

1 Jennifer Lynch (SBN 240701)
jlynch@eff.org
2 ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
3 San Francisco, CA 94110
Telephone: (415) 436-9333
4 Facsimile: (415) 436-9993

5 David L. Sobel (*pro hac vice*)
sobel@eff.org
6 ELECTRONIC FRONTIER FOUNDATION
1818 N Street, N.W.
7 Suite 410
Washington, DC 20036
8 Telephone: (202) 797-9009 x104
Facsimile: (202) 707-9066

9 Attorneys for Plaintiff
10 Electronic Frontier Foundation

11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION
14

15 ELECTRONIC FRONTIER FOUNDATION,)
16 Plaintiff,) Case No. 4:10-CV-04892-RS
17 vs.)
18 DEPARTMENT OF JUSTICE,)
19 Defendant.) NOTICE OF MOTION AND MOTION
20) FOR PARTIAL SUMMARY JUDGMENT;
21) MEMORANDUM OF POINTS AND
22) AUTHORITIES IN SUPPORT OF
23) MOTION FOR PARTIAL SUMMARY
24) JUDGMENT
25)
26) Date: February 10, 2011
27) Time: 1:30 p.m.
28) Courtroom: 3, 17th Floor

Case No. CV-10-04892-RS

NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NOTICE

TO DEFENDANTS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on February 10, 2011, or as soon thereafter as the matter may be heard in Courtroom 3 on the 17th Floor of the United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California, plaintiff Electronic Frontier Foundation (EFF) will, and hereby does, move for partial summary judgment to compel timely processing of Freedom of Information Act (“FOIA”) requests submitted to the Defendant.

Pursuant to Federal Rule of Civil Procedure 56, EFF seeks a court order requiring the Department of Justice (DOJ) and its components Federal Bureau of Investigation (FBI), DOJ Criminal Division, and the Drug Enforcement Agency (DEA) to process records under the FOIA. EFF respectfully asks that this Court issue an order requiring the government to expedite the processing of the requested records, as required by law and to complete their processing within 10 days of the Court’s order. This Motion is based on this Notice of Motion, the Memorandum of Points and Authorities in support of this Motion, the Declaration of Jennifer Lynch in support of this Motion, all papers and records on file with the Clerk or which may be submitted prior to or at the time of the hearing, and any further evidence which may be offered.

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES..... iv

MEMORANDUM OF POINTS AND AUTHORITIES..... 1

I. INTRODUCTION..... 1

II. STATEMENT OF FACTS 2

 A. The FBI Seeks Millions of Dollars to Fund its Surveillance Programs and Ensure Communications Providers Can Comply with Wiretap Orders..... 2

 B. Federal Law Enforcement and Intelligence Agencies Are Preparing to Seek Legislation Requiring All Communications Providers Build in Mechanisms to Enable Government Spying 3

 C. EFF’s May 21, 2009 Freedom of Information Act Request to the FBI..... 5

 D. EFF’s September 28, 2010 Freedom of Information Act Requests to the FBI, DOJ Criminal Division, and DEA..... 6

III. ARGUMENT 8

 A. The Court has Jurisdiction to Grant the Requested Relief..... 9

 B. EFF is Entitled to Partial Summary Judgment Because Defendant Has No Legal Basis to Further Delay Processing EFF’s FOIA Requests 11

 1. The FOIA Requires that an Agency Respond to Records Requests Within Twenty Working Days 11

 2. Defendant DOJ and its components are in violation of the FOIA 12

 3. EFF is Entitled to Expedited Processing of its September 28, 2010 FOIA Requests. 13

 4. EFF Has Exhausted All Applicable Administrative Remedies..... 15

IV. CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Al-Fayed v. CIA, 254 F.3d 300, 304 (D.C. Cir. 2001) 9, 10

Celotex Corp. v. Catrett, 477 U.S. 317 (1986)..... 10

Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285 (9th Cir. 1987) 10

Electronic Frontier Foundation v. Office of the Dir. of Nat. Intelligence, 542 F. Supp. 2d 1181 (N.D. Cal. 2008)..... 11, 13

Electronic Privacy Information Center v. Department of Justice, 416 F. Supp. 2d 30 (D.D.C. 2006) 12, 13, 14

Exner v. Federal Bureau of Investigation, 542 F.2d 1121 (9th Cir. 1976) 12

Gerstein v. Central Intelligence Agency, No. C-06-4643 MMC, 2006 WL 3462659 (N.D. Cal. 2006)..... 8, 12, 13, 14

Gilmore v. U.S. Dept. of Energy, 33 F. Supp. 2d 1184 (N.D. Cal. 1998) 12, 14

Laroche v. SEC, No. 05-4760 CW, 2006 U.S. Dist. LEXIS 75415, 2006 WL 2868972 (N.D. Cal. Oct. 6, 2006)..... 10

