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

ELECTRONIC FRONTIER FOUNDATION,)
Plaintiff,)
v.)
DEPARTMENT OF HOMELAND SECURITY,)
Defendant.)

Case No.:

**COMPLAINT FOR INJUNCTIVE
RELIEF FOR VIOLATION OF THE
FREEDOM OF INFORMATION ACT,
5 U.S.C. § 552**

1. This is an action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for injunctive and other appropriate relief. Plaintiff Electronic Frontier Foundation seeks the processing and release of records that Plaintiff requested from Defendant Department of Homeland Security's component Customs and Border Protection concerning the agency's use of unmanned aircraft or drones.

PARTIES

2. Plaintiff Electronic Frontier Foundation (EFF) is a not-for-profit corporation established under the laws of the Commonwealth of Massachusetts, with offices in San Francisco, California and Washington, D.C. EFF is a donor-supported membership organization that works to inform policymakers and the general public about civil liberties issues related to technology and to act as a defender of those liberties. In support of its mission, EFF uses the FOIA to obtain and

1 disseminate information concerning the activities of federal agencies.

2 3. Defendant Department of Homeland Security (DHS) is a Department of the
3 Executive Branch of the United States Government. DHS is an “agency” within the meaning of
4 5 U.S.C. § 552(f). Customs and Border Protection (CBP) is a component of Defendant DHS.

5 JURISDICTION

6 4. This Court has both subject matter jurisdiction over this action and personal
7 jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B) and 5 U.S.C. § 552(a)(6)(C)(i).
8 This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

9 VENUE AND INTRADISTRICT ASSIGNMENT

10 5. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C.
11 § 1391(e).

12 6. Assignment to the San Francisco division is proper pursuant to Local Rule 3-2(c)
13 and (d) because a substantial portion of the events giving rise to this action occurred in this district
14 and division, where Plaintiff is headquartered.

15 FACTUAL ALLEGATIONS

16 **Use of Drones or Unmanned Aircraft in the United States**

17 7. Unmanned aircraft or drones come in many shapes and sizes, from as large as a
18 commercial airplane¹ to as small as a hummingbird.²

19 8. Unmanned aircraft are designed to carry various types of equipment that allow them
20 to conduct highly sophisticated and almost constant surveillance, including video cameras, infrared
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23 ¹ See Associated Press, “Israel Unveils Drones Able to Hit Iran,” *N.Y. Times* (Feb. 21, 2010)
24 <https://www.nytimes.com/2010/02/22/world/middleeast/22mideast.html> (noting Israel owns a fleet
25 of drones, each the size of a Boeing 737); see also W.J. Hennigan, “Air Force buys souped-up,
26 stealthy version of Predator drone,” *L.A. Times* (Dec. 31, 2011)

27 http://latimesblogs.latimes.com/money_co/2011/12/drone-general-atomics-air-force-.html (noting
28 the Air Force recently purchased a drone with a 66 foot wingspan and a top speed of 460 mph).

² W.J. Hennigan, “It’s a Bird! It’s a Spy! It’s Both,” *L.A. Times Blog* (Feb. 17, 2011)
<http://articles.latimes.com/2011/feb/17/business/la-fi-hummingbird-drone-20110217>; Jason Paur,
“Video: Hummingbird Drone Does Loop-de-Loop,” *Wired Danger Room Blog* (Feb. 18, 2011)
<http://www.wired.com/dangerroom/2011/02/video-hummingbird-drone-can-perform-loops/>.

