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

15
16 ELECTRONIC FRONTIER FOUNDATION,) Case No. 10-CV-04892-RS
17 Plaintiff,)
18 vs.)
19 DEPARTMENT OF JUSTICE,) **REPLY IN SUPPORT OF PLAINTIFF'S**
20 Defendant.) **MOTION FOR PARTIAL SUMMARY**
21) **JUDGMENT**
22) Date: February 17, 2011
23) Time: 2:00 p.m.
24) Courtroom: 3, 17th Floor
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MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

The Freedom of Information Act (FOIA) requires, and Defendant does not dispute, that agencies must make a determination on releasing records within 20 working days of receiving a FOIA request. Defendant has not made such a determination on any of the requests at issue here. FOIA also requires, and Defendant does not dispute, that agencies must produce records “promptly.” Defendant has not produced *any* records, let alone done so promptly. In cases involving expedited processing, the timing requirements are even more stringent: the statute requires an agency decision on the requester’s entitlement to expedition within 10 calendar days and the production of responsive records “as soon as practicable.” Again, despite Defendant’s acknowledgment that *all* agency components involved in this case—the Federal Bureau of Investigation (FBI), the Drug Enforcement Agency (DEA), and the Department of Justice, Criminal Division (CRM)—are treating Plaintiff’s most recent FOIA requests as expedited ones, no determinations have been made and no records have been produced. Because of the inaction of its components, Defendant is in violation of the law.

Nevertheless, Defendant has opposed Plaintiff’s Motion for Partial Summary Judgment. In spite of its violation of the statutory requirements, Defendant argues that FBI, DEA, and CRM need two additional months just to begin “processing”—not necessarily producing—records.¹ According to the production schedule proposed by Defendant, EFF would not receive Defendant’s entire anticipated disclosure until August 1, 2012—nearly two years after Plaintiff’s second, allegedly-expedited request. The FOIA and relevant authority, most notably *Open America v. Watergate Special Prosecuting Force*, 547 F.2d 605 (D.C. Cir. 1976), define the circumstances under which a court may grant a recalcitrant agency “additional time” to respond to a FOIA request. Defendant’s Opposition cites neither the applicable statutory provision nor *Open America*; nor has the agency made the requisite factual showing needed to meet the standard for “additional time.” In fact, Defendant has not cited *any* authority to support its novel interpretations of FOIA.

¹ According to the FBI, Defendant will finish processing EFF’s May 2009 FOIA request “shortly.” (Decl. of David M. Hardy (Hardy Decl.) ¶ 11).

1 The legal issues raised in EFF’s Motion are straightforward. EFF submitted its first FOIA
2 request to FBI in May 2009. FBI has not made a determination whether to comply with the request,
3 and no records have been produced, therefore Defendant is in violation of the law. EFF submitted a
4 second set of FOIA requests in September 2010 to FBI, DEA, and CRM. Despite the purported
5 expedited treatment of those requests by all components, no determinations have been made and no
6 records have been produced. Again, Defendant is in violation of the law. Defendant has not shown
7 that EFF’s requests were broader than similar requests granted much shorter processing schedules.
8 In the absence of a factual showing sufficient to meet the standard set forth in *Open America*,
9 Defendant is not legally entitled to any additional time to process Plaintiff’s request. Therefore,
10 EFF urges this Court to grant its Motion for Partial Summary Judgment and order Defendant to
11 process and disclose the records requested by Plaintiff within 10 days of this Court’s order.

12 **II. STATEMENT OF ADDITIONAL FACTS**

13 Plaintiff’s Motion arises from Defendant’s failure to respond to related FOIA requests—a
14 May 2009 request submitted to FBI for materials related to FBI’s “Going Dark” Program (the
15 “Going Dark Request”), and a September 2010 request submitted to FBI, DEA, and CRM for
16 materials related to a soon-to-be-proposed legislative expansion of the Communications Assistance
17 for Law Enforcement Act (the “CALEA Request”). While Plaintiff’s Going Dark Request predates
18 its CALEA Request by more than a year, the two are closely associated: the FBI’s “Going Dark
19 Program” is intended to bolster the Bureau’s electronic communications intercept capability—a
20 capability the CALEA expansion would codify. *See* Charlie Savage, *U.S. Tries to Make it Easier to*
21 *Wiretap the Internet*, N.Y. Times at A1 (Sept. 27, 2010).²

22 In Defendant’s Opposition and accompanying Declarations, Defendant asserts that it is
23 working diligently to process EFF’s requests and that its production schedule is timely. Yet,
24 following Defendant’s proposed schedule would mean that EFF would not receive Defendant’s
25 entire, anticipated disclosure until August 1, 2012—nearly two years after Plaintiff’s second,
26 allegedly-expedited request.