Long v. I.R.S., 693 F.2d 907, 910 (9th Cir. 1982) 12

Oglesby v. Dep’t of the Army, 920 F.2d 57, 62 (D.C. Cir. 1990)..... 10, 15

Statutes

28 C.F.R. §16.5(d)(1) 14

28 C.F.R. §16.5(d)(4) 14

28 U.S.C. § 1331 9

5 U.S.C. § 552(a)(3)(A)(ii)..... 11

5 U.S.C. § 552(a)(4)(B)..... 9, 10

5 U.S.C. § 552(a)(4)(C)..... 11

5 U.S.C. § 552(a)(6)(B)..... 12

5 U.S.C. § 552(a)(6)(B)(i) 11

5 U.S.C. § 552(a)(6)(C)(i) 11, 15

5 U.S.C. § 552(a)(6)(C)(i) 10, 12

5 U.S.C. § 552(a)(6)(C)(ii)..... 12

1	5 U.S.C. § 552(a)(6)(E)(i)	13
2	5 U.S.C. § 552(a)(6)(E)(iii)	9, 14
3	50 U.S.C. § 552(a)(6)(A)(i)	11
4	Fed. R. Civ. P. 12(a)(2)	11
5	Fed. R. Civ. P. 56	10
6	H.R. Rep. No. 93-876 (1974), <i>as reprinted in</i> 1974 U.S.C.C.A.N. 6267	11

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This is an action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, seeking
4 the expedited processing and release of records held by Defendant Department of Justice (DOJ)
5 and its components Federal Bureau of Investigation (FBI), DOJ Criminal Division, and the Drug
6 Enforcement Agency (DEA). The action concerns several FOIA requests Plaintiff Electronic
7 Frontier Foundation (EFF) submitted to the agencies on May 21, 2009 and September 28, 2010
8 regarding the agencies' efforts to push for changes to federal surveillance law that would require
9 all communications providers to build in mechanisms to allow the government unprecedented
10 ability to intercept Americans' communications.

11 The FBI has acknowledged that some of the requested information qualifies for expedited
12 processing under the FOIA and Department of Justice regulations and has granted EFF's request
13 for such treatment. However, the Criminal Division and the DEA, operating under the same
14 Department of Justice regulations and the same set of facts, have both denied EFF's requests for
15 expedited processing. These components have failed to show any valid reason for their inconsistent
16 and contrary interpretation of the regulations.

17 The FOIA requires that agencies granting expedited processing disclose requested records
18 "as soon as practicable." Here, where none of the components has processed EFF's requests within
19 the statutory time frame for a *standard* request (20 business days), they have presumptively also
20 failed to process the expedited requests "as soon as practicable." Defendant's failure to process the
21 requests — or to even identify a date by which the components expect to complete processing —
22 violates the law.

23 An order compelling the timely processing and production of these documents is critical
24 because the information requested is directly relevant to the public's understanding of Defendant's
25 role in the introduction of legislation that would impose new technical requirements on
26 communications providers and would raise significant issues concerning government intrusions
27 into personal affairs, particularly those involving private communications and activities. Because

1 both EFF's rights and Defendant's obligations are highly time-sensitive, EFF respectfully requests
2 entry of an order compelling Defendant DOJ and its components to process and disclose the
3 requested records within 10 days of this Court's order.

4 **II. STATEMENT OF FACTS**

5 This case arises from Defendant's handling of Plaintiff's FOIA requests seeking disclosure
6 of agency records relating to the FBI's "Advanced Electronic Surveillance" Program (the "Going
7 Dark" Program) and soon-to-be-proposed legislation that would require all communications
8 providers to build in mechanisms to allow the government unprecedented ability to intercept
9 communications. Plaintiff moves here for partial summary judgment on the issues of expedited
10 processing and timing. At this time, no DOJ component has produced documents in response to
11 Plaintiff's FOIA requests.

12 **A. The FBI Seeks Millions of Dollars to Fund its Surveillance Programs and** 13 **Ensure Communications Providers Can Comply with Wiretap Orders**

14 In May 2009, the Department of Justice made public its Fiscal Year 2010 Budget Request.
15 As part of that request, the FBI sought an additional \$9 million for "Advanced Electronic
16 Surveillance, otherwise known as the FBI's Going Dark Program." *See FY2010 Budget and*
17 *Performance Summary, Federal Bureau of Investigation (FBI)* at 131.¹ This appears to be on top of
18 the \$233.9 million the agency already receives for the program. *Id.* (noting that the "FY 2010
19 current services for this program are 133 positions (15 agents) and \$233.9 million."). According to
20 comments by an FBI spokesman published by ABC, the "Going Dark Program" is the "program
21 name for the part of the FBI, Operational Technology Division's (OTD) lawful interception
22 program which is shared with other law enforcement agencies." Jason Ryan, *DOJ Budget Details*
23 *High-Tech Crime Fighting Tools*, ABC NEWS (May 9, 2009).² ABC notes that, "[a]ccording to FBI
24 officials, the program is designed to help the agency deal with changing technology and ways to
25 intercept phone calls such as those used by VOIP (Voice Over Internet Protocol) phones or
26 technology such as Skype." *Id.* The budget request explained that the program "supports the FBI's

27 ¹ Available at <http://www.usdoj.gov/jmd/2010summary/pdf/fbi-bud-summary.pdf>.

28 ² Available at <http://abcnews.go.com/TheLaw/Story?id=7532199&page=1>.

1 electronic surveillance (ELSUR), intelligence collection and evidence gathering capabilities, as
2 well as those of the greater Intelligence Community.” *FY2010 Budget and Performance Summary,*
3 *Federal Bureau of Investigation (FBI)* at 131.

