with us. Your patience is appreciated.

Sincerely yours,

David M. Hardy
Section Chief,
Record/Information
Dissemination Section
Records Management Division

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC FRONTIER FOUNDATION,

Plaintiff,

v.

DEPARTMENT OF JUSTICE,

Defendant.

Civ. Action No. 1:07-CV-00656 (JDB)

EXHIBIT D



U.S. Department of Justice

Federal Bureau of Investigation

Washington, D. C. 20535-0001

March 30, 2007

Ms. Marcia Hofmann
Staff Attorney
Electronic Frontier Foundation
Suite 650
1875 Connecticut Avenue, N.W.
Washington, DC 20009

RE: FOIPA Request No. 1073946-000

Dear Ms. Hofmann:

This letter is in response to your request to the U.S. Department of Justice ("DOJ"), Office of Public Affairs ("OPA"), for expedition of your Freedom of Information Act ("FOIA") request dated March 12, 2007 to FBI Headquarters ("FBIHQ"). Your March 12, 2007 FOIA request seeks access to "records discussing or reporting violations or potential violations of statutes, Attorney General guidelines, and internal FBI policies governing the use of National Security Letters." In your March 12, 2007 FOIA request you sought expedited processing pursuant to 28 C.F.R. § 16.5 (d)(1)(iv) ("[a] matter of widespread and exceptional media interest in which there exists possible questions about the government's integrity which affects public confidence."). We have been advised that the Director of OPA has concluded that the subject matter 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 public confidence," and has therefore concluded that your request for expedited processing should be granted.

By separate letter dated March 29, 2007, the FBI acknowledged your March 12, 2007 FOIA request and advised you that your FOIA request has been assigned FOIPA Request No. 1073946, and we 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.

With respect to the portion of your letter seeking a waiver of the customary fees, we will make a decision once our records search is completed. In the event that your request for a fee waiver is denied, you will be notified of any applicable fees prior to the processing of any responsive records.

Sincerely yours,

David M. Hardy

David M. Hardy
Section Chief
Record/Information
Dissemination Section
Records Management Division

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
ELECTRONIC FRONTIER FOUNDATION,)	
)	
Plaintiff,)	
)	
v.)	Civ. Action No. 1:07-CV-00656 (JDB)
)	
DEPARTMENT OF JUSTICE,)	
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Defendant.)	
_____)	

EXHIBIT E

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOSHUA A. GERSTEIN,

No. C-06-4643 MMC

Plaintiff,

**ORDER GRANTING PLAINTIFF'S
MOTION TO COMPEL RESPONSES TO
FOIA REQUESTS; SETTING DEADLINE
FOR PRODUCTION; DENYING
WITHOUT PREJUDICE REQUEST FOR
VAUGHN INDEX; VACATING HEARING**

v.

CENTRAL INTELLIGENCE AGENCY, et al.,

Defendants.

(Docket No. 8)

Before the Court is plaintiff Joshua A. Gerstein's ("Gerstein") motion to compel defendants Department of Defense ("DOD"), Department of Justice ("DOJ") and Federal Bureau of Investigation ("FBI") to respond to Gerstein's requests under the Freedom of Information Act ("FOIA"). Defendants have filed joint opposition to the motion; Gerstein has filed a reply. Having considered the papers filed in support of and in opposition to the motion, the Court finds the matter appropriate for decision without oral argument, see Civil L.R. 7-1(b), hereby VACATES the December 1, 2006 hearing, and rules as follows.

BACKGROUND

Gerstein alleges he is a professional journalist employed full-time as a reporter covering legal and political issues for the New York Sun, a daily newspaper published in New York City. (See Compl. ¶ 2.)

Gerstein alleges that "[f]rom mid-2005 to the present, President Bush, executive

United States District Court

For the Northern District of California

1 branch officials, members of Congress, and the press have participated in an escalating
2 public debate about unauthorized disclosures, often called 'leaks,' of classified information."
3 (See Compl. ¶ 13.) According Gerstein, such debate "has been spurred and fueled by a
4 series of highly-publicized news reports, including stories about alleged secret CIA prisons
5 overseas, about the warrantless surveillance by the NSA of certain telephone calls placed
6 or received by Americans, about an alleged decision by President Bush and Vice President
7 Cheney to declassify an intelligence estimate on Iraq without notifying personnel normally
8 notified in such declassification, and about the alleged tracking by government agencies of
9 billions of long-distance telephone calls made within the United States." (See id.)