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28 ² Available at <https://www.nytimes.com/2010/10/19/us/19wiretap.html>

1 **A. FBI’s Handling of Plaintiff’s “Going Dark” and “CALEA” FOIA Requests**

2 FBI states it received EFF’s Going Dark Request in May 2009, (*see* Dec. of David M.
3 Hardy (Hardy Decl.) ¶ 11), and began its search shortly thereafter. (*Id.* ¶ 33). Yet, FBI did not
4 complete its search until seven months later. (*Id.* ¶¶ 14, 35). FBI then sent the 1,039 pages it
5 located to classification review, which was completed on January 22, 2010, over a year ago. (*Id.*).
6 It is unclear from Mr. Hardy’s Declaration why it has taken 12 months since the classification
7 review for an FBI analyst to “process[] the potentially responsive material, send[] out
8 referrals/consults, work[] with internal division reviews, and prepare[] responsive material” (*Id.* ¶
9 36), and why the agency still cannot commit to a date certain for producing these documents to
10 Plaintiff. FBI states it expects to make its “first interim release” of documents to EFF “shortly.”
11 (*Id.* ¶ 36).

12 By letter dated September 28, 2010, EFF submitted its CALEA Request to FBI. (*Id.* ¶ 20).
13 Unlike FBI’s response to Plaintiff’s Going Dark Request, and despite its grant of expedited
14 treatment, FBI states it did not begin its search for responsive records until November 8, 2010—
15 nearly a month and a half after Plaintiff submitted its request. (*Id.* ¶ 38). FBI states it still does not
16 know the extent of material responsive to EFF’s FOIA request but estimates the pages “number . . .
17 in the thousands.” (*Id.* ¶ 40). FBI “anticipates processing its first interim response on or about April
18 1, 2011,” and proposes a processing rate of 400-500 pages per month until production is complete.
19 (*Id.* If, for example, FBI locates 3,000 responsive documents, this schedule would mean that FBI
20 would not complete production until October 1, 2011—369 days after Plaintiff submitted its
21 request and 326 days longer than the average time FBI takes to complete processing of any
22 expedited FOIA requests. *See* DOJ, FOIA, *Annual Report*, FY 2010, Section VII (“*DOJ FOIA*
23 *Report*”) at 1.³

24 **B. DEA’s Handling of Plaintiff’s CALEA Request**

25 DEA states it received EFF’s FOIA request on October 1, 2010. (Decl. of Katherine L.
26 Myrick (Myrick Decl.) ¶ 4). On November 18, 2010, three days after DEA received notice of this
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28 ³ Available at http://www.justice.gov/oip/annual_report/2010/sec7.pdf

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suit, the agency finally began its search for responsive records—over a month and a half after receiving Plaintiff’s request. (*Id.* ¶¶ 4-5). According to Defendant, in spite of its administrative denial of Plaintiff’s request for expedition, DEA nonetheless has accorded Plaintiff’s request “expedited” treatment. (Def. Opp. at 14-16). DEA states it completed its search on January 12, 2011 and has located 5,800 pages of potentially responsive material. (*Id.* ¶ 7). It estimates processing 350 pages per month, (*Id.* ¶¶ 7, 8), and, like the FBI, may begin producing documents to EFF on or about April 1, 2011. (*Id.* ¶ 8).⁴ Under DEA’s proposed schedule, DEA would not complete production until August 1, 2012—674 days after EFF submitted its request and 627 days longer than DEA’s average processing time for expedited requests. *DOJ FOIA Report* at 1.

11 C. CRM’s Handling of Plaintiff’s CALEA Request

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CRM states it received EFF’s FOIA request on September 29, 2010 and initiated its search shortly thereafter. (Decl. of Kristin L. Ellis (Ellis Decl.) ¶¶ 4, 10). Like DEA, in spite of its administrative denial of Plaintiff’s expedition request, CRM states it has accorded EFF’s request “expedited” treatment. (*Id.* ¶ 12; Def. Opp. at 14-16). CRM has estimated that 3,750 pages of records have been located, as well as 3,000 potentially responsive emails, and anticipates processing those documents at a rate of “450-500 pages of information every 30 days.” (*Id.* ¶¶ 14, 16, 20). Like both FBI and DEA, CRM anticipates “processing” its first interim response on or about April 1, 2011. *Id.* ¶ 20.⁵ If, for example, CRM identifies 6,000 pages of responsive documents, its release would not be complete until April 1, 2012—552 days after submission of Plaintiff’s request and 503 days longer than CRM’s average processing time for expedited requests. *DOJ FOIA Report* at 1.