4 The FBI has also sought significant funding to develop and update its intercept
5 technologies. The FBI’s 2010 budget request included “\$20.5 million to ensure the FBI’s capability
6 to develop wireless tracking and intercept technologies for 3rd Generation (3G) wireless networks
7 are up to date.” *FY2010 Budget and Performance Summary, Federal Bureau of Investigation (FBI)*
8 at 130. And the agency dedicates significant funds to ensure communications providers can comply
9 technically with the FBI’s surveillance requests. This October, the *New York Times* noted, in
10 discussing the FBI’s plans to push for legislative changes to the 1994 Communications Assistance
11 to Law Enforcement Act (CALEA), that the FBI spends “about \$20 million a year” to help
12 communications companies comply with wiretap orders. *See* Charlie Savage, *Officials Push to*
13 *Bolster Law on Wiretapping*, N.Y. TIMES at A1 (Oct. 18, 2010).³

14 **B. Federal Law Enforcement and Intelligence Agencies Are Preparing to Seek**
15 **Legislation Requiring All Communications Providers Build in Mechanisms to**
16 **Enable Government Spying**

17 On September 27, 2010, the *New York Times* reported:

18 Federal law enforcement and national security officials are preparing
19 to seek sweeping new regulations for the Internet[.] . . .

20 Essentially, officials want Congress to require all services that enable
21 communications — including encrypted e-mail transmitters like
22 BlackBerry, social networking Web sites like Facebook and software
23 that allows direct “peer to peer” messaging like Skype — to be
24 technically capable of complying if served with a wiretap order. The
25 mandate would include being able to intercept and unscramble
26 encrypted messages.

27 Charlie Savage, *U.S. Tries to Make it Easier to Wiretap the Internet*, N.Y. Times at A1 (Sept. 27,
28 2010).⁴ The *Times* further reported that officials from the FBI, the Justice Department, and the
National Security Agency, as well as other agencies had been meeting with White House officials
in the last few months to develop a proposal and that the Obama administration planned to submit

³ Available at <https://www.nytimes.com/2010/10/19/us/19wiretap.html>.

⁴ Available at http://www.nytimes.com/2010/09/27/us/27wiretap.html?_r=1.

1 legislation to Congress next year. *Id.*

2 Immediately after the *Times* reported on the agencies' plans, many other national and
3 international news organizations also reported on the story. *See, e.g.,* Glenn Greenwald, *The*
4 *Obama Administration's War on Privacy*, SALON (Sept. 27, 2010);⁵ Kit Eaton, *What a*
5 *Wiretappable Internet Could Mean for Facebook, Apple, Google, and You*, FAST COMPANY (Sept.
6 27, 2010);⁶ Lolita C. Baldor, *US Works to Make Internet Wiretaps Easier*, HUFFINGTON POST
7 (Sept. 27, 2010);⁷ Ellen Nakashima, *Administration Seeks Ways to Monitor Internet*
8 *Communications*, WASH. TIMES (Sept. 27, 2010);⁸ *Proposal Could Expand Government's Web*
9 *Wiretapping Efforts*, PBS NEWS HOUR (Sept. 27, 2010);⁹ Declan McCullagh, *US Government to*
10 *Seek Intercept Powers on Internet*, CNET NEWS (Sept. 27, 2010);¹⁰ Ryan Singel, *FBI Drive for*
11 *Encryption Backdoors Is Déjà Vu for Security Experts*, WIRED (Sept. 27, 2010);¹¹ Dan Goodin,
12 *Feds Want Backdoors Built into VoIP and Email*, THE REGISTER (Sept. 27, 2010).¹²

13 Shortly after the *Times* article appeared, FBI Director Robert Mueller publicly called for
14 changes to federal law to allow FBI agents greater ability to intercept communications. *See* Robert
15 S. Mueller, Director, Federal Bureau of Investigation, *Speech to Preparedness Group Conference*,
16 Washington, D.C. (Oct. 6, 2010).¹³ He stated,

17 One lesson we have learned in recent years is the need to ensure that the
18 laws by which we operate keep pace with new threats and new
19 technology. . . .

20 ⁵ Available at
http://www.salon.com/news/opinion/glenn_greenwald/2010/09/27/privacy/index.html.

21 ⁶ Available at [http://www.fastcompany.com/1691505/wiretap-emails-facebook-apple-](http://www.fastcompany.com/1691505/wiretap-emails-facebook-apple-google)
22 [google](http://www.fastcompany.com/1691505/wiretap-emails-facebook-apple-google).

23 ⁷ Available at [http://www.washingtontimes.com/news/2010/sep/27/report-us-would-make-](http://www.washingtontimes.com/news/2010/sep/27/report-us-would-make-internet-wiretaps-easier/)
24 [internet-wiretaps-easier/](http://www.washingtontimes.com/news/2010/sep/27/report-us-would-make-internet-wiretaps-easier/).

25 ⁸ Available at [http://www.washingtonpost.com/wp-dyn/content/article/2010/09/27/](http://www.washingtonpost.com/wp-dyn/content/article/2010/09/27/AR2010092703244.html)
26 [AR2010092703244.html](http://www.washingtonpost.com/wp-dyn/content/article/2010/09/27/AR2010092703244.html).

27 ⁹ Available at [http://www.pbs.org/newshour/bb/government_programs/july-](http://www.pbs.org/newshour/bb/government_programs/july-dec10/wiretap_09-27.html)
28 [dec10/wiretap_09-27.html](http://www.pbs.org/newshour/bb/government_programs/july-dec10/wiretap_09-27.html).

