

1
2 UNITED STATES DISTRICT COURT
3 FOR THE NORTHERN DISTRICT OF CALIFORNIA
4 SAN FRANCISCO DIVISION
5

6 ELECTRONIC FRONTIER FOUNDATION,)
7)
8 Plaintiff,)
9)
10 v.)
11)
12 CENTRAL INTELLIGENCE AGENCY, ET. AL.,)
13)
14 Defendants.)
15 _____)
16)
17)

Civil Action No.: 09-CV-03351-SBA

18
19 _____
20
21 **DECLARATION OF WILLIAM T. KAMMER**
22 _____
23

21 I, William T. Kammer, hereby declare under penalty of perjury that the following
22 information is true and correct:

23 1. I am the Chief, Office of Freedom of Information (“OFOI”), Executive Services
24 Directorate, Washington Headquarters Service, a Component of the Department of Defense
25 (“DoD”), and have held that position since August 2005. As Chief, I am responsible for
26 implementation of the DoD Freedom of Information Act (“FOIA”) Program and issuance of
27 agency-wide policy guidance and instruction on FOIA matters. See 32 CFR 286. Additionally, I
28 supervise the processing of initial FOIA and Privacy Act (“PA”) requests for documents within
29 the possession and control of the Office of the Secretary of Defense (“OSD”) and the Office of
30 the Chairman of the Joint Chiefs of Staff (“Joint Staff”). I also supervise the processing of
31 FOIA/PA appeals for the OSD and the Joint Staff.

1 components with less time needed by the FOIA analyst to process the request. The next queue is
2 reserved for more complex requests which require taskings or referrals to more DoD components
3 and/or other government agencies. Finally, the expedited processing queue is provided for
4 requesters who demonstrate “compelling need,” or for any other case deemed appropriate under
5 agency regulations. At present, the total number requests in all three queues are approximately
6 1950. 580 of these requests were submitted before EFF submitted the February 25, 2008 request
7 or the June 19, 2009 request described below. Because DoD follows a “first-in, first-out” system
8 for the processing of FOIA requests, these requests would ordinarily be processed ahead of the
9 EFF requests at issue in this litigation.

10 **CORRESPONDENCE**

11 6. On February 25, 2008, Ms. Marcia Hoffman, on behalf of the EFF, faxed a FOIA
12 request letter (08-F-0769) to the OFOI asking for “copies of all reports submitted by the
13 Department of Defense to the IOB pursuant to Section 2.4 of E.O. 12863 which “section
14 provides, in pertinent part, as follows: Inspectors General and General Counsel of the
15 Intelligence Community, to the extent permitted by law, shall report to the IOB at least on a
16 quarterly basis and from time to time as necessary or appropriate, concerning intelligence
17 activities that they have reason to believe may be unlawful or contrary to Executive Order or
18 Presidential directive.” Plaintiff asked that “such reports submitted to the IOB since January 1,
19 2001” be provided. The OFOI also received a referral of a request from the Department of
20 Defense, Inspector General (“DoD/IG”) on March 12, 2008 and determined it to be a duplicative
21 of Ms. Hoffman’s February 28, 2008 request to OFOI. (See Exhibit 1.) Ms. Hoffman did not
22 ask for expedited processing of the February 25, 2008 request.

1 7. Prior to the February 25, 2008 request, OFOI had received a request dated March 30,
2 2006, also from Ms. Marcia Hoffman, on behalf of the Electronic Privacy Information Center
3 (hereinafter "EPIC"). (See Exhibit 2.) OFOI determined that the documents being processed for
4 the March 30, 2006 EPIC request were also responsive to the February 25, 2008 EFF request.
5 Accordingly, processing on the March 30, 2006, EPIC request and the February 25, 2008 EFF
6 request continued. Both requests were placed in the "complex" processing queue within OFOI
7 because it was determined that the processing of the requests would require referrals to other
8 agencies and DoD components. Because DoD has elected to combine the February 25, 2008
9 request with the earlier request from EPIC, it has begun its processing of that request almost two
10 years earlier than EFF would otherwise have been entitled under DoD's "first-in, first-out"
11 system.

12 8. In response to the March 30, 2006 EPIC request, OFOI has sent a request to the
13 Assistant to the Secretary of Defense, Intelligence Oversight ("ATSD(IO)"), which functions as
14 the central collection point for DoD submissions to the IOB, for that agency to conduct a search
15 for responsive records to EPIC's March 30, 2006 request. Documents responsive to the requests
16 were identified and were referred for review to various DoD components and other government
17 agencies.