10 On March 16 and 17, 2006, Gerstein sent separate, but similar, FOIA requests to
11 the Central Intelligence Agency ("CIA"), National Security Agency ("NSA"), DOD, DOJ,
12 Department of State ("DOS"), FBI, and the National Reconnaissance Office ("NRO"),
13 pursuant to which Gerstein sought certain records relating to unauthorized disclosures of
14 classified information, and asked that the processing of each such request be expedited, on
15 the ground that a compelling need exists for disclosure of the records sought. (See
16 Gerstein Decl. ¶¶ 1, 5, 7-10, 13-14, and 16-18 and Exs. A, E, G-J, M-N, and P-R.) As an
17 example, Gerstein's request to the CIA seeks the following records:

- 18 1. All so-called criminal referrals submitted by CIA to the Department of
19 Justice ("DOJ") since January 1, 2001 regarding unauthorized disclosure of
20 classified information to the press or public.
- 21 2. All responses from DOJ to CIA indicating the outcome of the
22 investigations, inquiries, or legal analyses related to the incidents referenced
23 in No. 1 above.
- 24 3. All records reflecting the outcome of disciplinary proceedings instituted in
25 connection with the incidents referenced in No. 1 above.
- 26 4. All records reflecting the outcome of damage assessments conducted in
27 connection with the incidents referenced in No. 1 above.
- 28 5. All logs, lists, tallies, tabulations, summary reports, compilations, and the
like pertaining to the referrals described in No. 1 above, whether or not
composed solely of those referrals.
6. All records pertaining to published reports in or about August 1998 that the
United States was aware of or tracking a satellite telephone used by Osama
Bin Laden, the source or sources of that alleged leak, all referrals by DOJ in

1 connection with that alleged leak, all replies from DOJ thereto, and any
2 damage assessment conducted in connection with that alleged leak.

3 (See id. Ex. A at 1-2.)

4 The DOD, DOJ, FBI, and DOS granted Gerstein's request for expedited processing.
5 (See id. Exs. F, L, O.) The CIA and NSA denied Gerstein's request for expedited
6 processing.¹ (See id. Exs. B, and S.) As of the date of the complaint, Gerstein alleges, he
7 has received no records from any of the defendants in response to his FOIA requests.
8 (See id. ¶¶ 15, 16, 20, 21, 22, 23.)²

9 Gerstein filed the instant action on July 31, 2006. Gerstein alleges, inter alia, that
10 (1) the CIA, DOD, DOJ, DOS, FBI, and NSA have violated FOIA by failing to disclose the
11 requested records, or to justify their withholding, within 20 business days of the receipt of
12 the requests; (2) the NRO has violated FOIA by failing to act on plaintiff's administrative
13 appeal within 20 business days of receipt; and (3) the CIA and NSA have violated FOIA by
14 failing to grant Gerstein's request for expedited processing. (See id. ¶¶ 27-29.)

15 LEGAL STANDARD

16 Except in "unusual circumstances," an agency receiving a FOIA request must
17 "determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after
18 the receipt of any such request whether to comply with such request[.]" See 5 U.S.C.
19 § 552(a)(6)(A), (B). "Upon any determination by an agency to comply with a request for

20
21 ¹ According to Gerstein, the NRO rejected his request for expedited processing, but
22 shortly thereafter advised him that it had located 31 pages of records responsive to his
23 request and was withholding all records in their entirety pursuant to FOIA exemptions.
(See Compl. ¶ 22.) Gerstein alleges he has filed an administrative appeal of the NRO's
withholding of responsive records, but, as of the date of the complaint, has received no
response to the appeal. (See id.)

24 ² In a letter dated September 25, 2006, the DOJ Office of Professional Responsibility
25 ("OPR") responded to Gerstein's FOIA request. (See attachment to Second Gerstein
26 Decl.) In that response, OPR stated it had identified 328 responsive documents, 70 of
27 which were duplicates; of the remaining 258 documents, OPR produced 59 documents in
28 full and an additional 75 documents in part. (See id.) OPR referred 102 documents for
review by the other agencies or other DOJ "components" from which they originated, and
referred an additional nine documents because they "contain information that is of interest
to other agencies or DOJ components." (See id.) OPR withheld the remaining information
pursuant to various FOIA exemptions. (See id.)

