

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

<b>ELECTRONIC FRONTIER FOUNDATION,</b>	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 07-656 (JDB)
	)	
<b>DEPARTMENT OF JUSTICE,</b>	)	
	)	
Defendant.	)	
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**NOTICE OF FILING OF PLAINTIFF’S PROPOSAL FOR A FREEDOM OF  
INFORMATION ACT PRODUCTION SCHEDULE**

Pursuant to the Court’s May 21, 2007 minute order, Plaintiff Electronic Frontier Foundation (“EFF”) reports that counsel for the parties in this action met in person on May 23, 2007, and conferred via telephone on May 24, 2007, in hopes of determining a mutually agreeable processing schedule for EFF’s March 12, 2007 Freedom of Information Act (“FOIA”) request for Federal Bureau of Investigation (“FBI”) records concerning the Bureau’s abuse of investigative power. The parties were unable to reach an agreement on processing, though EFF has agreed to narrow the scope of its request to exclude material that comes from public sources. At the Court’s direction, EFF respectfully submits this report of additional relevant facts and its proposal for a processing schedule for its FOIA request.

**ADDITIONAL FACTS**

The public urgency surrounding the subject of this request — the government’s misuse of National Security Letter (“NSL”) investigative authority — has remained extraordinary since Plaintiff filed its FOIA request on March 12, 2007. The FBI’s widespread abuse of NSLs continues to be a subject of great interest to members of Congress, who have repeatedly raised the issue in congressional hearings. *See, e.g., The Inspector General’s Independent Report of the*

*Federal Bureau of Investigation's Use of National Security Letters: Hearing of the H. Comm. on the Judiciary*, 110th Cong. (Federal News Service March 20, 2007) (testimony of DOJ Inspector General Glenn Fine and FBI General Counsel Valerie Caproni on the FBI's abuse of NSLs); *Misuse of Patriot Act Powers: The Inspector General's Findings of Improper Use of the National Security Letters by the FBI: Hearing of the S. Comm. on the Judiciary*, 110th Cong. (Federal News Service March 21, 2007) (testimony of DOJ Inspector General Glenn Fine on his findings of NSL misuse); *Oversight of the Federal Bureau of Investigation: Hearing of the S. Comm. on the Judiciary*, 110th Cong. (Federal News Service March 27, 2007) (testimony of FBI Director Robert Mueller on the FBI's abuse of NSLs); *National Security Letters: Hearing of the H. Select Comm. on Intelligence*, 110th Cong. (Federal News Service March 28, 2007) (two-panel hearing on the FBI's misuse of NSL authority); *Responding to the Inspector General's Findings of Improper Use of National Security Letters by the FBI: Hearing of the S. Comm. on the Judiciary, Subcomm. On the Constitution, Civil Rights and Property, Rights*, 110th Cong. (Federal News Service April 11, 2007) (testimony of privacy scholar, national security expert, and representatives of a non-profit organization and library consortium on the Inspector General's findings); *Department of Justice Oversight: Hearing of the S. Comm. on the Judiciary*, 110th Cong. (Federal News Service April 19, 2007) (Senator Leahy mentioning "widespread abuses of national security letters" as a problem compounding the effect of partisan politics); *The Foreign Intelligence Modernization Act of 2007: Hearing of the S. Intelligence Comm.*, 110th Cong. (Federal News Service May 1, 2007) (Senators Bond and Wyden questioning Assistant Attorney General for National Security Kenneth Wainstein and Director of National Intelligence Michael McConnell on the Bureau's response to the Inspector General's report and whether the standard for obtaining NSLs should be more strict); *Oversight of the U.S. Department of Justice:*

*Hearing of the H. Comm. on the Judiciary*, 110th Cong. (Federal News Service May 10, 2007) (Rep. Nadler questioning Attorney General Alberto Gonzales about the government's use of NSLs to conduct "fishing expeditions").

Furthermore, the National Security Letter Judicial and Congressional Oversight Act (H.R. 1739), which was introduced in reaction to the Inspector General's report revealing the Bureau's misuse of NSL authority, remains pending before the House Committees on Intelligence, the Judiciary, and Financial Services. *See* bill summary at <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR01739>: (last visited May 24, 2007). These committees should have available as much information as possible about the FBI's misuse of NSLs as they weigh this legislative proposal.