18 9. On June 19, 2009, Mr. Nathan Cardozo, on behalf of EFF, faxed a FOIA request
19 (09-F-1257) to the OFOI asking for, (1) "all reports submitted to the Intelligence Oversight
20 Board ("IOB") pursuant to Section 2.4 of E.O. 12863 from February 25, 2008 to February 29,
21 2008" which "section provides, in pertinent part, as follows: Inspectors General and General
22 Counsel of the Intelligence Community, to the extent permitted by law, shall report to the IOB at
23 least on a quarterly basis and from time to time as necessary or appropriate, concerning

1 intelligence activities that they have reason to believe may be unlawful or contrary to Executive
2 Order or Presidential directive; (2) all reports submitted to the IOB or the Director of National
3 Intelligence (“DNI”) pursuant to Section 1.7(d) of Executive Order 12333 from February 29,
4 2008 to the present; (3) all reports of any assessments or reviews of intelligence activities by the
5 President’s Intelligence Advisory Board (“PIAB”) to the DoD pursuant to Section 4(a)(ii) of
6 Executive Order 13462 from February 29, 2008 to present; (4) all recommendations concerning
7 intelligence matters identified by the PIAB to the DoD pursuant to Section 4(b) of Executive
8 Order 13462 from February 29, 2008 to the present; (5) all reports and recommendations by the
9 IOB to the DoD pursuant to Section 6(c) of Executive Order 13462 concerning the performance
10 of the DoD under Executive Order 13462 from February 29, 2008 to the present; (6) all reports
11 containing information and all recommendations for corrective action submitted by the IOB to
12 the DoD pursuant to Section 6(d) of Executive Order 13462 from February 29, 2008 to the
13 present; (7) all requests for investigations of intelligence activities by the IOB to the DoD and
14 reports by the DoD to the IOB of the results of those investigations pursuant to Section 6(e) of
15 Executive Order 13462 from February 29, 2008 to the present;” and (8) “all reports made by the
16 DoD to the IOB or PIAB pursuant to Section 8(c) of Executive Order 13462, concerning the
17 reasons for not implementing a PIAB or IOB recommendation from February 29, 2008 to the
18 present.” Plaintiff also requested “that it not be charged search or review fees for this request
19 because EFF qualifies as a representative of the news media pursuant to the FOIA and 32 C.F.R.
20 § 286.28(e)(7).” Since Plaintiffs did not seek expedited processing, their request was placed in
21 the complex queue along with other non-expedited requests currently being handled in OFOI.
22 (See Exhibit 3.) Ordinarily, this request would be processed in accordance with its placements in
23 the queue. However, DoD has begun processing of this request earlier than would otherwise

1 occur, because DoD has elected to combine the request with the February 25, 2008 request
2 which, as referenced in paragraph 5, had already been combined with the March 30, 2006, EPIC
3 request.

4 10. On July 3, 2009, the OFOI acknowledged receipt of EFF's June 19, 2009 request and
5 advised that Plaintiff's February 2008 request had been assigned FOIA case number 08-F-0769.
6 DoD also advised that "this Office is responsible for responding to requests for records held by
7 the Office of the Secretary of Defense and the Joint Staff and we will process your requests as
8 they pertain to those organizations." In accordance with the OPEN Government Act of
9 December, 2007, Plaintiff was advised that "this Office processes requests on a first-in, first-out
10 basis and we will be unable to make a release determination on your request within the twenty-
11 day statutory time period, since there are unusual circumstances which impact our ability to
12 process your request." Defendant advised that "these unusual circumstances are: (a) the need to
13 search for and collect records from a facility geographically separated from this Office; (b) the
14 potential volume of records responsive to your request; and (c) the need for consultation with
15 one or more DoD or other Government components having a substantial interest in either the
16 determination or subject matter of the records." Plaintiff was advised that "for these reasons,
17 your request will be placed in our complex processing queue and will be worked in the order the
18 request was received. (See Exhibit 4.)