1 cameras, heat sensors, and radar.³ Some newer drones even carry super high resolution “gigapixel”
2 cameras that can “track people and vehicles from altitudes above 20,000 feet[,] . . . [can] monitor
3 up to 65 enemies of the State simultaneously[, and] . . . can see targets from almost 25 miles down
4 range.”⁴ And one drone unveiled last year can crack Wi-Fi networks and intercept text messages
5 and cell phone conversations—without the knowledge or help of either the communications
6 provider or the customer.⁵ Drones may also carry weapons.⁶

7 9. In the past, unmanned aircraft have been used almost exclusively by military and
8 security organizations.⁷ In the last year or so, interest has also grown in using unmanned aircraft
9 domestically for a broad range of other uses, including “aerial photography, surveying land and
10 crops, [and] monitoring forest fires and environmental conditions.”⁸

11 10. Drones are also increasingly being used for routine state and local law enforcement
12 activities, from catching cattle rustlers⁹ and drug dealers¹⁰ to finding missing persons.¹¹ Some
13 within law enforcement have even proposed using drones for recording traffic violations.¹²

14 ³ Brian Bennett, “Police Employ Predator Drone Spy Planes on Home Front,” *L.A. Times* (Dec. 10,
15 2011) <http://articles.latimes.com/2011/dec/10/nation/la-na-drone-arrest-20111211> (describing
16 Predator drones used to aid local law enforcement that contain “high-resolution cameras, heat
sensors and sophisticated radar” as well as live video feed).

17 ⁴ Andrew Munchbach, “US Army’s A160 Hummingbird Drone-Copter to Don 1.8 Gigapixel
18 Camera,” *Engadget* (Dec. 27, 2011) [http://www.engadget.com/2011/12/27/us-armys-a160-
hummingbird-drone-copter-to-don-1-8-gigapixel-cam/](http://www.engadget.com/2011/12/27/us-armys-a160-hummingbird-drone-copter-to-don-1-8-gigapixel-cam/).

19 ⁵ See Andy Greenberg, “Flying Drone Can Crack Wi-Fi Networks, Snoop On Cell Phones,” *Forbes*
20 (July 28, 2011) [http://www.forbes.com/sites/andygreenberg/2011/07/28/flying-drone-can-crack-
wifi-networks-snoop-on-cell-phones/](http://www.forbes.com/sites/andygreenberg/2011/07/28/flying-drone-can-crack-wifi-networks-snoop-on-cell-phones/).

21 ⁶ Eric Schmidt, “In the Skies Over Iraq, Silent Observers Become Futuristic Weapons,” *N.Y. Times*
22 (April 17, 2003) [http://www.nytimes.com/2003/04/18/world/nation-war-military-aircraft-skies-
over-iraq-silent-observers-become-futuristic.html](http://www.nytimes.com/2003/04/18/world/nation-war-military-aircraft-skies-over-iraq-silent-observers-become-futuristic.html); Jane Perlez and Pir Zubair Shah, “Drones Batter
23 Al Qaeda and Its Allies Within Pakistan,” *N.Y. Times* (April 4, 2010)
<https://www.nytimes.com/2010/04/05/world/asia/05drones.html>; David Axe, “New Armed Stealth
24 Drone Heads to Afghanistan (And Maybe Iran, Too),” *Wired Danger Room Blog* (Dec. 13, 2011)
<http://www.wired.com/dangerroom/2011/12/stealth-drone-afghanistan/>; Robert Stanton, “Texas
25 Civil Libertarians Have Eye on Police Drones,” *Houston Chronicle* (Oct. 31, 2011)
[http://www.chron.com/news/houston-texas/article/Texas-civil-libertarians-have-eye-on-police-
drones-2245644.php](http://www.chron.com/news/houston-texas/article/Texas-civil-libertarians-have-eye-on-police-drones-2245644.php); Stephen Dean, “New Police Drone Near Houston Could Carry Weapons,”
26 *Click2Houston.com* (Nov. 10, 2011) [http://www.click2houston.com/news/New-Police-Drone-
Near-Houston-Could-Carry-Weapons/-/1735978/4717922/-/59xnnz/-/index.html](http://www.click2houston.com/news/New-Police-Drone-Near-Houston-Could-Carry-Weapons/-/1735978/4717922/-/59xnnz/-/index.html).

27 ⁷ See FAA, *Fact Sheet* at 1.

28 ⁸ FAA, *Fact Sheet* at 1.

⁹ Bennett, “Police Employ Predator Drone Spy Planes on Home Front,” *supra*.