¹⁰ Available at [http://www.zdnet.co.uk/news/regulation/2010/09/27/us-government-to-seek-](http://www.zdnet.co.uk/news/regulation/2010/09/27/us-government-to-seek-intercept-powers-on-internet-40090294/)
intercept-powers-on-internet-40090294/.

¹¹ Available at <http://www.wired.com/threatlevel/2010/09/fbi-backdoors/>.

¹² Available at http://www.theregister.co.uk/2010/09/27/encryption_backdoor_legislation/.

¹³ Available at <http://www.fbi.gov/news/speeches/countering-the-terrorism-threat/>.

1 In some instances, communications providers are not able to provide the
2 electronic communications we seek in response to a court order. Many
3 providers are not currently required to build or maintain intercept
capabilities in their operating systems. As a result, they are often not
equipped to provide timely assistance.

4 Critical laws covering this area have not been updated since 1994[.] . . .

5 We want to ensure that our ability to intercept communications is not
6 eroded by advances in technology—technology we all rely on to
communicate.

7 *Id.*

8 On October 18, 2010, the *New York Times* published a second article on agency efforts to
9 expand communications surveillance laws. *See* Charlie Savage, *Officials Push to Bolster Law on*
10 *Wiretapping*, N.Y. TIMES at A1 (Oct. 18, 2010). The *Times* reported,

11 An Obama administration task force that includes officials from the
12 Justice and Commerce Departments, the F.B.I. and other agencies
recently began working on draft legislation to strengthen and expand
13 the Communications Assistance to Law Enforcement Act[.]

14 *Id.* The article further noted, “The Obama administration is circulating several ideas for
15 legislation,” and reiterated that, although “[t]here is not yet agreement over the details . . . the
16 administration intends to submit a package to Congress next year.” *Id.*

17 On November 16, 2010, the *Times* published its third article on the subject. *See* Charlie
18 Savage, *F.B.I. Seeks Wider Wiretap Law for Web*, N.Y. TIMES at B5 (Nov. 16, 2010).¹⁴ The *Times*
19 reported that “Robert S. Mueller III, the director of the Federal Bureau of Investigation, traveled to
20 Silicon Valley on Tuesday to meet with top executives of several technology firms about a
21 proposal to make it easier to wiretap Internet users.” *Id.* According to the *Times*, Facebook
22 confirmed the meetings, and Michael Kortan, an F.B.I. spokesman, “acknowledged the meetings
23 but did not elaborate.” *Id.*

24 **C. EFF’s May 21, 2009 Freedom of Information Act Request to the FBI**

25 On May 21, 2009 Plaintiff faxed a letter to the FBI requesting under the FOIA all agency
26 records, including electronic records, from 2007 to the present concerning the Going Dark
27

28 ¹⁴Available at <https://www.nytimes.com/2010/11/17/technology/17wiretap.html>.
Case No. CV-10-04892-RS -5-

1 Program, including but not limited to a) all records that describe the Going Dark Program; b) all
2 Privacy Impact Assessments prepared for the Going Dark Program; and c) all System of Records
3 Notices (“SORNs”) that discuss or describe the Going Dark Program. (Declaration of Jennifer
4 Lynch (hereinafter “Lynch Decl.”) Ex. 1.)

5 The FBI acknowledged Plaintiff’s request via a form letter dated May 26, 2009. (Lynch
6 Decl. Ex. 2.) By letter dated August 21, 2009, the FBI stated it was currently searching for files
7 responsive to EFF’s request. (Lynch Decl. Ex. 3.) By letters dated January 7, 2010, April 9, 2010,
8 July 8, 2010 and October 6, 2010, the FBI stated EFF’s “request is being reviewed by an analyst.”
9 (Lynch Decl. Exs. 4-7.) EFF’s FOIA request has now been in the agency’s hands for over a year
10 and a half, yet to date, the FBI has not produced any documents in response to EFF’s request nor
11 informed EFF of a date certain by which it will complete processing of the request.

12 **D. EFF’s September 28, 2010 Freedom of Information Act Requests to the FBI,**
13 **DOJ Criminal Division, and DEA**

14 On September 28, 2010, EFF faxed letters to the FBI, DEA, and DOJ Criminal Division,
15 requesting under the FOIA all records created on or after January 1, 2006 discussing, concerning,
16 or reflecting:

17 a) any problems, obstacles or limitations that hamper the agency’s current ability to
18 conduct surveillance on communications systems or networks including, but not
19 limited to, encrypted services like Blackberry (RIM), social networking sites like
Facebook, peer-to-peer messaging services like Skype, etc.;

20 b) any communications or discussions with the operators of communications
21 systems or networks (including, but not limited to, those providing encrypted
22 communications, social networking, and peer-to-peer messaging services), or with
equipment manufacturers and vendors, concerning technical difficulties the agency
has encountered in conducting authorized electronic surveillance;

23 c) any communications or discussions concerning technical difficulties the agency
24 has encountered in obtaining assistance from non-U.S.-based operators of
communications systems or networks, or with equipment manufacturers and
vendors in the conduct of authorized electronic surveillance;

25 d) any communications or discussions with the operators of communications
26 systems or networks, or with equipment manufacturers and vendors, concerning
27 development and needs related to electronic communications surveillance-enabling
28 technology;

1 e) any communications or discussions with foreign government representatives or
2 trade groups about trade restrictions or import or export controls related to
electronic communications surveillance-enabling technology;

3 f) any briefings, discussions, or other exchanges between agency officials and
4 members of the Senate or House of Representatives concerning implementing a
5 requirement for electronic communications surveillance-enabling technology,
including, but not limited to, proposed amendments to the Communications
Assistance to Law Enforcement Act (CALEA).