19 11. Searches for potentially responsive documents have now been completed. At the
20 present time, there are 1,181 pages of documents that are potentially responsive to one or more
21 of the requests at issue in this litigation; these documents have been referred to ten (10) DoD
22 components or to other Government agencies for their review. For several reasons, DoD will be
23 unable to complete its processing of these documents by December 15, 2009, which is the date

1 by which Plaintiff has asked DoD to complete its processing. Currently, there are a total of 64
2 open litigations DoD-wide. These open litigations are on-going and contain voluminous
3 amounts of records in various stages of processing. Because DoD personnel must balance their
4 efforts to process the two requests at issue in this litigation with their obligations to respond to
5 other FOIA litigation matters, as well as their obligations to continue the administrative
6 processing of other FOIA requests, they cannot devote all of their attention solely to these two
7 requests. In addition, because Plaintiff's requests seek classified materials, a careful page-by-
8 page, line-by-line review is required to ensure that the interests of national security are protected
9 before records are disclosed to Plaintiff. In addition, other government agencies are required to
10 review responsive records to obtain their concurrence on classification decisions, or other
11 assertions of exemptions from FOIA. Each of these agencies also must engage in a careful
12 review of these records to ensure that national security interests are protected. At the conclusion
13 of this review, all potentially responsive pages will be returned to OFOI for processing and
14 release to Plaintiff. Because of the need for a careful review of the national security implications
15 of any potential release of documents in response to the Plaintiff's FOIA requests, DoD will
16 require until February 2, 2010 to complete its processing.

17
18 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true
19 and correct.

20 Dated this 21st day of October 2009, at Arlington, Virginia.
21
22
23
24
25

William T. Kammer
William T. Kammer

Exhibit

1

08 - F - 0769



February 25, 2008

BY FACSIMILE — (703) 696-4506

Department of Defense
Will Kammer
Defense Freedom of Information Policy Office
1155 Defense Pentagon
Washington, DC 20301-1155

RE: Freedom of Information Act Request

Dear Mr. Kammer:

This letter constitutes a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and is submitted to the Department of Defense 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.

We are seeking copies of all reports submitted by the Department of Defense to the Intelligence Oversight Board ("IOB") pursuant to Section 2.4 of Executive Order 12863. That section provides, in pertinent part, as follows:

Inspectors General and General Counsel of the Intelligence Community, to the extent permitted by law, shall report to the IOB at least on a quarterly basis and from time to time as necessary or appropriate, concerning intelligence activities that they have reason to believe may be unlawful or contrary to Executive order or Presidential directive.¹

We seek such reports submitted to the IOB since January 1, 2001.

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 32 C.F.R. § 286.28(e)(7). In requesting this classification, we note that the National Security Agency, Department of Homeland Security, and Department of State have recognized that EFF qualifies as a "news media" requester, based upon the publication activities set forth below (see NSA letter, DHS stipulation, and State Department 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).

¹ Several Department of Defense components are members of the "Intelligence Community." See <http://www.intelligence.gov/1-members.shtml>.

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February 25, 2008
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EFF is a non-profit public interest organization that works "to protect and enhance our core civil liberties in the digital age."² One of EFF's primary objectives is "to educate the press, policymakers and the general public about online civil liberties."³ 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 46,682,194 hits in July 2007 -- an average of 62,744 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 510,633 hits in July 2007.⁴

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.

² GuideStar Basic Report, Electronic Frontier Foundation, <http://www.guidestar.org/pqShowGsReport.do?npId=561625> (last visited Feb. 1, 2008).

³ *Id.*

⁴ These figures include hits from RSS feeds through which subscribers can easily track updates to DeepLinks and miniLinks.

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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 2,600 times from EFF's web site in July 2007.

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 32 C.F.R. § 286.28(d). To determine whether a request meets this standard, Department of Defense components determine whether disclosure of the requested information "is in the public interest because it 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." 32 C.F.R. §§ 286.28(d)(3)(i), (ii). This request clearly satisfies these criteria.

First, disclosure of the requested information will "will significantly contribute to the public understanding of the operations or activities of the Department of Defense." 32 C.F.R. § 286.28(d)(3)(i)(A). EFF has requested information that will shed light on the agency's interpretation of laws governing intelligence activities, and how well it conforms to those laws.

Second, the "informative value" of the records EFF has requested is likely to be meaningful. 32 C.F.R. § 286.28(d)(3)(i)(B). EFF has requested information that will shed light on the manner in which the agency reviews and reports intelligence matters to the IOB. This information is unlikely to be duplicative of information about the Army's operations and activities already in the public domain.