1 records, the records shall be made promptly available to such person making such
2 request." See 5 U.S.C. § 552(a)(6)(C)(i).

3 Where "unusual circumstances" exist,³ the 20-day time limit "may be extended by
4 written notice to the person making such request setting forth the unusual circumstances
5 for such extension and the date on which a determination is expected to be dispatched,"
6 but "[n]o such notice shall specify a date that would result in an extension for more than ten
7 working days." See 5 U.S.C. § 552(a)(6)(B)(i). Where such written notice has been
8 provided, "the agency shall notify the person making the request if the request cannot be
9 processed within the time limit specified and shall provide the person an opportunity to limit
10 the scope of the request so that it may be processed within that time limit or an opportunity
11 to arrange with the agency an alternative time frame for processing the request or a
12 modified request." See 5 U.S.C. § 552(a)(6)(B)(ii).

13 "Any person making a request to any agency for records . . . shall be deemed to
14 have exhausted his administrative remedies with respect to such request if the agency fails
15 to comply with the applicable time limit provisions." See 5 U.S.C. § 552(a)(6)(C)(i). "If the
16 Government can show exceptional circumstances exist and that the agency is exercising
17 due diligence in responding to the request, the court may retain jurisdiction and allow the
18 agency additional time to complete its review of the records." See id. "[T]he term
19 'exceptional circumstances' does not include a delay that results from a predictable agency
20 workload of requests . . . , unless the agency demonstrates reasonable progress in
21 reducing its backlog of pending requests." See 5 U.S.C. § 552(a)(6)(C)(ii). "Refusal by a
22 person to reasonably modify the scope of a request or to arrange an alternative time frame
23

24 ³ FOIA provides that "'unusual circumstances' means, but only to the extent
25 reasonably necessary to the proper processing of the particular requests – (I) the need to
26 search for and collect the requested records from field facilities or other establishments that
27 are separate from the office processing the request; (II) the need to search for, collect, and
28 appropriately examine a voluminous amount of separate and distinct records which are
demanded in a single request; or (III) the need for consultation, which shall be conducted
with all practicable speed, with another agency having a substantial interest in the
determination of the request or among two or more components of the agency having
substantial subject-matter interest therein." See 5 U.S.C. § 552(a)(6)(B)(iii).

1 for processing a request (or a modified request) . . . after being given an opportunity to do
2 so by the agency to whom the person made the request shall be considered as a factor in
3 determining whether exceptional circumstances exist." See 5 U.S.C. § 552(a)(6)(C)(iii).

4 Although FOIA provides for expedited processing of certain requests, see 5 U.S.C. §
5 552(a)(6)(C)(iii), the statute does not set forth a specific deadline by which expedited
6 processing of a FOIA request must be concluded. Rather, the statute provides: "An agency
7 shall process as soon as practicable any request for records to which the agency has
8 granted expedited processing[.]" See 5 U.S.C. § 552(a)(6)(E)(iii). Nonetheless, "an agency
9 that violates the twenty-day deadline applicable to standard FOIA requests presumptively
10 also fails to process an expedited request 'as soon as practicable.'" See Electronic Privacy
11 Information Center v. Department of Justice, 416 F. Supp. 2d 30, 39 (D.D.C. 2006). "The
12 presumption of agency delay raised by failing to respond to an expedited request within
13 twenty days" is, however, "rebuttable if the agency presents credible evidence that
14 disclosure within such time period is truly not practicable." See id. at 39; see also 5 U.S.C.
15 § 552(a)(6)(C)(i) (authorizing courts to grant agency additional time to complete review of
16 records responsive to FOIA request "[i]f the Government can show exceptional
17 circumstances exist and that the agency is exercising due diligence in responding to the
18 request"). "[V]ague assertions, unsupported by credible evidence, are insufficient to
19 demonstrate that further delay is . . . necessitated." See Electronic Privacy Information
20 Center v. Department of Justice, 416 F. Supp. 2d at 39.

