



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

FOIA Case: 58957A
25 February 2010

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

Dear Mr. Cardozo:

This responds to your Freedom of Information Act (FOIA) request of 19 June 2009, which was received by this office on 22 June 2009 for the following:

1. All reports submitted to the Intelligence Oversight Board (IOB) pursuant to Section 2.4 of Executive Order 12863 from [FY08 to the present];
2. All reports submitted to the IOB [through NSA's designated contact] pursuant to Section 1.7(d) of Executive Order 12333 from 29 February 2008 to the present;
3. All reports of any assessments or reviews of intelligence activities by the President's Intelligence Advisory Board (PIAB) to the NSA pursuant to Section 4(a)(ii) of Executive Order 13462 from 29 February 2008 to the present;
4. All recommendations concerning intelligence matters identified by the PIAB to the NSA pursuant to Section 4(b) of Executive Order 13462 from 29 February 2008 to the present;
5. All reports and recommendations by the IOB to the NSA pursuant to Section 6(c) of Executive Order 13462 concerning the performance of the NSA under Executive Order 13462 from 29 February 2008 to the present;
6. All records containing information and all recommendations for corrective action submitted by the IOB to the NSA of the results of those investigations pursuant to Section 6(d) of Executive Order 13462 from 29 February 2008 to the present;
7. All requests for investigations of intelligence activities by the IOB to the NSA and reports by the NSA to the IOB of the results of those investigations pursuant to Section 6(e) of Executive Order 13462 from 29 February 2008 to the present; and

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

A copy of your request is enclosed. On 23 June 2009, you spoke with me to clarify request items 1 and 2. The clarification information has been incorporated and is shown in brackets in the numbered items above. Also, we informed you by letter dated 7 July 2009 that no records responsive to items 3-8 of your request were located, and you were provided appeal rights at that time for that portion of your request.

Your request has been processed under the FOIA, and seven documents responsive to your request are enclosed. Certain information, however, has been deleted from the enclosures, and eight documents (22 pages) have been withheld in their entirety.

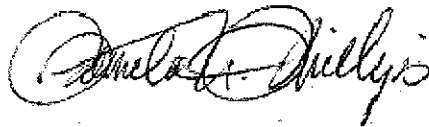
Some of the information deleted from the documents was found to be currently and properly classified in accordance with Executive Order 12958, as amended. This information meets the criteria for classification as set forth in Subparagraph c of Section 1.4 and remains classified TOP SECRET and SECRET and CONFIDENTIAL as provided in Section 1.2 of the Executive Order. The information is classified because its disclosure could reasonably be expected to cause exceptionally grave damage to the national security. Because the information is currently and properly classified, it is exempt from disclosure pursuant to the first exemption of the FOIA (5 U.S.C. Section 552(b)(1)).

In addition, this Agency is authorized by various statutes to protect certain information concerning its activities. We have determined that such information exists in these documents. Accordingly, those portions are exempt from disclosure pursuant to the third exemption of the FOIA which provides for the withholding of information specifically protected from disclosure by statute. The specific statutes applicable in this case are Title 18 U.S. Code 798; Title 50 U.S. Code 403-1(i); and Section 6, Public Law 86-36 (50 U.S. Code 402 note).

The Initial Denial Authority for NSA information is the Deputy Associate Director for Policy and Records, Diane M. Janosek. Since some documents were withheld in their entirety and information was withheld from the enclosures, you may construe this as a partial denial of your request. You are hereby advised of this Agency's appeal procedures. Any person denied access to information may file an appeal to the NSA/CSS Freedom of Information Act Appeal Authority. The appeal must be postmarked no later than 60 calendar days from the date of the initial denial letter. The appeal shall be in writing

addressed to the NSA/CSS FOIA Appeal Authority (DJP4), National Security Agency, 9800 Savage Road STE 6248, Fort George G. Meade, MD 20755-6248. The appeal shall reference the initial denial of access and shall contain, in sufficient detail and particularity, the grounds upon which the requester believes release of the information is required. The NSA/CSS Appeal Authority will endeavor to respond to the appeal within 20 working days after receipt, absent any unusual circumstances.

Sincerely,

A handwritten signature in cursive script, appearing to read "Pamela N. Phillips".

PAMELA N. PHILLIPS
Chief
FOIA/PA Office

Encls:
a/s



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

June 19, 2009

BY FACSIMILE — (301) 688-4762

National Security Agency
Pamela N. Phillips
Chief, FOIA/PA Office (DJP4)
9800 Savage Road, Ste 6248
Fort George G. Meade, MD 20755-6248

RE: Freedom of Information Act Request

Dear Ms. Phillips:

This letter constitutes a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and is submitted to the National Security Agency ("NSA") 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 NSA 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. On June 8, 2009, the NSA issued a partial response to that request, FOIA case number 54854A. EFF today appeals that response under separate cover.

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

³ The NSA 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 NSA 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 NSA 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 NSA pursuant to Sec. 6(c) of Executive Order 13462 concerning the performance of the NSA 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 NSA 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 NSA and reports by the NSA to the IOB of the results of those investigations pursuant to Sec. 6(e) of Executive Order 13462 from February 29, 2008 to the present.

8.) All reports made by the NSA 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?npofid=561625> (last visited June 12, 2009).

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the press, policymakers and the general public about online civil liberties.¹⁶ 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](http://www.eff.org/rss/linenoisemp3.xml) and [feed://www.eff.org/rss/linenoiseogg.xml](http://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

¹⁶ *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 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.

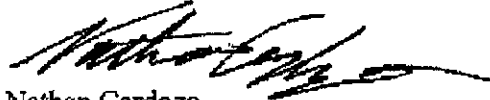
Furthermore, a fee waiver is appropriate here because EFF has no commercial interest in the disclosure of the requested records. 32 C.F.R. § 286.28(d)(3)(ii). EFF is a 501(c)(3) nonprofit organization, and will derive no commercial benefit from the information at issue here.

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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