Third, the requested material will contribute to the general public's understanding of how the agency interprets applicable laws and monitors internal compliance. 32 C.F.R. § 286.28(d)(3)(i)(C) (internal quotation marks omitted). This information will contribute not only to EFF's understanding of the agency's interpretation and use of legal authority, 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.

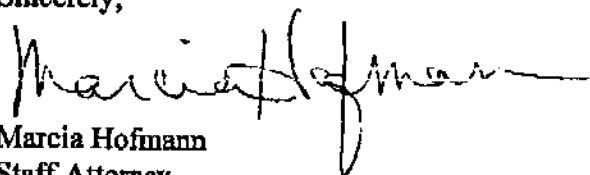
Fourth, the disclosure will contribute significantly to the public's knowledge and understanding of how the agency seeks compliance with laws governing intelligence activities. 32 C.F.R. § 286.28(d)(3)(i)(D). Disclosure of the requested information will help inform the public about the agency's actions, as well as contribute to the public debate about how intelligence activities should be conducted.

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Furthermore, a fee waiver is appropriate here because EFF has no commercial interest in the disclosure of the requested records. 32 C.F.R. § 286.28(d)(3)(ii). 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. If you have any questions or concerns, please do not hesitate to contact me at (415) 436-9333 x. 116. As the FOIA provides, I will anticipate a determination on this request from your office within 20 working days.

Sincerely,



Marcia Hofmann
Staff Attorney

Enclosures

Exhibit

2

06-F-1305



March 30, 2006

VIA FACSIMILE — (703) 696-4506

Office of Freedom of Information
1155 Defense Pentagon
Washington, DC 20301-1155

1718 Connecticut Ave NW
Suite 200
Washington DC 20009
USA
+1 202 483 1140 (tel)
+1 202 483 1248 (fax)
www.epic.org

RE: Freedom of Information Act Request and Request for Expedited Processing

To Whom It May Concern:

This letter constitutes a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and Department of Defense regulation 32 C.F.R. part 286, and is submitted to the Department of Defense ("DOD") on behalf of the Electronic Privacy Information Center ("EPIC").

We are seeking all agency records (including but not limited to electronic records) from September 2001 to the present concerning matters of possible intelligence misconduct reported or considered for reporting to the Intelligence Oversight Board ("IOB"), as required by Executive Order 12863.

Executive Order 12863 provides:

Inspectors General and General Counsel of the Intelligence Community, to the extent permitted by law, shall report to the IOB, at least on a quarterly basis and from time to time as necessary or appropriate, concerning intelligence activities that they have reason to believe may be unlawful or contrary to Executive order or Presidential directive.

Sec. 2.4.

Request for Expedited Processing

This request warrants expedited processing because it pertains to a matter about which there is an "urgency to inform the public about an actual or alleged federal government activity," and the request is made by "a person primarily engaged in disseminating information." 5 U.S.C. § 552(6)(E)(v)(II).

As an initial matter, EPIC notes that the Department of Justice ("DOJ") has granted expedited processing for similar requests to the Federal Bureau of Investigation ("FBI"), Attorney General, and DOJ Inspector General.

The government activity at issue here — possible intelligence misconduct — raises serious questions about the government's use of its investigative authority and has received considerable media attention in recent days and months.

In October 2005, the FBI released to EPIC during FOIA litigation several reports of possible misconduct it had made to the IOB. Shortly thereafter, the Washington Post reported on its front page:

The FBI has conducted clandestine surveillance on some U.S. residents for as long as 18 months at a time without proper paperwork or oversight, according to previously classified documents to be released today.

Records turned over as part of a Freedom of Information Act lawsuit also indicate that the FBI has investigated hundreds of potential violations related to its use of secret surveillance operations, which have been stepped up dramatically since the Sept. 11, 2001, attacks but are largely hidden from public view.

* * *

Although heavily censored, the documents provide a rare glimpse into the world of domestic spying, which is governed by a secret court and overseen by a presidential board that does not publicize its deliberations. The records are also emerging as the House and Senate battle over whether to put new restrictions on the controversial USA Patriot Act, which made it easier for the government to conduct secret searches and surveillance but has come under attack from civil liberties groups.

Dan Eggen, *FBI Papers Indicate Intelligence Violations*, Washington Post, Oct. 24, 2005, at A01.