Customs and Border Protection's Unmanned Aircraft

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2 11. In December 2011, CBP purchased its ninth drone.¹³ According to a DHS Office of
3 Inspector General (OIG) Report, as of May 30, 2012, "CBP was awaiting delivery of a tenth
4 aircraft purchased with FY 2011 funds."¹⁴

5 12. CBP flies its drones "from National Air Security Operation Centers (NASOCs) in
6 Sierra Vista, Arizona; Corpus Christi, Texas; Cocoa Beach, Florida; and Grand Forks, North
7 Dakota."¹⁵ These drones "provide reconnaissance, surveillance, targeting, and acquisition (RSTA)
8 capabilities across all CBP areas of responsibility" and include "capabilities, such as the ability to
9 carry a variety of sensors and payloads and to remain airborne for extended periods without the
10 limitations imposed by requiring onboard pilots."¹⁶

11 13. On December 10, 2011, the *Los Angeles Times* reported that CBP used one of its
12 Predator drones to help the Nelson County Sheriff's Department in North Dakota to find three
13 individuals suspected of committing a property theft.¹⁷

14 14. In a second article on April 28, 2012, the *Times* reported that CBP "drones often are
15 unavailable to assist border agents because Homeland Security officials have lent the aircraft to the
16 FBI, Texas Rangers and other government agencies for law enforcement, disaster relief and other
17 uses."¹⁸

18 ¹⁰ Peter Finn, "Domestic Use of Aerial Drones by Law Enforcement Likely to Prompt Privacy
19 Debate," *Washington Post* (Jan. 23, 2011) [http://www.washingtonpost.com/wp-](http://www.washingtonpost.com/wp-dyn/content/article/2011/01/22/AR2011012204111.html)
20 [dyn/content/article/2011/01/22/AR2011012204111.html](http://www.washingtonpost.com/wp-dyn/content/article/2011/01/22/AR2011012204111.html).

21 ¹¹ Robert Stanton, "Texas Civil Libertarians Have Eye on Police Drones," *supra*.

22 ¹² Finn, "Domestic Use of Aerial Drones by Law Enforcement Likely to Prompt Privacy Debate,"
23 *supra* (noting that a "senior officer in Houston then mentioned to reporters that drones might
ultimately be used for recording traffic violations").

24 ¹³ "CBP Receives Fourth Predator-B in Arizona: Agency Now Operates 9 Unmanned Aircraft,"
25 *U.S. Customs and Border Protection* (Dec. 27, 2011) [http://www.cbp.gov/xp/cgov/newsroom/](http://www.cbp.gov/xp/cgov/newsroom/news_releases/national/12272011.xml)
[news_releases/national/12272011.xml](http://www.cbp.gov/xp/cgov/newsroom/news_releases/national/12272011.xml).

26 ¹⁴ Office of Inspector General, *CBP's Use of Unmanned Aircraft Systems in the Nation's Border*
27 *Security*, DHS OIG-12-85, 2 (May 2012).

28 ¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See Brian Bennett, "Police Employ Predator Drone Spy Planes on Home Front," *LA Times* (Dec.
10, 2011) available at <http://articles.latimes.com/2011/dec/10/nation/la-na-drone-arrest-20111211>.

¹⁸ Brian Bennett, "Predator Drones Have yet to Prove their Worth on Border," *LA Times*, (Apr. 28,
2012) available at <http://articles.latimes.com/2012/apr/28/nation/la-na-drone-bust-20120429>.

1 (3) a copy of the "Concept of Operations for CBP's Predator B
2 Unmanned Aircraft System, FY 2010 Report to Congress" discussed
3 in the OIG May 2012 report at p. 7 (OIG-12-85).

4 18. Plaintiff further requested that, pursuant to 18 USC §§ 552(a)(3)(B), (a)(3)(C), and
5 (f)(2)(A), where available and appropriate, the requested records be provided in electronic format,
6 either in their native format, or as image files (such as jpeg, png, tiff, etc), or saved as text-
7 searchable pdf formatted files.