6 (Lynch Decl. Exs. 8-10.)

7 In each of its September 28, 2010 letters, EFF formally requested that the agency expedite
8 processing of the requests because they seek the disclosure of information about which there is
9 “[a]n urgency to inform the public about an actual or alleged Federal Government activity,” and
10 were “made by a person primarily engaged in disseminating information,” as provided in 5 U.S.C.
11 § 552(a)(6)(E)(v)(II) and 28 C.F.R. § 16.5(d)(1)(ii).

12 The FBI responded to Plaintiff’s September 28, 2010 FOIA request by letter dated October
13 20, 2010. (Lynch Decl. Ex. 11.) In that letter, the FBI granted Plaintiff’s request for expedited
14 processing, finding “under 28 C.F.R. §16.5 (d)(1)(ii) [that] the topic [of EFF’s FOIA request] is a
15 matter of ‘widespread and exceptional media interest,’ and [under] 28 C.F.R. §16.5 (d)(1)(iv) [the
16 topic is] a matter “in which there exist possible questions about the government’s integrity which
17 affect public confidence.”¹⁵

18 The DEA acknowledged EFF’s FOIA request by letter dated October 1, 2010. (Lynch Decl.
19 Ex. 12.) Then, by letter dated October 28, 2010, the DEA denied EFF’s request for expedited
20 processing, finding, pursuant to the very same regulation that the FBI found *warranted* expedited
21 processing, that EFF’s request failed to demonstrate “that a particular urgency concerning actual or
22 alleged federal government activity beyond the public’s right to know about government activities
23 exists.” (Lynch Decl. Ex. 13.)

24 _____
25 ¹⁵ As noted above, EFF cited 28 C.F.R. §16.5(d)(1)(ii) in its September 28, 2010 FOIA
26 requests and requests for expedited processing. This section provides that requests may be
27 expedited if they involve “[a]n urgency to inform the public about an actual or alleged federal
28 government activity, if made by a person primarily engaged in disseminating information.” While
the FBI referred to this section in granting EFF’s request for expedited processing, the agency
mistakenly quoted similar language from §16.5(d)(1)(iv) (“matter of widespread and exceptional
media interest”) rather than §16.5(d)(1)(ii).

1 The DOJ Criminal Division acknowledged EFF's FOIA request by letter dated October 4,
2 2010. (Lynch Decl. Ex. 14.) Similar to the DEA, the Criminal Division denied EFF's request for
3 expedited processing pursuant to the same Department of Justice regulation, 28 C.F.R. §16.5(d),
4 under which the FBI granted EFF's expedition request.

5 To date, none of the components has completed processing of EFF's FOIA requests or
6 produced any records in response to those requests. (Lynch Decl. ¶ 17.) Nor have they informed
7 EFF of a date certain for the full completion of the processing of the requests. (*Id.*)

8 EFF initiated this lawsuit on October 28, 2010. On December 9 and 15, 2010, EFF
9 contacted counsel for Defendant via phone and email to explore the possibility of negotiating a
10 processing schedule for EFF's FOIA requests to eliminate the need for the Court's intervention.
11 (Lynch Decl. ¶ 18.) Counsel for Defendant stated that while the components were giving EFF's
12 requests "high-level treatment" and were already searching for responsive records, they could not
13 commit yet to a processing schedule or date by which to complete production. (*Id.*) EFF explained
14 that it planned to seek an order from the Court if the parties could not agree upon a mutually
15 acceptable date by which to process EFF's requests. (*Id.* and Ex. 15.) The parties continued
16 discussing timelines before and after the holidays, but the components still could not commit to a
17 schedule. (Lynch Decl. ¶ 25; Exs. 16-20.) When Defendant failed to agree to complete the
18 processing of the requests by the date EFF proposed and failed to propose or commit to another
19 specific date, Plaintiff informed counsel for Defendant that EFF would be filing this Motion. (*Id.* ¶
20 25.)

21 **III. ARGUMENT**

22 The issues raised in this motion are clear-cut and discrete. The FBI has acknowledged
23 EFF's legal entitlement to expedited processing of its September 28, 2010 FOIA request, and by
24 doing so, has "effectively conceded" that EFF has demonstrated under the Department of Justice
25 regulations an "urgency to inform the public about the government activity that is the subject of
26 [its] requests." *Gerstein v. CIA*, No. C-06-4643 MMC, 2006 WL 3462659, *5 (N.D. Cal. Nov. 29,
27 2006). Although the DEA and Criminal Division have found, under the very same Department of
28

1 Justice regulations, that expedited processing is not warranted, they have failed to justify their
2 inconsistent and contrary interpretation of the applicable agency regulations.

3 Further, all three have failed to comply not only with the FOIA's provisions for expedited
4 processing, but also with the statute's mandated timeframe of 20 working days for responding to
5 standard FOIA requests. This is true for both EFF's September 2010 FOIA requests and its May
6 2009 request, which is now over 18 months old. Defendant DOJ's failure to process these requests
7 is a continuing impediment to EFF's—and the public's—ability to timely examine and evaluate the
8 government's current communications surveillance capabilities as well as DOJ's proposals for
9 expanding those capabilities.