According to the New York Times, which also reported on the documents, "newly disclosed records indicat[e] that the F.B.I. had violated the law[.]" Eric Lichtblau, *Tighter Oversight of F.B.I. is Urged*, NY Times, Oct. 24, 2005, at A16. The article said that "internal reviews had identified 113 violations since last year that were referred to a federal intelligence board." *Id.*¹

¹ In addition to the Washington Post and New York Times, dozens of local and national media organizations reported on the documents throughout the United States and around the world. A nonexhaustive list of media outlets that reported on this matter includes USA Today, United Press International, CNN, ABC News, FOX News, Centre Daily Times (PA), Detroit Free Press (MI), Christian Science Monitor (MA), Myrtle Beach Sun News (SC), Miami Herald (FL), Indianapolis Star (IN), San Francisco Chronicle (CA), KARE (MN), St. Louis Post-Dispatch (MO), KPHO Phoenix (AZ), Fort Wayne Journal Gazette (IN), Boston Globe (MA), Austin American-Statesman (TX), Contra Costa Times (CA), Seattle Post Intelligencer (WA), Newsday (NY), San Jose Mercury News (CA), Mohave Valley News (NV), MSNBC, Providence Eyewitness News (RI), Charlotte Observer (NC), Kansas City Star (MO), Biloxi Sun Herald (MS), Grand Forks Herald (ND), Columbus Ledger-Enquirer (GA), WXXA (NY),

In response to the accounts of apparent intelligence violations released to EPIC, the DOJ Inspector General has examined the FBI's procedures for reporting possible agent misconduct, and learned that the FBI found more than 100 apparent violations of intelligence-gathering procedures in 2004-2005. The findings, which were relayed in a semiannual report to Congress, were the subject of substantial media interest.² See, i.e., Dan Eggen, *FBI Cites More Than 100 Possible Eavesdropping Violations*, Washington Post, March 9, 2006, at A9; Eric Lichtblau, *Justice Dept. Report Cites F.B.I. Violations*, NY Times, March 9, 2006, at A21.

The Justice Department Inspector General's findings have also drawn congressional attention. Congressman John Conyers, Jr., said the report

is yet another vindication for those of us who have raised concerns about the Administration's policies in the war on terror. Despite the Bush Administration's attempt to demonize critics of its anti-terrorism policies as advancing phantom or trivial concerns, the report demonstrates that the independent Office of Inspector General has found that many of these policies indeed warrant full investigations.

Press Release, Conyers on Justice Department Inspector General Status Report: "More Evidence of Civil Liberties Abuses" (March 8, 2006).

The subject of possible intelligence misconduct reported to the IOB has unquestionably become the subject of ongoing and exceptional media interest. Furthermore, any reports of intelligence misconduct within the DOD are particularly critical now, when the

Bradenton Herald (FL), San Louis Obispo Tribune (CA), Duluth News Tribune (MN), WSAV-TV (GA), Monterey County Herald (CA), Seattle Times (WA), Arkansas Democrat-Gazette (AR), Bakersfield California (CA), Akron Beacon Journal (OH), Corvallis Gazette Times (OR), Macon Telegraph (GA), Wilkes Barre Times-Leader (PA), Pioneer Press (MN), Times Picayune (LA), Fort Worth Star Telegram (TX), Southern Standard (TN), Aberdeen American News (SD), Hartford Courant (CT), Quad City Times (IA), Provo Daily Herald (UT), Pakistan Dawn (Pakistan), The Statesman (India), China Post (Taiwan), Kazinform (Kazakhstan), and Guardian Unlimited (UK).

Furthermore, news outlets across the country editorialized on the matter. See, i.e., Commentary, *FBI's Power to Abuse*, Orange County Register (CA), Oct. 26, 2005; Editorial, *Patriot Act Alteration is Essential*, York Dispatch (York County, PA), Oct. 27, 2005; Editorial, *Keeping an Eye Out Editorials*, Fort Worth Star Telegram, Oct. 27, 2005, at B10; Editorial, *Protect Citizen Rights*, Florida Today, Oct. 30, 2005; Editorial, *Patriot Act Dangers*, Times Union (Albany, NY), Oct. 30, 2005; Editorial and Comment, *Be Vigilant*, Columbus Dispatch (OH), Nov. 4, 2005, at 12A; Editorial, *Keep an Eye on the FBI*, Baltimore Sun, Nov. 7, 2005, at 10A; Editorial, *Check FBI Spying*, Washington Post, Nov. 10, 2005, at A28.