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⁴ It is unclear whether DEA actually intends to produce documents on this date. Ms. Myrick states “it is DEA’s goal to process a minimum of 350 pages per month and provide Plaintiff a *rolling update/determination/release* on a monthly basis, with the first to occur on or about April 1, 2011.” *Id.* ¶8 (emphasis added)

⁵ CRM’s Declaration, too, states that the components will begin “processing” documents by April 1, 2011. (Ellis Decl. ¶ 20). It is unclear whether this means CRM intends to actually *produce* documents to EFF by this date.

1 **III. ARGUMENT**

2 In May 2009, twenty months ago, Plaintiff submitted its Going Dark Request to FBI;
3 Plaintiff submitted its separate but related CALEA Requests to FBI, DEA, and CRM in September
4 2010. FBI, DEA, and CRM have failed to comply with the FOIA's mandated time limits for
5 responding to requests. Defendant's failure to complete the processing of EFF's requests
6 constitutes a continuing violation of the law. In opposing this Motion, the DOJ components now
7 seek until April 1, 2011 to *begin* "processing," only further exacerbating the violation. For the
8 reasons stated in our Motion and discussed below, this Court should grant EFF's Motion and order
9 Defendant to complete the processing and release of records responsive to EFF's requests within
10 10 days of its order.

11 **A. Because Defendant is in Violation of FOIA and Because Defendant Has Not**
12 **Satisfied the Requirements for "Exceptional Circumstances" Under Statute or**
13 ***Open America*, Defendant is Not Entitled to Additional Time to Process**
14 **Plaintiff's FOIA Requests**

15 FOIA does not permit agencies to use bureaucratic delays to postpone the disclosure of
16 records. Specifically, the law gives the agency twenty working days to determine whether to
17 comply with a given request. 5 U.S.C. § 552(a)(6)(A)(i); *Elec. Frontier Found. v. Office of the Dir.*
18 *of Nat. Intelligence*, 542 F. Supp. 2d 1181, 1184 (N.D. Cal. 2008) (There is a "generally applicable
19 twenty-day statutory deadline for processing standard, non-expedited FOIA requests."). The statute
20 makes clear that, after determining whether to comply with a request, an agency "shall make the
21 records *promptly* available." 5 U.S.C. § 552(a)(3)(A)(ii) (emphasis added).

22 For both Plaintiff's Going Dark Request and CALEA Request, Defendant has neither
23 provided a determination to comply with the request nor produced responsive documents. Setting
24 aside the issue of expedited processing, Defendant has not complied with the statutory requirement
25 for *standard* processing for any of Plaintiff's requests. Defendant now seeks as long as two years to
26 complete a task for which the law allows twenty working days. *See Fiduccia v. U.S. Dept of*
27 *Justice*, 185 F.3d 1035, 1041 (9th Cir. 1999) ("Congress gave agencies *20 days*, not years, to
28 decide whether to comply with requests and notify the requesters.") (emphasis in original). The
time limits of FOIA are short; as the Ninth Circuit has emphasized, "Congress wrote a tough

1 statute on agency delay in FOIA compliance.” *Id.*

2 FOIA does provide that when “the Government can show exceptional circumstances exist
3 and that the agency is exercising due diligence in responding to the request,” a court may stay an
4 action and allow the agency to complete processing. 5 U.S.C. § 552(a)(6)(C)(i). The leading case
5 defining these “exceptional circumstances” is *Open America v. Watergate Special Prosecution*
6 *Force*, 547 F.2d 605 (D.C. Cir. 1976) (adopted by the Ninth Circuit in *Exner v. Federal Bureau of*
7 *Investigation*, 542 F.2d 1121 (9th Cir. 1976)).