10 Plaintiff moves for partial summary judgment on the issue of the timing of Defendant's
11 responses to Plaintiff's FOIA requests. To date, none of the components has completed the
12 processing of any of EFF's requests. EFF seeks an order directing DOJ and its components to
13 expedite the processing of EFF's September 28, 2010 requests. EFF further seeks an order
14 requiring Defendant to process and disclose the requested records in response to all requests within
15 10 days of this Court's order.

16 **A. The Court has Jurisdiction to Grant the Requested Relief**

17 The Court's jurisdiction to consider this matter and grant appropriate relief is clear. The
18 FOIA provides, in pertinent part:

19 Agency action to deny or affirm denial of a request for expedited processing . . .
20 shall be subject to judicial review under paragraph (4), except that the judicial
21 review shall be based on the record before the agency at the time of the
22 determination.

22 5 U.S.C. § 552(a)(6)(E)(iii). The referenced judicial review provision states, in pertinent part:

23 On complaint, the district court of the United States in the district in which the
24 complainant resides, or has his principal place of business . . . has jurisdiction to
25 enjoin the agency from withholding agency records and to order the production of
any agency records improperly withheld from the complainant. In such a case the
court shall determine the matter de novo

26 *Id.* § 552(a)(4)(B).¹⁶ See *Al-Fayed v. CIA*, 254 F.3d 300, 304 (D.C. Cir. 2001).

27
28 ¹⁶ EFF's principal place of business is in San Francisco, California. (Lynch Decl. ¶ 2.) This Court
also has jurisdiction of this case under 28 U.S.C. § 1331 ("The district courts shall have original
Case No. CV-10-04892-RS -9-

1 Here, notwithstanding the FBI's decision to "expedite" EFF's September 28, 2010 request,
2 all three DOJ components have failed to fully respond within the generally applicable 20-working-
3 day time limit established by 5 U.S.C. § 552(a)(6)(A) to any of EFF's requests. EFF's claim is ripe
4 for adjudication because EFF has exhausted all applicable administrative remedies. The FOIA
5 provides:

6 [a]ny person making a request to any agency for records . . . shall be deemed to have
7 exhausted his administrative remedies with respect to such request if the agency
fails to comply with the applicable time limit provisions of this paragraph.

8 5 U.S.C. § 552(a)(6)(C)(i). See also *Oglesby v. Dep't of the Army*, 920 F.2d 57, 62 (D.C. Cir.
9 1990) ("If the agency has not responded within the statutory time limits, then . . . the requester may
10 bring suit."). As the FOIA provides, in reviewing Defendant's actions, "the court shall determine
11 the matter de novo." 5 U.S.C. § 552(a)(4)(B); see also *Al-Fayed*, 254 F.3d at 308 ("[A] district
12 court must review de novo an agency's denial of a request for expedition under FOIA.")

13 "Summary judgment is properly granted when no genuine and disputed issues of material
14 fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant
15 is clearly entitled to prevail as a matter of law." *Laroche v. SEC*, No. 05-4760 CW, 2006 WL
16 2868972, at *1 (N.D. Cal. Oct. 6, 2006) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23
17 (1986)); see also Fed. R. Civ. P. 56; *Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285, 1288-89 (9th
18 Cir. 1987).

19 To prevail on this motion, EFF need only show that there is no genuine issue of material
20 fact as to whether Defendant has complied with the FOIA and Department of Justice regulations
21 and completed processing within the time limits required by law.¹⁷ It is beyond dispute that
22 Defendant and its components have fallen short of their legal obligations.

23
24
25
26 jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United
States.").

27 ¹⁷ Once Defendant has completed processing EFF's requests, it will have the burden of proving that
28 any documents or portions of documents it may withhold fall within the exemptions to the FOIA.

1 **B. EFF is Entitled to Partial Summary Judgment Because Defendant Has No**
2 **Legal Basis to Further Delay Processing EFF’s FOIA Requests**

3 1. The FOIA Requires that an Agency Respond to Records Requests Within
4 Twenty Working Days

5 The FOIA does not permit agencies to use bureaucratic delays to postpone the disclosure of
6 records. The statute is clear that, upon receiving a records request, an agency “shall make the
7 records promptly available.” 5 U.S.C. § 552(a)(3)(A)(ii). Specifically, the law gives the agency
8 twenty working days to determine whether to comply with a given request and “immediately”
9 notify the requestor of its determination and the reasons therefor. *Id.* at § 552(a)(6)(A)(i); *Elec.*
10 *Frontier Found. v. Office of the Dir. of Nat. Intelligence*, 542 F. Supp. 2d 1181, 1184 (N.D. Cal.
11 2008) (There is a “generally applicable twenty-day statutory deadline for processing standard, non-
12 expedited FOIA requests.”). Once the agency has made the determination whether to comply, the
13 records responsive to the request “shall be made promptly available” to the requestor. *Id.* at
14 § 552(a)(6)(C)(i). In “unusual circumstances,” for instance the need to collect records from field
15 offices, an agency may elect to notify the requestor that it will require up to an additional ten
16 working days to respond to the request, for a total of thirty working days. *Id.* at § 552(a)(6)(B)(i).¹⁸

17 Congress was both clear and deliberate in creating the strict timing requirements of the
18 FOIA: “information is often useful only if it is timely.” H.R. Rep. No. 93-876, at 4 (1974), *as*
19 *reprinted in* 1974 U.S.C.C.A.N. 6267, 6271. The legislative history of the law is unambiguous; the
20 House Report explicitly states that Congress intended “that the affected agencies be required to
21 respond to inquiries and administrative appeals within specific time limits.” *Id.* An order granting
22 EFF partial summary judgment on the issue of timing and ordering Defendant DOJ and its
23 components to process EFF’s requests in a timely manner is therefore authorized by law and fully
24 comports with congressional intent.