² Dep't of Justice Office of the Inspector General, *Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act* (March 8, 2006), available at <http://www.usdoj.gov/oig/special/s0603/final.pdf>.

agency's domestic surveillance operations are drawing substantial ongoing media attention.³

Furthermore, the National Security Agency's warrantless surveillance operation continues to be a subject of intense congressional debate. This week, the Senate Judiciary Committee held its third hearing on the controversial program,⁴ while several pieces of legislation were introduced in response to the NSA's surveillance activities in recent days.⁵

The purpose of EPIC's request is to obtain any documentation of possible misconduct in DOD intelligence operations. For the reasons discussed above, EPIC's request for records clearly meets the standard for expedited processing.

Request for "News Media" Fee Status

EPIC is a non-profit, educational organization that routinely and systematically disseminates information to the public. This is accomplished through several means. First, EPIC maintains a heavily visited Web site (www.epic.org) that highlights the "latest news" concerning privacy and civil liberties issues. The site also features scanned images of documents EPIC obtains under the FOIA. Second, EPIC publishes a bi-weekly electronic newsletter that is distributed to over 15,000 readers, many of whom report on technology issues for major news outlets. The newsletter reports on relevant policy developments of a timely nature (hence the bi-weekly publication schedule). It has been published continuously since 1996, and an archive of past issues is available at our Web site. Finally, EPIC publishes and distributes printed books that address a broad range of privacy, civil liberties and technology issues. A list of EPIC publications is available at our Web site.

For the foregoing reasons, EPIC clearly fits the definition of "representative of the news media" contained in the FOIA and the DOD regulations. Indeed, the U.S. District Court for the District of Columbia has held that EPIC is a "news media" requester under the

³ See, e.g., Jonathan S. Landay, *Data-mining Work Under Scrutiny*, Saint Paul Pioneer Press, March 18, 2006, at A11; Charles Babington and Dan Eggen, *Gonzales Seeks to Clarify Testimony on Spying*, Washington Post, March 1, 2006, at A08; Vicki Allen, *Pentagon Denies Data Program Gave 9/11 Clues*, Reuters, Feb. 16, 2006; Robert S. Boyd, *Senate Hearings Offer Window Into Data Mining*, Knight Ridder, Feb. 5, 2006; Walter Pincus, *Pentagon Will Review Database on U.S. Citizens*, Washington Post, Dec. 15, 2005, at A01; Lisa Myers, Douglas Pasternak, Rich Gardella and the NBC Investigative Unit, *Is the Pentagon Spying on Americans?*, MSNBC, Dec. 13, 2005, <http://www.msnbc.msn.com/id/10454316>; Walter Pincus, *Pentagon Expanding Its Domestic Surveillance Activity*, Washington Post, Nov. 27, 2005, at A06.

⁴ *NSA III: Wartime Executive Powers and the FISA Court: Hearing Before the Comm. on the Judiciary*, 109th Cong. (March 28, 2006).

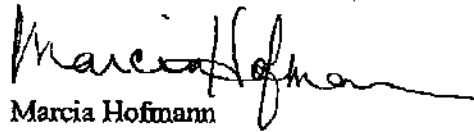
⁵ See, e.g., NSA Oversight Act, H.R. 4976, 109th Cong. (introduced March 16, 2006); Relating to the Censure of George W. Bush, S. Res. 398, 109th Cong. (introduced March 13, 2006); Surveillance Activities Commission Act of 2006, S. 2362, 109th Cong. (introduced March 2, 2006).

FOIA. See *Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003). Based on our status as a "news media" requester, we are entitled to receive the requested records with only duplication fees assessed under 32 CFR § 286.28. Further, because disclosure of this information will "contribute significantly to public understanding of the operations or activities of the government," as described above, any duplication fees should be waived.

Thank you for your consideration of this request. As applicable DOD regulations provide, I will anticipate your determination on our request for expedited processing within ten (10) calendar days. Should you have any questions about this request, please feel free to call me at 202-483-1140 ext. 112.

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

Sincerely,



Marcia Hofmann
Director, Open Government Project

Exhibit

3



ELECTRONIC FRONTIER FOUNDATION
Protecting Rights and Promoting Freedom on the Electronic Frontier

09 F 1257

June 19, 2009

BY FACSIMILE — (703) 696-4506

Department of Defense
Will Kammer
OSD/JS FOIA Requester Service Center
Office of Freedom of Information
1155 Defense Pentagon
Washington, DC 20301-1155

RE: Freedom of Information Act Request

Dear Mr. Kammer:

This letter constitutes a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and is submitted to the Department of Defense ("DOD") 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.