8 Under *Open America*, “exceptional circumstances” exist when the agency meets a three-
9 part test: first, the agency must show that it is “is deluged with a volume of requests for
10 information vastly in excess of that anticipated by Congress;” second, it must show that “existing
11 resources are inadequate to deal with the volume of such requests within the time limits of
12 subsection (6)(A);” and, third, the agency must demonstrate “that it ‘is exercising due diligence’ in
13 processing the requests.” *Open America*, 547 F.2d at 616 ; *see also Gilmore v. U.S. Dep’t of*
14 *Energy*, 4 F. Supp. 2d 912, 925 (N.D. Cal. 1998); *Exner*, 542 F.2d at 1122. The burden is on the
15 agency to show that circumstances exist sufficient to justify a delayed response. *Exner*, 542 F.2d at
16 1123; *Gerstein v. CIA*, No. C-06-4643 MMC, 2006 WL 3462659, *2-3 (N.D. Cal. 2006) (*citing*
17 *EPIC v. Department Of Justice*, 416 F. Supp. 2d 30, 39 (D.D.C. 2006)).

18 Defendant has not even attempted to make the requisite *Open America* showing; in fact,
19 Defendant’s Opposition does not even cite the case. Defendant provides nothing more than stock
20 Declarations describing FBI, DEA, and CRM’s searches for responsive records—the same as those
21 filed in every FOIA case. Defendant has thus failed to carry its burden of showing its entitlement to
22 additional time. This Court should consider Defendant’s failure to seek an *Open America* stay as
23 tantamount to an admission that “exceptional circumstances” are not, in fact, present here.

24
25 1. Defendant Has Not Shown that the “Agency Is Deluged with Requests For
Information Vastly in Excess of that Anticipated by Congress”

26 Defendant has failed to demonstrate that FBI, DEA, and CRM are currently “deluged with
27 requests for information,” and, as such, Defendant has failed to satisfy the first requirement of the
28 *Open America* test. *Open America*, 547 F.2d at 616. In fact, only FBI submitted information

1 concerning the volume of requests currently being processed by the agency. (See Hardy Decl. ¶
2 41). However, FOIA explicitly provides that “the term ‘exceptional circumstances’ does not
3 include a delay that results from a predictable agency workload of requests under this section.” 5
4 U.S.C. § 552(a)(6)(C)(ii); see also *Elec. Frontier Found. v. Office of the Dir. Of Nat. Intelligence*,
5 2007 WL 4208311 at *6 (N.D. Cal. Nov. 27, 2007) (finding no exceptional circumstances where
6 the agency’s justifications for delay are “generically applicable to all FOIA requests that would be
7 received” by the agency). Neither Defendant’s Declarations nor its Opposition provide anything
8 more than a description of typical agency backlogs. As such, Defendant has failed to satisfy the
9 first element of an *Open America* showing.

10 2. Defendant Has Failed to Demonstrate that “Existing Resources Are
11 Inadequate to Deal with the Volume of Such Requests”

12 Defendant has also failed to demonstrate that “existing resources are inadequate to deal
13 with the volume of such requests.” *Open America*, 547 F.2d at 616. The second prong is
14 necessarily dependent on an adequate showing under the first prong: “such requests” refers to the
15 “deluge[]” of requests experienced by the agency under the first prong of *Open America*. Because
16 Defendant failed to satisfy the first required showing, Defendant necessarily fails to satisfy the
17 second requirement as well.

18 3. Defendant Has Failed to Demonstrate that It “is Exercising Due Diligence’
19 in Processing the Requests”

20 Much of Defendant’s Opposition appears to be an attempt to demonstrate its exercise of
21 “due diligence” in processing EFF’s FOIA request. (See Def. Opp. 17-22). However, Defendant
22 did not begin processing Plaintiff’s FOIA requests, in some instances, for over a month. Further,
23 when compared with FBI, DEA, and CRM’s median and average processing times for similar
24 requests, Defendant has processed EFF’s requests at a unhurried pace. See *DOJ FOIA Report* at 1.
25 And by no stretch of the imagination can the processing be characterized as “expedited.”

26 First, courts have recognized that FOIA’s legislative history requires an agency to have
27 exercised “due diligence” from the receipt of the request in order to qualify for the kind of
28 extension Defendant seeks here. See *Oglesby v. Dep’t of the Army*, 920 F.2d 57, 62 n.3 (D.C. Cir.

