

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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ELECTRONIC FRONTIER FOUNDATION,)	
)	
Plaintiff,)	
)	
v.)	Civ. A. No. 1:6-CV-01708 -CKK
)	
U. S. DEPARTMENT OF JUSTICE,)	
)	
Defendant.)	
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SIXTH 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 Federal Bureau of Investigation Headquarters ("FBIHQ") in Washington, D.C. I have held this position since August 1, 2002. Prior to my joining the FBI, from May 1, 2001 to July 31, 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 ("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, and have 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 194 employees who staff a total of ten (10) units and a field operational service center unit whose collective mission is 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 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) This declaration is submitted in support of defendant's position to proceed with a Vaughn declaration based on a sample of documents.

(5) In response to plaintiff's August 11, 2006 FOIA request, the FBI made ten interim releases to plaintiff, consisting of 5,240 pages released out of a total 7,935 pages reviewed. In so doing, the FBI has reviewed and processed all pages responsive to plaintiff's request.

(6) I have been advised that counsel for defendant proposed that in order to resolve the case based on dispositive motions in a manner which would expedite resolution and achieve judicial economy, defendant would submit a Vaughn declaration based on a representative

sample of the documents produced. Defendant has done this in a number of litigations which involve several thousands of pages of documents, such as this one. I am advised that following additional dialogue between counsel for the parties, plaintiff's counsel refused to consent to proceeding based on a Vaughn of a representative sample. Despite plaintiff's lack of consent, the FBI believes that the selection of a representative sample for which the FBI will prepare a Vaughn declaration is the most efficient manner in which to proceed to summary judgment. If defendant had to prepare a Vaughn declaration for all 7,935 pages at issue in this case, we would require 18 months. This is in part due to the complex, technical nature of the documents at issue, as well as several resource constraints, discussed below, which the FBI is presently facing. By contrast, a Vaughn declaration based on a representative sample of documents consisting of approximately 400 pages (5% of the total number of pages) would require three months after the representative sample has been selected.

(7) In addition, the type of information contained in the documents is repetitive in nature so that a Vaughn declaration on the larger set of documents will provide no greater insight for plaintiff and the Court than the proposed sample. In view of the administrative burden for the FBI to prepare and the Court to review a declaration addressing close to 8000 pages, with the declaration itself estimated to be easily over one hundred and fifty pages long, sampling is the most judicially efficient manner in which to resolve this case.

RMD Relocation to Frederick County, Virginia

(8) First, defendant's Records Management Division has been undergoing a gradual relocation to an off-site location some 90 miles outside of Washington, D.C., about 1 ½ hours drive from FBIHQ. RIDS began relocation of its operations in February 2006 by establishing an

advance team to prepare for the eventual relocation of RIDS in incremental stages. The RIDS relocation will be complete effective September 2008, with the final set of personnel scheduled to move on or about September 8, 2008. The decision to locate the permanent FBI Central Records Complex ("CRC") site to Frederick County, Virginia, was recently finalized by the U.S. General Services Administration. The FBI has begun the temporary relocation of RMD sections to interim sites in Frederick County, Virginia, and will continue with a full relocation of its workforce once the permanent CRC is built and ready for occupancy, sometime around the year 2010.

(9) RIDS has made every effort to minimize disruption to operations during this transition period. This has been made all the more challenging as many employees have chosen not to transfer with their unit function, opting to either retire or find other jobs rather than relocate to Frederick County, Virginia. Unfortunately, many of these employees have been among the most senior and experienced in their areas of expertise. Since RMD announced its off-site relocation plans, 140 former RIDS employees have either resigned, retired, or found other jobs in the Washington, D. C. Metropolitan area, rather than relocate with their unit.

(10) In light of this loss of personnel, the FBI is engaged in aggressive and intense recruitment and hiring efforts in the Frederick County, Virginia area. Over 500 potential candidates have been interviewed, with 82 new employees now on board. The new RIDS employees who have less than one year of experience are in various stages of professional development, but none are yet operating as experienced employees. It takes an average of three years to adequately train a new employee in the FOIA/Privacy Act process to be able to work independently in a productive, efficient, and effective manner. Accordingly, RIDS has only a limited number of experienced employees processing FOIA/Privacy Act requests at this time. Even more importantly, the primary Legal Administrative Specialists ("LASs") who are able to

effectively complete a Vaughn declaration addressing the entire 7,935-page collection of documents will have dwindled significantly by September 8, 2008. For example, it is anticipated that after September 8, 2008, the RIDS Unit responsible for preparing the Vaughn declaration in this case, the Litigation Support Unit "LSU," will be comprised of one supervisor, two senior LASs, one experienced LAS, and seven LASs who have been with the FBI and RIDS for two years or less and have just started their litigation training.

LSU's Preparation of the Vaughn Declaration in this Case

(11) Plaintiff is not alone in suing the FBI. The FBI is actively defending numerous other lawsuits in district courts and appellate courts across the country, each with its own set of deadlines. At this time, the FBI is defending 100 FOIA/Privacy Act lawsuits nationwide.

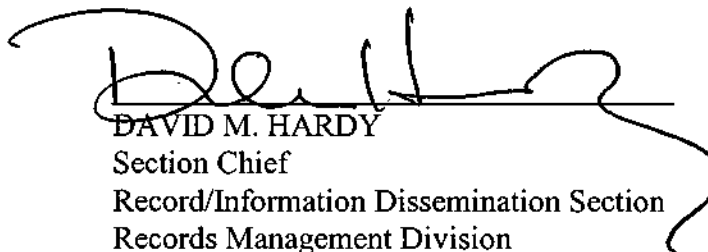
(12) The responsive material in this case consists of complex, scientific information. Accordingly, this litigation, along with the preparation of the Vaughn declaration, has been assigned to a senior LAS, who will be required to engage in numerous consultations with the operational divisions and/or units with substantive knowledge regarding the documents. This LAS's caseload consists of 11 other complex cases currently in litigation. In addition, this senior LAS will have the responsibilities of mentoring the new LASs and, when necessary, serving as the acting supervisor. Under these circumstances, it will take the senior LAS approximately 18 months of full-time work to prepare a Vaughn declaration for the 7,935 pages in this case.

(13) Alternatively, the FBI anticipates that it will require approximately three months after the representative sample has been selected for the senior LAS assigned to this case, who will be required to set aside her other supervisory responsibilities, to prepare a Vaughn declaration for a representative sample of documents consisting of approximately 400 pages (5% of the total number of pages). In light of the technical nature of the documents at issue, as well as the significant resource constraints the FBI's FOIA staff is experiencing at the present time,

sampling is not only more beneficial to the FBI, but also judicially the most efficient manner in which to resolve this case.

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

Executed this 1st day of August, 2008.

A handwritten signature in black ink, appearing to read "D. Hardy", written over a horizontal line. The signature is stylized and extends to the right of the line.

DAVID M. HARDY
Section Chief
Record/Information Dissemination Section
Records Management Division
Federal Bureau of Investigation
Washington, D.C.