We are seeking copies of all DOD records, including but not limited to electronic records, as follows:

1.) All reports submitted to the Intelligence Oversight Board ("IOB")¹ pursuant to Section 2.4 of Executive Order 12863 from February 25, 2008 to February 29, 2008.² That section provides, in pertinent part, as follows:

Inspectors General and General Counsel of the Intelligence Community, to the extent permitted by law, shall report to the IOB at least on a quarterly basis and from time to time as necessary or appropriate, concerning intelligence activities that they have reason to believe may be unlawful or contrary to Executive order or Presidential directive.³

2.) All reports submitted to the IOB or the Director of National Intelligence ("DNI") pursuant to Section 1.7(d) of Executive Order 12333 from February 29, 2008 to the present. That section, incorporated by reference by Section 8(b)(i)(A) of Executive Order 13462,⁴ provides that heads of departments shall "[r]eport to the Intelligence Oversight Board, and keep the Director of Central Intelligence appropriately informed, concerning

¹ On February 25, 2008, EFF requested all reports submitted to the IOB from January 1, 2001 through the date of the request. If convenient, please feel free to combine this request with our prior request, attached hereto for your reference.

² Executive Order 12863 was explicitly revoked by Executive Order 13462 on February 29, 2008.

³ The DOD is a member of the "Intelligence Community." See <http://www.intelligence.gov/1-members.shtml>.

⁴ Executive Order 13462, Section 8(b)(i)(A) provides that all heads of department shall ensure that the DNI receives "copies of reports submitted to the IOB pursuant to section 1.7(d) of Executive Order 12333[.]"

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any intelligence activities of their organizations that they have reason to believe may be unlawful or contrary to Executive order or Presidential directive.”

3.) All reports of any assessments or reviews of intelligence activities by the President's Intelligence Advisory Board (“PIAB”) to the DOD pursuant to Sec. 4(a)(ii) of Executive Order 13462 from February 29, 2008 to the present.

4.) All recommendations concerning intelligence matters identified by the PIAB to the DOD pursuant to Sec. 4(b) of Executive Order 13462 from February 29, 2008 to the present.

5.) All reports and recommendations by the IOB to the DOD pursuant to Sec. 6(c) of Executive Order 13462 concerning the performance of the DOD under Executive Order 13462 from February 29, 2008 to the present.

6.) All records containing information and all recommendations for corrective action submitted by the IOB to the DOD pursuant to Sec. 6(d) of Executive Order 13462 from February 29, 2008 to the present.

7.) All requests for investigations of intelligence activities by the IOB to the DOD and reports by the DOD to the IOB of the results of those investigations pursuant to Sec. 6(e) or Executive Order 13462 from February 29, 2008 to the present.

8.) All reports made by the DOD to the IOB or PIAB pursuant to Sec. 8(c) of Executive Order 13462, concerning the reasons for not implementing a PIAB or IOB recommendation from February 29, 2008 to the present.

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 32 C.F.R. § 286.28(e)(7). In requesting this classification, we note that the National Security Agency, Department of Justice, Department of Homeland Security, and Department of State have recognized that EFF qualifies as a “news media” requester, based upon the publication activities set forth below (see NSA letter, DOJ letter, DHS stipulation, and State Department 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.”⁵ One of EFF's primary objectives is “to educate

⁵ Guidestar Basic Report, Electronic Frontier Foundation, <http://www.guidestar.org/pqShowGsReport.do?npold=561625> (last visited June 12, 2009).

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the press, policymakers and the general public about online civil liberties.⁶ 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 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.

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.

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.

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

⁶ *Id.*

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32 C.F.R. § 286.28(d). To determine whether a request meets this standard, Department of Defense components determine whether disclosure of the requested information "is in the public interest because it 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." 32 C.F.R. §§ 286.28(d)(3)(i), (ii). This request clearly satisfies these criteria.

First, disclosure of the requested information will "will significantly contribute to the public understanding of the operations or activities of the Department of Defense." 32 C.F.R. § 286.28(d)(3)(i)(A). EFF has requested information that will shed light on the agency's interpretation of laws governing intelligence activities, and how well it conforms to those laws.