#### **PROPOSAL FOR FOIA PROCESSING SCHEDULE**

Pursuant to the Court's May 21, 2007 order, EFF proposes that the Court order the following processing schedule for EFF's March 12, 2007 request:

- Defendant DOJ and its component the FBI shall, within 20 calendar days of this Court's Order, complete the processing of no fewer than 1500 pages of agency records potentially responsive to Plaintiff's March 12, 2007 FOIA request, and provide to Plaintiff copies of all non-exempt material contained therein;
- Defendant DOJ and its component the FBI shall thereafter 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.
- In an effort to minimize the number of exemption claims that must be litigated, Defendant DOJ shall produce a *Vaughn* index no later than 15 calendar days after processing is complete. EFF and Defendant DOJ shall then confer about the possibility

of removing any exemption claims from the scope of the litigation.

- No later than 45 calendar days after processing is complete, Defendant DOJ shall file its motion for summary judgment. No later than 15 calendar days thereafter, Plaintiff shall file its cross motion for summary judgment, if any, and/or its opposition to Defendant DOJ's motion for summary judgment. No later than 15 calendar days thereafter, Defendant DOJ shall file its opposition to Plaintiff's cross-motion for summary judgment, if any, and/or its reply to Plaintiff's opposition. No later than 15 calendar days thereafter, Plaintiff shall file its reply to Defendant DOJ's opposition to Plaintiff's cross-motion for summary judgment, if any.

The processing schedule that EFF proposes is modeled in part on Judge Kessler's order in *Electronic Privacy Information Center v. Dep't of Justice*, No. 05-845 (GK), 2005 U.S. Dist. LEXIS 40318, at \* 5 (D.D.C. Nov. 16, 2005) ("*EPIC*"), a lawsuit concerning an expedited FOIA request for FBI records relevant to the reauthorization of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("*PATRIOT Act*"). Plaintiff believes these cases are factually similar in a number of important respects. First, both requests were relatively broad in scope and involved a search for a potentially voluminous number of agency records, the processing time for which the government had not determined at the time the processing schedule was ordered by the Court. *See EPIC* at \*\* 2-4; April 24, 2007 Declaration of David M. Hardy in Support of Defendant's Opposition to Plaintiff's Motion for a Preliminary Injunction, *Electronic Frontier Foundation v. Dep't of Justice*, No. 07-656 (JDB) ("April 24, 2007 Hardy Decl.") ¶¶ 4-6, 26. Furthermore, both requests sought records that require numerous stages of review, including for classification and withholdings under FOIA exemptions. June 29, 2005 Declaration of David M. Hardy in Support

of Defendant's Opposition to Plaintiff's Motion to Compel Expedited Processing of Plaintiff's Freedom of Information Act Request, *Electronic Privacy Information Center v. Dep't of Justice*, No. 05-845 (GK) ("June 29, 2005 Hardy Decl.") ¶¶ 21, 26 (attached hereto as Exhibit A); April 24, 2007 Hardy Decl. ¶¶ 30-33. Finally, in both cases the DOJ was processing agency records on a rolling basis, with groups of documents at various stages of review at any given time. *See EPIC* at \* 5 n.3; April 24, 2007 Hardy Decl. ¶¶ 20, 33; Comments of DOJ Attorney Elisabeth Layton at May 21, 2007 Status Conference.

In *EPIC*, the FBI was able to meet each production deadline under Judge Kessler's schedule, and did not seek a modification of Judge Kessler's order. Due to the similarities in these cases, EFF respectfully submits that a similar production schedule would be appropriate here, and would not impose an undue burden on the FBI.<sup>1</sup>

Respectfully submitted,

/s/ Marcia Hofmann

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<sup>1</sup> We note that in FY 2006, the Bureau processed 133 FOIA requests that required expedited processing, and completed processing of those requests within a "median" of 62 days. U.S. Department of Justice, Freedom of Information Act Report for Fiscal Year 2006, Compliance with Time Limits/Status of Pending Requests, [http://www.usdoj.gov/oip/annual\\_report/2006/06foiapg7.htm](http://www.usdoj.gov/oip/annual_report/2006/06foiapg7.htm). Here, EFF's request has already been pending for 78 days, and processing, even under the schedule that EFF proposes, will not be completed for many more months.