25 ¹⁸ The timing of litigation under the FOIA is similarly streamlined, and for the same reason: the
26 “rapid disposition of freedom of information suits.” H.R. Rep. No. 93-876, at 5 (1974), *as*
27 *reprinted in* 1974 U.S.C.C.A.N. 6267, 6272. In a standard civil suit, the government has sixty days
28 to answer after being served with the complaint, but agencies have only thirty days to answer under
the FOIA. Fed. R. Civ. P. 12(a)(2); 5 U.S.C. § 552(a)(4)(C).

1 2. Defendant DOJ and its components are in violation of the FOIA

2 There is no genuine issue of material fact in dispute on the issue of the timing of the DOJ
3 components' responses, or lack thereof, to EFF's FOIA requests. The components have yet to
4 make any determination whether to comply with any of EFF's FOIA requests, the earliest of which
5 is now more than eighteen months old. None has invoked the "unusual circumstances" specified
6 by 5 U.S.C. § 552(a)(6)(B) for a ten-day extension to reply to the requests. Further, Defendant
7 admits that more than twenty working days have passed since receiving EFF's May 21, 2009
8 request (Answer ¶15.) and cannot deny more than 20 days have passed since it received EFF's
9 September 28, 2010 request.¹⁹ The Ninth Circuit has made clear that "unreasonable delays in
10 disclosing non-exempt documents violate the intent and purpose of the FOIA, and the courts have a
11 duty to prevent these abuses." *Long v. I.R.S.*, 693 F.2d 907, 910 (9th Cir. 1982); *see also Gilmore*
12 *v. U.S. Dep't of Energy*, 33 F. Supp. 2d 1184, 1188 (N.D. Cal. 1998) ("[U]nless an agency makes a
13 timely determination that documents should or should not be disclosed, either because they fall
14 within one of the FOIA exemptions or because they are not considered to be agency records, there
15 is no compliance with the FOIA.").

16 In the limited circumstance in which the government can show "exceptional circumstances"
17 exist, an agency may be allowed "additional time to complete its review of the records." 5 U.S.C.
18 § 552(a)(6)(C)(i). "Exceptional circumstances" as defined in the statute specifically "does not
19 include a delay that results from a predictable agency workload of requests under [the FOIA],
20 unless the agency demonstrates reasonable progress in reducing its backlog of pending requests."
21 *Id.* § 552(a)(6)(C)(ii) The burden is on the agency to show that "exceptional circumstances" exist
22 sufficient to justify a delayed response. *Exner v. FBI*, 542 F.2d 1121, 1123 (9th Cir. 1976);
23 *Gerstein v. CIA*, No. C-06-4643 MMC, 2006 WL 3462659, *2-3 (N.D. Cal. 2006) (*citing Elec.*
24 *Privacy Info. Center v. DOJ*, 416 F. Supp. 2d 30, 39 (D.D.C. 2006) ("*EPIC*"). The record reflects
25 no exceptional circumstances that might justify the agencies' delay in processing EFF's requests.²⁰

26 ¹⁹ Defendant seems not to have admitted or denied this in its Answer. *See* Answer ¶22.

27 ²⁰ In addition to demonstrating that "exceptional circumstances" justify a delay in
28 processing requested records, a recalcitrant agency also bears the burden of demonstrating that it is
"exercising due diligence in responding to the request" before a court can even consider whether to
Case No. CV-10-04892-RS -12-

1 3. EFF is Entitled to Expedited Processing of its September 28, 2010 FOIA
2 Requests

3 Because the FBI has already determined, under Department of Justice regulations applying
4 to all DOJ components, that EFF’s FOIA requests are entitled to expediting processing, and
5 because the Criminal Division and DEA have failed to provide justification for their inconsistent
6 interpretations of the applicable DOJ regulations, the only question before the Court is whether the
7 Defendants are “actually processing the requests ‘as soon as practicable.’” *Gerstein v. CIA*, 2006
8 WL 3462659 at *3 (N.D. Cal. Nov. 29, 2006)(citing *EPIC*, 416 F. Supp.2d at 39). EFF is entitled
9 to prevail on this issue because at least one DOJ component has recognized that EFF’s request is
10 entitled to expedited processing, yet all components have violated the terms of the FOIA and
11 agency regulations by failing process the requests within the legally mandated timeframe for even a
12 standard, non-expedited request. As this Court has found, “[w]here an agency fails to comply with
13 the twenty-day deadline applicable to a standard FOIA request, the agency ‘presumptively also
14 fails to process an expedited request ‘as soon as practicable.’” *Elec. Frontier Found. v. Office of*
15 *the Dir. of Nat’l Intelligence*, 542 F. Supp. 2d 1181, 1186 (N.D. Cal. 2008) (citing *EPIC*, 416 F.
16 Supp. 2d at 39). This Court’s ruling should be the same here. The FOIA clearly establishes the
17 circumstances in which an agency must process a request in an expedited manner. According to the
18 statute, “[e]ach agency shall promulgate regulations . . . providing for expedited processing of
19 requests for records . . . in cases in which the person requesting the records demonstrates a
20 compelling need and . . . in other cases determined by the agency.” 5 U.S.C. § 552(a)(6)(E)(i).
21 “Compelling need” includes, “with respect to a request made by a person primarily engaged in
22 disseminating information, urgency to inform the public concerning actual or alleged Federal