1 1990) (“The court [has] authority to allow the agency additional time . . . in exceptional
2 circumstances where the agency was exercising due diligence in responding to the request *and had*
3 *been since the request was received.*”) (emphasis added) (quoting H.R. Conf. Rep. No. 1380, 93d
4 Cong., 2d Sess. 11 (1974)). Both FBI and DEA delayed initiating their searches for documents
5 responsive to Plaintiff’s CALEA Request for approximately a month and a half after receiving the
6 request—despite both components’ purported “expedited” treatment of Plaintiff’s request. FBI did
7 not begin searching for responsive records until November 8, 2010, (Hardy Decl. ¶ 38), 41 days
8 after EFF submitted its request. DEA did not begin its search until November 18, 2010, (Myrick
9 Decl. ¶ 15), 51 days after Plaintiff submitted its request. Given this delay, Defendant has not
10 exercised the requisite “due diligence.”

11 Second, in comparison with the median and average processing time for similar FOIA
12 requests submitted to FBI, DEA, and CRM, Plaintiff’s requests have taken substantially longer.
13 On average, FBI completes processing of expedited FOIA requests in 42.37 days; the median
14 processing time for expedited FBI requests is 27.5 days. *DOJ FOIA Report* at 1. In 2010, the
15 *longest* processing time for an expedited FBI request was 182 days. *Id.* Thus, if Defendant is
16 allowed to delay its first, interim processing until April 1, 185 days after EFF submitted its request,
17 the treatment of Plaintiff’s CALEA Request would set a new bar for FBI’s “expedited” response
18 time.

19 DEA’s average and median response times to expedited FOIA requests are similar to FBI’s.
20 *Id.* On average, DEA processes expedited FOIA requests in 46.9 days; the median number of days
21 is 30.5. *Id.* On April 1, the date of DEA’s first proposed processing, Plaintiff’s CALEA Request
22 will have been pending nearly four times longer than the average request and six times longer than
23 the median request.

24 In light of its standard processing times, CRM’s delayed response to Plaintiff’s CALEA
25 Request is similarly severe. In 2010, on average, expedited requests were processed in 49 days; the
26 median processing time for expedited requests was 46 days. *Id.* The *longest* expedited processing
27 time during 2010 was 81 days. *Id.* In fact, the average and median processing times for *non-*
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1 expedited, complex requests are 77.51 days and 44 days, respectively. By April 1, Plaintiff's
2 expedited request will have been pending for twice as long as the average.

3 With regard to Plaintiff's Going Dark Request, the amount of time it has taken FBI to
4 process it is extraordinary—even by the FBI's standard for non-expedited requests. By February
5 17, Plaintiff's request will have been pending for 637 days—617 more days than the law permits.
6 According to the FBI, the average complex request⁶ takes 224 days to process—almost 3 times
7 faster than Plaintiff's request. *DOJ FOIA Report* at 1. Moreover, the median time for processing
8 complex requests is even lower: 180 days. *Id.* Further, the amount of time EFF's request has spent
9 in “perfected” status is far beyond the FBI's average.⁷ On the date of this hearing, EFF's request
10 will have been perfected for 443 days. The average pending, perfected, complex request takes 122
11 days; the median, 118. *Id.* at 11. In fact, EFF's request has only been pending for two months less
12 than the *oldest* pending, perfected request currently being processed by the FBI. *Id.* at 14.

13 When compared with the treatment afforded similar requests submitted to Defendant,
14 Plaintiff's requests are not receiving the same level of timely attention provided to others. Coupled
15 with Defendant's failure to promptly begin processing Plaintiff's CALEA Request, Defendant has
16 failed to satisfy its burden of demonstrating “due diligence” as required by *Open America*.
17 Therefore, EFF urges this Court to grant Plaintiff's Motion and order the agency to produce
18 responsive records within 10 days of this Court's order.

19 **B. EFF is Entitled to Summary Judgment and Immediate Processing of Its Requests**

20 1. EFF is Entitled to Immediate and Expedited Processing of its CALEA
21 Request

22 FBI has already determined, under DOJ regulations applying to all components, that EFF's
23 CALEA Request is entitled to expediting processing. By Defendant's own admission, both CRM

24 _____
25 ⁶ It is not clear that Plaintiff's request should even constitute a complex request. The FBI's
26 *average* response to a FOIA request is 1,380 pages. (Hardy Decl. ¶ 41). By contrast, FBI has
27 located only 1,039 responsive pages for Plaintiff's Going Dark request, (*Id.* ¶ 14) 300 pages fewer
28 than the average. On average, the FBI responded to simple FOIA requests in only 36 days. *DOJ*
FOIA Report at 1.