Second, the "informative value" of the records EFF has requested is likely to be meaningful. 32 C.F.R. § 286.28(d)(3)(i)(B). EFF has requested information that will shed light on the manner in which the agency reviews and reports intelligence matters to the IOB. This information is unlikely to be duplicative of information about the DOD's operations and activities already in the public domain.

Third, the requested material will contribute to the general public's understanding of how the agency interprets applicable laws and monitors internal compliance. 32 C.F.R. § 286.28(d)(3)(i)(C) (internal quotation marks omitted). This information will contribute not only to EFF's understanding of the agency's interpretation and use of legal authority, 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.

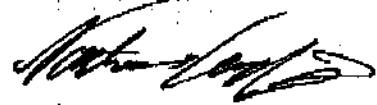
Fourth, the disclosure will contribute significantly to the public's knowledge and understanding of how the agency seeks compliance with laws governing intelligence activities. 32 C.F.R. § 286.28(d)(3)(i)(D). Disclosure of the requested information will help inform the public about the agency's actions, as well as contribute to the public debate about how intelligence activities should be conducted.

Furthermore, a fee waiver is appropriate here because EFF has no commercial interest in the disclosure of the requested records. 32 C.F.R. § 286.28(d)(3)(ii). EFF is a 501(c)(3) nonprofit organization, and will derive no commercial benefit from the information at issue here.

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Thank you for your consideration of this request. If you have any questions or concerns, please do not hesitate to contact me at (415) 436-9333 x. 136. As the FOIA provides, I will anticipate a determination on this request from your office within 20 working days.

Sincerely,



Nathan Cardozo
Open Government Legal Fellow

Enclosures

Exhibit

4



DEPARTMENT OF DEFENSE
OFFICE OF FREEDOM OF INFORMATION
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155

03 JUL 2009

Ref: 09-F-1257
08-F-0769

Nathan Cardozo
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA 94110

Dear Mr. Cardozo:

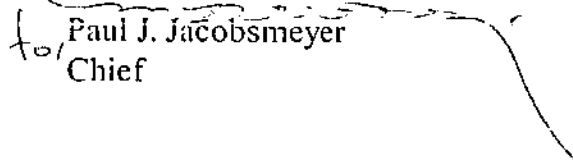
This is an interim response to your June 19, 2009, Freedom of Information Act (FOIA) request on behalf of the Electronic Frontier Foundation (EFF) for records concerning reports submitted to the Intelligence Oversight Board ("IOB") or the Director of National Intelligence for the period February 25, 2008 to the present and includes six other related items which concern or touch on the IOB. You also state that this latest request may be combined with a prior request submitted in February 2008, for all reports submitted to the IOB from January 1, 2001 through the date of that request. For your information the case number assigned to that request is 08-F-0769. This Office is responsible for responding to requests for records held by the Office of the Secretary of Defense and the Joint Staff and we will process your requests as they pertain to those organizations. This Office received your most recent request on June 19, 2009, and assigned it FOIA case number 09-F-1257.

This Office has previously granted EFF representative of the news media fee status and this request, and the February 2008 request, will also be processed under that status. With regard to your request for a waiver of duplication fees, a partial waiver is granted up to 300 additional pages of duplication in addition to the 100 pages you receive as a representative of the news media.

This Office processes requests on a first-in, first-out basis and we will be unable to make a release determination on your request within the twenty-day statutory time period, since there are unusual circumstances which impact our ability to process your request. These unusual circumstances are: (a) the need to search for and collect records from a facility geographically separated from this Office; (b) the potential volume of records responsive to your request; and (c) the need for consultation with one or more DoD or other Government components having a substantial interest in either the determination or subject matter of the records. For these reasons, your request will be placed in our complex processing queue and will be worked in the order the request was received.

If you are not satisfied with this action, you may appeal to the appellate authority, the Director of Administration and Management, Office of the Secretary of Defense. To submit your appeal, you should write directly to the Defense Freedom of Information Policy Office, ATTN: Mr. James Hogan, 1155 Defense Pentagon, Washington, D.C. 20101-1155. Your appeal should be postmarked within 60 calendar days of the date of this letter, should cite to case number 09-F-1257, and should be clearly marked "Freedom of Information Act Appeal"

Sincerely,


to, Paul J. Jacobsmeyer
Chief