23
24 “allow the agency additional time to complete its review of the records.” 5 U.S.C.
25 § 552(a)(6)(C)(i); *see also Open America v. Watergate Special Prosecution Force*, 547 F.2d 605
26 (D.C. Cir. 1976). It is worth noting that, in *Open America*, the D.C. Circuit recognized that an
27 agency’s standard “first-in, first-out” method of prioritizing FOIA requests would not be applicable
28 “where exceptional need or urgency is shown.” *Id.* at 616. Twenty years later in the 1996
amendments to the FOIA, Congress established a statutory right to expedited processing where
such urgency is shown. As we discuss *infra*, such urgency is present in this case, as the FBI has
acknowledged.

1 Government activity.” 5 U.S.C. § 552(a)(6)(E)(v).

2 Pursuant to this statutory directive, the DOJ has issued regulations establishing grounds for
3 expedited processing. These regulations provide that requests “will be taken out of order and given
4 expedited [processing] treatment whenever it is determined that they involve . . . [a]n urgency to
5 inform the public about an actual or alleged federal government activity, if made by a person
6 primarily engaged in disseminating information.” 28 C.F.R. §16.5(d)(1). If the agencies grant
7 expedited treatment, they are obligated to process the request “as soon as practicable.” 5 U.S.C. §
8 552(a)(6)(E)(iii); 28 C.F.R. §16.5(d)(4). As the *EPIC* court noted, the statute’s “phrase ‘as soon as
9 practicable,’ in the context of a provision of FOIA allowing for *expedited* processing, cannot be
10 interpreted to impose a lower burden on the agency than would otherwise exist.” *EPIC*, 416 F.
11 Supp. 2d at 39 (emphasis in original).

12 Here, EFF requested expedited processing of its FOIA requests because they concern
13 potential sweeping new legislation that would impose new technical requirements on
14 communications providers and would raise significant issues concerning government intrusions
15 into personal affairs. (Lynch Decl. Exs. 8-10.) By granting the request, the FBI has “effectively
16 conceded” under DOJ regulations that there is “an urgency to inform the public” about the subject
17 of EFF’s requests. *Gerstein*, 2006 WL 3462659 at *5. Furthermore, as the FBI implicitly concedes,
18 the requests were made on behalf of EFF, which is a requester “primarily engaged in disseminating
19 information.” *Id.*

20 As this Court has noted, “in the absence of relevant evidence as to the reasons for their
21 delay in processing [a plaintiff’s FOIA] requests, [the government] ha[s] *no* likelihood of success
22 on the merits.” *Id.* at *4 (emphasis added). *See also Gilmore*, 33 F. Supp. 2d at 1188 (“unless an
23 agency makes a timely determination that documents should or should not be disclosed . . . there is
24 no compliance with the FOIA.”). Here, these DOJ components have failed to provide evidence that
25 would justify their inconsistent and contrary interpretations of the same regulations and failed to
26 provide any reason for their unlawful delay in processing. For these reasons, EFF is entitled to the
27 immediate processing and release of the requested records, and asks that the Court issue an order to

1 secure this right.

2 4. EFF Has Exhausted All Applicable Administrative Remedies

3 The FOIA requires that requestors exhaust the administrative remedies available to them
4 before filing suit to compel compliance with the law. *Oglesby v. U.S. Dep't of Army*, 920 F.2d at
5 61. EFF has satisfied this requirement here.

6 “Any person making a request to any agency for records under [the FOIA] shall be deemed
7 to have exhausted his administrative remedies with respect to such request if the agency fails to
8 comply with the applicable time limit provisions of this paragraph.” 5 U.S.C. § 552(a)(6)(C)(i).
9 Courts have interpreted this language to “allow[] immediate recourse to the courts to compel the
10 agency’s response to a FOIA request” if the agency has failed to respond to the request within the
11 specified time. *Oglesby*, 920 F.2d at 64. Defendant has failed to comply with the time limits
12 specified by the FOIA; EFF has therefore exhausted its administrative remedies for each request,
13 and the case is ripe for Court review.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IV. CONCLUSION

For the foregoing reasons, Plaintiff's motion for partial summary judgment should be granted.

Dated this 6th day of January 2011.

Respectfully submitted,

/s/ Jennifer Lynch
ELECTRONIC FRONTIER FOUNDATION
Jennifer Lynch, Esq. (240701)
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333
Facsimile: (415) 436-9993

David L. Sobel (*pro hac vice*)
ELECTRONIC FRONTIER FOUNDATION
1818 N Street, N.W.
Suite 410
Washington, DC 20036
Telephone: (202) 797-9009 x104
Facsimile: (202) 707-9066

Attorneys for Plaintiff

1 I declare under penalty of perjury of the laws of the State of California that I met and
2 conferred with Nicholas Cartier, attorney for Defendants, via telephone and email on December 9,
3 15, and 20, 2010 and January 3, 5, and 6, 2011 before filing this motion for partial summary
4 judgment. Executed January 6, 2011 in San Francisco, California.

5
6 /s/ Jennifer Lynch

Jennifer Lynch