⁷ A request is “perfected” when “all administrative tasks have been completed and when all
responsive documents have been scanned.” (Hardy Decl. ¶ 25).

1 and DEA are currently treating Plaintiff's CALEA Requests as "expedited." (Def. Opp. ¶ 14-16).

2 Even if FBI, DEA, and CRM were not actually expediting Plaintiff's CALEA Request,
3 Plaintiff's request would still be entitled to expedited treatment under the applicable DOJ
4 regulations. The regulations provide that requests merit expedited processing "whenever it is
5 determined that they involve . . . [a]n urgency to inform the public about an actual or alleged
6 federal government activity." 28 C.F.R. §16.5(d)(1). EFF requested expedited processing because
7 its requests concern "actual or alleged government activity"—meetings between White House
8 officials and law enforcement agencies to discuss and draft sweeping new legislation. *See* Charlie
9 Savage, *U.S. Tries to Make it Easier to Wiretap the Internet*, N.Y. Times at A1 (Sept. 27, 2010).
10 Because of the likelihood of new technical requirements on communications providers, and
11 because of the significant issues concerning government intrusions into personal affairs these
12 meetings and draft proposals raise, an urgency to inform the public about the alleged government
13 activity exists.

14 Defendant contends that Plaintiff cannot demonstrate that "the consequences of delaying a
15 response would compromise a significant recognized interest" because "there can be no
16 impairment of an interest in commenting on proposed legislation when that proposed legislation
17 does not yet exist;" thus, defendant argues, no "urgency to inform" exists. (Def. Opp. at 13); *ACLU*
18 *v. Dep't of Justice*, 321 F. Supp. 2d 24, 29 (D.D.C. 2004). Defendant is mistaken. The public's
19 ability to influence legislation is not dormant until the instant a bill is introduced in Congress.
20 Instead, the best opportunity to inform and shape the nature of legislation often is before it is
21 actually proposed. As such, Plaintiff's request is as entitled to expedited processing now as when
22 the proposed legislation is introduced. Significantly, Defendant does not dispute the fact that
23 proposed legislation is, in fact, contemplated.⁸ Moreover, DEA and CRM's decision to give
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25 ⁸ While this Court's decision to grant expedited processing must be based "on the record
26 before the agency at the time of decision," 5 U.S.C. § 552(a)(6)(E)(iii), in the months since
27 Plaintiff's original request, press coverage and public statements by elected officials lend credence
28 at the Newseum, "Protecting Taxpayers, Promoting Innovation, Preserving Justice," An Agenda

1 “expedited” treatment to Plaintiff’s request, despite their administrative denial, serves as a tacit
2 admission to the urgency of the Plaintiff’s request.

3 By granting Plaintiff’s request for expedited processing, the FBI has “effectively conceded”
4 under DOJ regulations that there is “an urgency to inform the public” about the subject of EFF’s
5 requests. *Gerstein*, 2006 WL 3462659 at *5. However, Defendant argues that its decision is not
6 binding but is subject to *de novo* review. This interpretation of FOIA is directly contrary to statute:
7 only “[a]gency action to *deny or affirm denial* of a request for expedited process . . . shall be
8 subject to judicial review.” 5 U.S.C. § 552(a)(6)(E)(iii); *see also Al-Fayed v. CIA*, 254 F.3d 300,
9 308 (D.C. Cir. 2001) (“[A] district court must review *de novo* an agency’s *denial* of a request for
10 expedition under FOIA.”) (emphasis added). Thus, because EFF does not challenge FBI’s
11 determination to *grant* expedited processing of its CALEA Request, this is not an issue before the
12 Court.

13 Moreover, Defendant argues that FBI’s decision to grant expedited processing does not
14 bind DEA and CRM in any way—components of the same agency, interpreting and implementing
15 the same agency regulations. Regardless of the DOJ regulation used by FBI to grant expedited
16 processing, FBI’s decision constitutes an agency determination.⁹ “[I]t is a well-settled proposition
17 of administrative law that . . . when an agency treats two similar transactions differently, an
18 explanation for the agency’s actions must be forthcoming.” *Baltimore Gas & Electric Co. v.*
19 *Heintz*, 760 F.2d 1408, 1418 (4th Cir. 1985). While Defendant has stated the reasons each
20 component reached its own determination regarding expedited processing, Defendant has proffered
21 no explanation as to why the components reached contrary determinations.

