

Exhibit D

Reply in Support of Plaintiff's Motion for a Preliminary Injunction

Electronic Frontier Foundation v. Dep't of Justice, C.A. No. 07-0656 (JDB)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION
CENTER,

Plaintiff

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant.

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) Civil Action No.
) 1:05CV00845 (GK)
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DEFENDANT'S RESPONSE TO PLAINTIFF'S NOTICE OF FILING

Pursuant to this Court's order at the status conference on November 8, 2005, defendant attempted to reach an agreement with the plaintiff on a schedule for the processing of the remaining approximately 18,000 pages of potentially responsive documents to plaintiff's FOIA request. Unfortunately, defendant was not able to reach an agreement and hereby submits its alternative proposed order. See Attachment A. Defendant cannot agree to plaintiff's proposed order on two points.

1. The rate of processing suggested by plaintiff in its proposed order – 3000 pages of responsive material (including both exempt and non-exempt material) every 15 days — is not reasonable. The standard for expedited processing set by FOIA is "as soon as practicable." 5 U.S.C. § 552(a)(6)(E). As defendant explained at the status conference, because of the nature of plaintiff's request, identification of responsive records has proven much more difficult than initially anticipated. While the FBI has completed the enormous task of narrowing the scope of potentially responsive pages of records from 130,000 to approximately 18,000 pages based on the time periods specified in plaintiff's FOIA request, attorneys familiar with the U.S. PATRIOT

Act provisions are still reviewing these 18,000 pages to determine which pages are actually responsive to plaintiff's request.

With enormous effort, FBI predicts that it could process approximately 3000 pages of records every 30 business days. To accomplish this rate, the FBI has assigned six attorneys (including a team leader) and three paralegals with expertise in the U.S. PATRIOT Act to review the records for responsiveness. In addition, the FBI has four paralegals plus a team leader working on a full-time basis to review the documents for exemptions. While the FBI predicted that an employee may be able to process approximately 1000 per month,¹ this does not mean that with four employees FBI can complete the processing of 4000 pages of records in one month. As Mr. Hardy explained in his declaration, this estimate did not include time required for classification review, legal review and final review by the document owners/originators for accuracy. Hardy Decl., ¶ 26. Because many of the records are classified, the FBI has assigned on a full-time basis four paralegals plus a team leader in its Declassification Review Unit to review these records. In addition, as Mr. Hardy explained in his declaration, once the documents have been reviewed for exemptions and declassification, the documents are subject to legal review to and final review by owners/originators for accuracy. This final review process adds additional time to the processing of the request.

2. Plaintiff's proposed order requires FBI, within 45 days of the date of the order, to (a) make a final determination of the total number of pages of agency records responsive to plaintiff's request and (b) file with the Court a report "stating total number of pages responsive to each of the three categories of agency records identified in plaintiff's request." This demand

¹ Declaration of David M. Hardy, ¶ 26 (attached as Attachment 1 to Opposition to Plaintiff's Motion to Compel Expedited Processing of Plaintiff's Freedom of Information Act Request)

presents two problems.

a. First, while the FBI is devoting a substantial amount of resources to its completion of the review of the records for responsiveness, 45 days is not sufficient. FBI estimate that it will take 60 business days to complete the process of reviewing the 18,000 pages of potentially responsive records to determine the number of pages of responsive records.

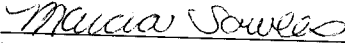
b. Second, plaintiff's demand that FBI specify the number of pages responsive to each of the three categories of plaintiff's request adds an unnecessary burden on the FBI and slows down the process. It would require the FBI to re-review the records it has already determined to be responsive to determine which category or categories each record was responsive. Therefore, defendant could not agree to this additional and unnecessary burden.

Respectfully Submitted,

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