

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC FRONTIER FOUNDATION,

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant.

Civ. A. No. 06-CV-1708 (CKK)

THIRD DECLARATION OF DAVID M. HARDY

I, David M. Hardy, declare as follows:

(1) I am currently the Section Chief of the Record/Information Dissemination Section ("RIDS"), Records Management Division ("RMD"), at the Federal Bureau of Investigation Headquarters ("FBIHQ") in Washington, D.C. I have held this position since August 1, 2002. Prior to joining the FBI, from May 1, 2001 to July 21, 2002, I was the Assistant Judge Advocate General of the Navy for Civil Law. In that capacity, I had direct oversight of Freedom of Information Act ("FOIA") policy, procedures, appeals, and litigation for the Navy. From October 1, 1980 to April 30, 2001, I served as a Navy Judge Advocate at various commands and routinely worked with FOIA matters. I am also an attorney who has been licensed to practice law in the state of Texas since 1980.

(2) In my official capacity as Section Chief of RIDS, I supervise approximately 211 employees who staff a total of ten (10) FBIHQ units and a field operational service center unit with the collective mission to effectively plan, develop, direct, and manage responses to requests for access to FBI records and information pursuant to the FOIA; Privacy Act; Executive Order 12958, as amended; Presidential, Attorney General, and FBI policies and procedures; judicial decisions; and Presidential and Congressional directives. The statements contained in this

declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information from its files pursuant to the provisions of the FOIA, 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a. Specifically, I am aware of the treatment which has been afforded the FOIA request of plaintiff, the Electronic Frontier Foundation, for documents related to two electronic surveillance systems. More specifically, plaintiff's August 11, 2006 FOIA request seeks access to records pertaining to System DCS-3000 and Red Hook, and any reports made by the FBI to Congress on the FBI's use of these technologies.

(4) As Ordered by the Court on May 7, 2007, this declaration provides the Court and plaintiff with a status of the progress being made by the FBI with regard to plaintiff's FOIA request.

CORRESPONDENCE

(5) See Hardy Declaration, dated February 9, 2007 paragraphs 25-28 and Second Hardy Declaration dated August 3, 2007, paragraphs 5-7, for earlier correspondence.

(6) By letter dated August 27, 2007, FBIHQ released documents to plaintiff, subject to withholdings pursuant to exemptions (b)(1), (b)(2), (b)(6), (b)(7)(C) and (b)(7)(E). Plaintiff was advised that 967 pages had been reviewed and 618 pages were being released. Plaintiff was advised this was the fourth interim release as ordered by the court on May 7, 2007 for documents concerning electronic surveillance systems known as DCS-3000 and Red Hook. FBIHQ stated that a decision had not yet been made concerning plaintiff's request for a fee waiver and that the FBI would be corresponding with plaintiff in the near future on that subject. Further, plaintiff

was advised that pursuant to 28 C.F.R. § 16.11, there is a duplication fee of ten cents per page and that no fees are assessed for the first 100 pages. Plaintiff was further advised that if it is determined that plaintiff does not qualify for a fee waiver, duplication fees would be assessed accordingly. Plaintiff was advised of its right to file an administrative appeal. **(See Exhibit A.)**

(7) By letter dated September 24, 2007, FBIHQ released documents to plaintiff, subject to withholdings pursuant to Exemptions (b)(1), (b)(2), (b)(6), (b)(7)(C) and (b)(7)(E). Plaintiff was advised that 502 pages had been reviewed and 342 pages were being released. Plaintiff was advised that this was the fifth interim release as ordered by the court on May 7, 2007, for documents concerning surveillance systems known as DCS-3000 and Red Hook. Plaintiff was also advised that the number of documents reviewed actually totaled 963 pages and that after a review by the technical operations group that manages the system it was determined that 461 of those pages were not responsive to plaintiff's request. Further, FBIHQ advised plaintiff that a decision had not yet been made concerning plaintiff's request for a fee waiver and that the FBI would be corresponding with plaintiff in the near future on that subject. Further, plaintiff was advised that pursuant to 28 C.F.R. § 16.11, there is a duplication fee of ten cents per page and that no fees are assessed for the first 100 pages. Plaintiff was further advised that if it is determined that plaintiff does not qualify for a fee waiver, duplication fees would be assessed accordingly. **(See Exhibit B.)**

(8) By letter dated October 22, 2007, FBIHQ released documents to plaintiff, subject to withholdings pursuant to Exemptions (b)(1), (b)(2), (b)(5), (b)(6), (b)(7)(C), (b)(7)(D) and (b)(7)(E). Plaintiff was advised that 909 pages had been reviewed and 564 pages were being released. Plaintiff was advised that this was the sixth interim release as ordered by the court on May 7, 2007. Plaintiff was also advised that the number of documents reviewed actually totaled 1,209 pages and that after a review by the technical operations group that manages the system it

was determined that 300 of those pages were not responsive to plaintiff's request. Further, FBIHQ advised plaintiff that a decision had not yet been made with regard to plaintiff's request for a fee waiver and that the FBI would be corresponding with plaintiff in the near future. Plaintiff was further advised that if the FBI determined that plaintiff does not qualify for a fee waiver, duplication fees would be assessed accordingly. (See Exhibit C.)

(9) At this time, approximately 4,825 pages remain to be reviewed and processed. The FBI estimates that the review and processing of these pages will take approximately 24 weeks.¹

CONCLUSION

(10) To date, the FBI has made six (6) interim releases to plaintiff, consisting of 3,119 pages released out of a total of 4,297² pages reviewed. In accordance with the Court Order dated May 7, 2007, the next scheduled release will be November 19, 2007. Approximately 4,825 pages remain to be reviewed and processed, which the FBI anticipates will take the FBI approximately 24 weeks to complete.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct and that Exhibits A through C attached hereto are true and correct copies.

Executed this 30th day of October, 2007.



DAVID M. HARDY
Section Chief
Record/Information Dissemination Section
Records Management Division

¹ The FBI will be able to review and process approximately 800 pages every four (4) weeks. See First Hardy Declaration, ¶ 39.

² This figure does not include 761 pages which were ultimately found to be non-responsive.

**Federal Bureau of Investigation
Washington, D.C.**