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23
24 for the Senate Judiciary Committee in the 112th Congress (Jan. 2011) (“I also hope to work with
the Obama administration, and with Senators on both sides of the aisle, to revisit [CALEA].”)

25 ⁹ Plaintiff requested expedited treatment under DOJ regulation 28 C.F.R. § 16.1(b)(ii)
26 (“urgency to inform the public about an actual or alleged government activity”). The FBI granted
27 Plaintiff’s request for expedition under both subsection (ii) and (iii) (“[a] matter of widespread and
exceptional media interest in which there exist possible questions about the government’s
28 integrity.”) Regardless of the applicable DOJ regulation under which expedited processing was
granted, the fact remains that the FBI’s decision is a binding agency determination as to the merit
of Plaintiff’s request for expedited processing.

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Indeed, while the Court's review of DEA and CRM's decision is *de novo*, the Court should endeavor to apply agency regulations in a consistent manner. *See Ehlert v. United States*, 402 U.S. 99, 105 (1971) (“[W]e are obligated to regard as controlling a reasonable, *consistently* applied administrative interpretation if the Government's be such.”) (emphasis added). Because FBI's decision to grant expedited processing is a binding agency decision, on *de novo* review, and in the interest of consistent application of agency regulations, this Court should similarly find that Plaintiff's requests to DEA and CRM are entitled to expedited processing.

Because the components state they have each expedited EFF's requests, the real question before the Court is whether the Defendants are “actually processing the requests ‘as soon as practicable.’” *Gerstein*, 2006 WL 3462659 at *3 (citing *EPIC*, 416 F. Supp.2d at 39); 5 U.S.C. § 552(a)(6)(E)(iii); 28 C.F.R. §16.5(d)(4). As the *EPIC* court noted, and despite Defendant's claim to the contrary, (Def. Opp. at 16), the statute's “phrase ‘as soon as practicable,’ in the context of a provision of FOIA allowing for *expedited* processing, cannot be interpreted to impose a lower burden on the agency than would otherwise exist” under standard processing requirements. *EPIC*, 416 F. Supp. 2d at 39 (emphasis in original).

2. Plaintiff Is Entitled to Immediate Processing of its Going Dark Request

With respect to Plaintiff's Going Dark request, FBI has neither provided a determination to EFF nor “promptly” produced records. Consequently, Defendant is in violation of the law.

First, Defendant has not provided EFF with a determination of whether it will produce records pursuant to EFF's request. FOIA provides that an agency shall “determine within 20 days . . . whether to comply with such request.” 5 U.S.C. § 552(a)(6)(A)(i); *see also Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 514 F. Supp. 2d 7, 8 (D.D.C. 2007) (“defendant agencies were required to respond within twenty days to this FOIA request.”). In its Opposition, Defendant juxtaposes its description of FOIA's 20-day determination requirement with a description of FBI's correspondence with Plaintiff, documenting the status of its search for responsive records. (Def. Opp. at 9). Letters stating the status of a search and letters stating the agency's determination to comply with a request are not equivalent. As such, Defendant has not met its legal obligations.

1 Further, Defendant cannot be said to have produced the requested records “promptly,” as
2 FOIA requires. 5 U.S.C. § 552(a)(3)(A)(ii). FBI received EFF’s Going Dark request 20 months ago
3 and completed the search for responsive records and the classification review over a year ago.
4 (Hardy Decl. ¶¶ 11, 14, 15). For the past twelve months, EFF’s request has languished in
5 “perfected status,” as an FBI analyst reviews the approximately 1,000 responsive pages. (*Id.* ¶¶ 35,
6 36).

7 Defendant argues that because EFF did not request expedited processing, it is now barred
8 from seeking an order compelling compliance with the law. (Def. Opp. at 14). That result would be
9 inconsistent with FOIA and the controlling case law. FOIA provides that a requester “shall be
10 deemed to have exhausted his administrative remedies with respect to such request if the agency
11 fails to comply with the applicable time limit provisions” and therefore may seek relief in the
12 District Court once twenty working days have elapsed without a response from the agency. 5
13 U.S.C. §§ 552(a)(6)(C)(i), 552(a)(6)(A)(i), *see also Pollack v. Dep’t of Justice*, 49 F.3d 115, 119
14 (4th Cir. 1995) (“Thus, a requester who has not received a timely notice of the agency’s decision . .
15 . may proceed immediately in court to enforce a FOIA request.”).