21 "Agency action to deny or affirm denial of a request for expedited processing . . . ,
22 and failure by an agency to respond in a timely manner to such a request [is] subject to
23 judicial review . . . based on the record before the agency at the time of the determination."
24 See 5 U.S.C. § 552(a)(6)(E)(iii). Additionally, "the district court . . . has jurisdiction to enjoin
25 the agency from withholding agency records and to order the production of any agency
26 records improperly withheld from the complainant." See 5 U.S.C. § 552(a)(4)(B). In such a
27 case the district court "determine[s] the matter de novo, . . . and the burden is on the
28 agency to sustain its action." See id.

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DISCUSSION

Gerstein moves to compel the DOD, DOJ, and FBI to release "all non-exempt responsive records and portions of records within 30 days of the Court's ruling." See Motion at 5:4-6.) Gerstein notes that although the DOD, DOJ, and FBI granted expedited processing of his FOIA requests, those requests have been pending for more than eight months and he has received no substantive response to his requests. Gerstein argues that because FOIA requires non-expedited requests to be processed within 20 days, defendants are in violation of FOIA by taking more than eight months to respond to FOIA requests that have been granted expedited processing.

As discussed above, defendants have the burden of demonstrating both the existence of exceptional circumstances, and that they are exercising due diligence in responding to Gerstein's FOIA requests, before the Court may grant defendants an extension of FOIA's time limits. See 5 U.S.C. § 552(a)(6)(C)(i) ("If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records."). Here, defendants have submitted no evidence as to the reasons for their delay in processing Gerstein's requests, and no evidence that they are exercising due diligence. Accordingly, defendants have not demonstrated a need for additional time to complete their review. See, e.g., Electronic Privacy Information Center v. Department of Justice, 416 F. Supp. 2d at 39-40 (granting preliminary injunction by which DOJ required to complete processing of expedited FOIA request within 20 days because defendant submitted no evidence that timely processing was impracticable); see also Fiduccia v. United States Department of Justice, 185 F.3d 1035 (9th Cir. 1999) (rejecting defendant's request for eight-year extension of time to respond to non-expedited FOIA request where defendant's "own affidavits show[ed] that the circumstances were unexceptional").

Defendants do not contend otherwise. Rather, defendants argue that Gerstein cannot meet the requirements for a preliminary injunction. Assuming Gerstein's "Motion to

1 Compel" is, in effect, a motion for a preliminary injunction, he has satisfied the
2 requirements thereof. In determining whether to grant a motion for a preliminary injunction,
3 the Court weighs "four equitable factors: the movant's likelihood of success on the merits;
4 the possibility of irreparable injury to the moving party; the extent to which the balance of
5 hardships favors each party; and whether the public interest will be advanced by granting
6 the preliminary relief." See Overstreet v. United Brotherhood of Carpenters and Joiners of
7 America, Local Union No. 1506, 409 F.3d 1199, 1207 (9th Cir. 2005). To obtain a
8 preliminary injunction, "a moving party must show either a combination of probable success
9 on the merits and the possibility of irreparable harm or serious questions going to the
10 merits, the balance of hardships tipping sharply in its favor, and at least a fair chance of
11 success on the merits." See id. (internal quotation and citations omitted). As set forth
12 below, Gerstein has made the requisite showing.

13 First, Gerstein has demonstrated a likelihood of success on the merits of his claim
14 that defendants are violating FOIA by failing to timely respond to his FOIA requests,
15 because defendants have submitted no evidence as to the reasons for such delay. See
16 Electronic Privacy Information Center v. Department of Justice, 416 F. Supp. 2d at 39 n.8
17 (rejecting argument that plaintiff, on motion for preliminary injunction, bears burden of
18 demonstrating agency is not processing request as soon as practicable). Indeed, in the
19 absence of relevant evidence as to the reasons for their delay in processing Gerstein's
20 requests, defendants have no likelihood of success on the merits. See id. at 39-40 (finding
21 likelihood of success on merits of claim for untimely processing of expedited FOIA request
22 where defendants submitted no evidence of reasons for delay).