8 19. Plaintiff also requested that all pages be consecutively numbered and that the page
9 numbers of pages or records withheld in full be clearly indicated in a document or file
10 accompanying the produced records.

11 20. Plaintiff requested it be granted a waiver of search and review fees based on its
12 status as a "representative of the news media." See 5 U.S.C. §552(4)(A) and 6 C.F.R. §5.11(b)(6),
13 (d)(1). Plaintiff cited and attached a stipulation by DHS recognizing Plaintiff's news media
14 requestor status filed in *EFF v. Dept. of Homeland Security*, Case No. 06-1988, (D.D.C. Feb. 27,
15 2007).

16 21. Plaintiff also requested it be granted a waiver of search and duplication fees because
17 disclosure of the information is in the public interest within the meaning of 5 U.S.C.
18 § 552(a)(4)(a)(iii) and 6 C.F.R. §5.11(k). Plaintiff cited several facts to support its request,
19 including the fact that the information is not in the public domain, that EFF will make this
20 information available through its website and newsletter, that this information will contribute
21 significantly to the debate over whether and how the government should be flying drones, and that
22 EFF has no commercial interest in disclosure of the requested information.

23 22. On information and belief, CBP received Plaintiff's request letter, described in
24 paragraphs 17-21, on June 25, 2012.

25 23. By letter dated July 9, 2012, CBP acknowledged receipt of Plaintiff's FOIA request
26 and assigned it Request Number 2012F24771.

27 24. In its July 9, 2012 letter, CBP stated it "determined that [EFF had] not presented a
28 convincing argument that [EFF is] entitled to a blanket waiver of fees." CBP stated it would

1 therefore charge Plaintiff “for records in accordance with DHS Interim FOIA regulations as they
2 apply [to] representatives of the media.” CBP did not state that this determination was subject to
3 administrative appeal.

4 25. Despite CBP’s acknowledgement of Plaintiff’s FOIA request, CBP has yet to
5 process and release records responsive to EFF’s FOIA request. As such, CBP has exceeded the
6 generally applicable twenty-day deadline for the processing of any FOIA request.

7 26. Plaintiff has exhausted the applicable administrative remedies with respect to its
8 FOIA request referenced herein.

9 27. Defendant has wrongfully withheld the requested records from Plaintiff and
10 wrongfully denied Plaintiff’s request for a fee waiver.

11 **CAUSES OF ACTION**

12 **FIRST CAUSE OF ACTION**

13 **Violation of the Freedom of Information Act for Wrongful Withholding of Agency Records**

14 28. Plaintiff repeats and realleges paragraphs 1-27.

15 29. Defendant has wrongfully withheld agency records requested by Plaintiff by failing
16 to comply with the statutory time limit for the processing of FOIA requests.

17 30. Plaintiff has exhausted the applicable administrative remedies with respect to
18 Defendant’s wrongful withholding of the requested records.

19 31. Plaintiff is entitled to injunctive relief with respect to the release and disclosure of
20 the requested documents.

21 **SECOND CAUSE OF ACTION**

22 **Violation of the Freedom of Information Act for Wrongful Denial of**
23 **Plaintiff’s Fee Waiver Request**

24 32. Plaintiff repeats and realleges paragraphs 1-27.

25 33. Plaintiff has demonstrated it is entitled to a waiver of fees based both on its status as
26 a news media requestor and on the fact that disclosure of the information requested is in the public
27 interest.

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34. Defendant has wrongfully denied Plaintiff's request for a fee waiver.

35. Plaintiff has exhausted the applicable administrative remedies with respect to Defendant's wrongful denial.

36. Plaintiff is entitled to injunctive relief with respect to its fee waiver request.

REQUESTED RELIEF

WHEREFORE, Plaintiff prays that this Court:

1. order Defendant and its component to disclose immediately the requested records in their entirety;
2. order Defendant and its component to waive all fees associated with the processing and release of the requested records;
3. award Plaintiff its costs and reasonable attorneys fees incurred in this action; and
4. grant such other relief as the Court may deem just and proper.

DATED: October 30, 2012

Respectfully submitted,

By: 

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