16 Defendant attempts to characterize EFF’s Motion as a belated request for expedited
17 processing on its Going Dark Request, (Def. Opp. at 10): it is not. EFF only seeks an order
18 requiring Defendant to comply with FOIA’s standard, non-expedited processing requirements.
19 Nothing in statute or precedent suggests that the Court cannot order Defendant to comply with
20 FOIA’s statutory deadlines: “The FOIA imposes no limits on courts’ equitable powers in enforcing
21 its terms.” *Payne Enters., Inc. v. U.S.*, 837 F.2d 486, 494 (D.C. Cir. 1988) (citing *Renegotiation Bd.*
22 *v. Bannercraft Clothing Co.*, 415 U.S. 1, 19-20 (1974)).

23 Absent a showing sufficient to warrant additional time under *Open America*, which
24 Defendant has not made, Defendant is not entitled to more time to finish processing Plaintiff’s
25 request; as such, the Court should grant EFF’s Motion and order Defendant to produce records
26 responsive to the Going Dark Request in 10 days.
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1 **C. The Process Plaintiff Requests Is Consistent with Other FOIA Production**
2 **Orders**

3 The rights provided by the FOIA are highly time-sensitive. Congress recognized that
4 “excessive delay by the agency in its response is often tantamount to denial.” H.R. Rep. No. 93-
5 876, at 4 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 6267, 6271. Because “stale information is of
6 little value,” EFF’s rights are diminished each day Defendants continue to delay their compliance
7 with the law. *See Payne Enters.*, 837 F.2d at 494.

8 The process that EFF requests is not unusual. Courts regularly impose specific processing
9 deadlines on agencies, requiring the prompt delivery of non-exempt records to FOIA requesters.
10 For example, in *Judicial Watch, Inc.*, the court ordered the Commerce and Transportation
11 Departments to process, respectively, 9,000 and 6,000 pages of records; to complete processing
12 within 60 days; and to provide the requester with a *Vaughn* index within 72 days. *Id.* at 141. And
13 the requesters in *Judicial Watch* did not request expedited processing.

14 Similarly, in *NRDC v. Department of Energy*, the court ordered the Energy Department to
15 process 7,500 pages of material; to complete the processing of the “vast majority” of material
16 within 32 days; to complete all processing within 48 days; and to provide the requester with a
17 *Vaughn* index within 63 days. 191 F. Supp. 2d 41, 43-44 (D.D.C. 2002). Like *Judicial Watch*, the
18 FOIA request in *NRDC* had not been granted expedited treatment.

19 In *Elec. Frontier Found. v. Department of Justice*, the FBI sought a 27-month stay to
20 process 20,000 pages potentially responsive to EFF’s FOIA request. 517 F. Supp. 2d 111, 113
21 (D.D.C. 2007). The court, despite finding that “exceptional circumstances” in fact existed, ordered
22 the FBI to complete processing of EFF’s non-expedited FOIA request within a year and to make
23 interim releases of documents every four weeks until then. *Id.* at 121.

24 In *Government Accountability Project v. Dep’t of Health and Human Serv.*, 568 2d 55
25 (D.D.C. 2008), the court denied the agency’s request for an *Open America* stay, ordered the agency
26 to process the plaintiff’s request and begin rolling releases of documents within one month. *Gov’t*
27 *Account. Proj.*, 568 F. Supp. at 56. The agency had moved for a stay of over a year in order to
28 complete processing, and plaintiffs moved for judgment on the pleadings. In denying the

1 government's motion for a stay and granting judgment on the pleadings on the issue of timing for
2 the plaintiff, Judge Kollar-Kotelly held that the twenty-working-day limit of the FOIA sets the time
3 for the production of "documents responsive to [the] FOIA request." *Id.* at 58. Once again, the
4 FOIA request at issue did not include a request for expedited processing.

5 EFF's requested relief is consistent with these examples. Because the rights in FOIA are
6 highly time-sensitive, and because Plaintiff's requests concern matters of pressing importance, the
7 Court should grant Plaintiff's Motion and order production of all responsive documents within 10
8 days of this Court's order.

9 **IV. CONCLUSION**

10 For the foregoing reasons, Plaintiff's Motion for Partial Summary Judgment should be
11 granted.

12 Dated this 3rd day of February, 2011.

Respectfully submitted,

13 /s/ Jennifer Lynch
14 ELECTRONIC FRONTIER FOUNDATION

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