23 Next, Gerstein has demonstrated a likelihood of irreparable injury if an injunction is
24 not granted, because, as Gerstein argues, (see Motion at 4:14-18), "[t]he ongoing debate
25 about how to respond to classified leaks and how aggressively to investigate them cannot
26 be restarted or wound back." See Electronic Privacy Information Center v. Department of
27 Justice, 416 F. Supp. 2d at 41 (finding adequate showing of irreparable injury to support
28 preliminary injunction where plaintiff would be precluded, in absence of injunction, "from

1 obtaining in a timely fashion information vital to the current and ongoing debate surrounding
2 the legality of the Administration's warrantless surveillance program").

3 Third, with respect to the balance of hardships, defendants fail to submit any
4 evidence that they would incur any hardship by being ordered to respond to Gerstein's
5 FOIA requests in accordance with the proposed timeline. Accordingly, the balance of
6 hardships tips entirely in Gerstein's favor.

7 Finally, the public interest is advanced by an injunction because, as Gerstein notes,
8 a core purpose of FOIA is to allow the public to be informed about "what their government
9 is up to," and "[o]fficial information that sheds light on an agency's performance of its
10 statutory duties falls squarely within that statutory purpose." See United States Department
11 of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 772-73 (1989);
12 see also Electronic Privacy Information Center v. Department of Justice, 416 F. Supp. 2d at
13 42 (internal quotation and citation omitted) (finding public interest prong met because
14 expedited release of requested documents "furthers FOIA's core purpose" and because of
15 an "overriding public interest . . . in the general importance of an agency's faithful
16 adherence to its statutory mandate"). Moreover, by granting Gerstein's request for
17 expedited processing, defendants have effectively conceded that Gerstein has
18 demonstrated an "urgency to inform the public" about the government activity that is the
19 subject of his requests. See 5 U.S.C. § 552(a)(6)(E)(v)(II) (defining "compelling need"
20 justifying request for expedited processing of FOIA request to include "urgency to inform
21 the public concerning actual or alleged Federal Government activity").

22 Accordingly, the Court will GRANT Gerstein's motion to compel the DOD, DOJ, and
23 FBI to process Gerstein's FOIA requests and to produce all non-exempt responsive records
24 and non-exempt portions of records within 30 days.⁴

25 Lastly, Gerstein seeks an order requiring the DOD, DOJ, and FBI, as well as the
26

27 ⁴ The Court, by this order, does not preclude the DOD, DOJ, and/or FBI from
28 withholding responsive documents pursuant to relevant FOIA exemptions. The question of
whether any responsive documents may properly be withheld from production is not
currently before the Court.

1 NRO, to provide, within 60 days of the date of this order, a Vaughn index of withheld
2 records. A Vaughn index, see Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), "must
3 identify each document withheld, and provide a particularized explanation of how disclosure
4 would violate an exemption" under FOIA. See Minier v. Central Intelligence Agency, 88
5 F.3d 796, 803 (9th Cir. 1996). The Ninth Circuit has held, however, that production of a
6 Vaughn index is not necessary in all FOIA cases, see id. at 804, and in particular, is
7 unnecessary where an "affidavit submitted by an agency is sufficient to establish that the
8 requested documents should not be disclosed," or where "a FOIA requester has sufficient
9 information to present a full legal argument." See id. In the instant case, as the DOD,
10 DOJ, and FBI have not yet responded to Gerstein's FOIA requests, and Gerstein has not
11 identified any deficiency in the NRO's response, Gerstein has not demonstrated the
12 necessity of a Vaughn index. Accordingly, the Court will DENY Gerstein's request for a
13 Vaughn index, without prejudice to Gerstein's seeking such relief at a later date.

14 **CONCLUSION**

15 For the reasons set forth above, Gerstein's motion to compel the DOD, DOJ, and
16 FBI to respond to Gerstein's FOIA requests within 30 days is hereby GRANTED. The
17 DOD, DOJ, and FBI are hereby ORDERED to process Gerstein's FOIA requests and to
18 produce all non-exempt records and non-exempt portions of records that are responsive to
19 Gerstein's FOIA requests within 30 days of the date of this order. Gerstein's request for a
20 Vaughn index is hereby DENIED without prejudice.

21 This order terminates Docket No. 8.

22 **IT IS SO ORDERED.**

23 Dated: November 29, 2006

24 _____
25 MAXINE M. CHESNEY
26 United States District Judge
27
28