



**ELECTRONIC FRONTIER FOUNDATION**

Protecting Rights and Promoting Freedom on the Electronic Frontier

February 5, 2014

**VIA FAX & EMAIL**

Katherine L. Myrick, Chief  
Freedom of Information Operations Unit  
FOI/Records Management Section  
Drug Enforcement Administration  
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**RE: Freedom of Information Act Request and Request for Expedited Processing**

Dear Ms. Myrick:

This letter constitutes an expedited request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and is submitted to the Drug Enforcement Agency (“DEA”) on behalf of the Electronic Frontier Foundation (“EFF”). EFF makes this request as part of its Transparency Project, which works to obtain government records and make those records widely available to the public.

On September 1, 2013, the *New York Times* reported on the existence of a partnership between telecommunications provider AT&T and the DEA known as “Hemisphere.”<sup>1</sup> According to the *New York Times*, the government pays for AT&T employees to be embedded with DEA and local law enforcement agencies across the country in order to facilitate and provide quick access to phone data travelling through AT&T’s communications infrastructure. According to a slide presentation disclosed through public information requests and contained in the article,<sup>2</sup> agents and officers who request information through the “Hemisphere” program are directed not to disclose the existence of the program. The presentation notes the program is used by both state and federal agencies, and contains a number of “success stories” about the use of the program.

Then, during a December 20, 2013 federal court hearing in San Francisco, California, in *United States v. Ortiz, et al.*, 12-CR-0119-SI (N.D. Cal.), it was revealed that local police

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<sup>1</sup> See Scott Shane and Colin Moynihan, “Drug Agents Use Vast Phone Trove, Eclipsing N.S.A.’s,” *New York Times*, September 1, 2013, available at <http://www.nytimes.com/2013/09/02/us/drug-agents-use-vast-phone-trove-eclipsing-nsas.html?pagewanted=all> (last visited February 4, 2014).

<sup>2</sup> See “Synopsis of the Hemisphere Project,” *New York Times*, September 1, 2013, <http://www.nytimes.com/interactive/2013/09/02/us/hemisphere-project.html> (last visited February 4, 2014).

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submitted a request via letter to “Hemisphere” for call records five days before a subpoena was issued by the San Mateo, California County Superior Court authorizing the disclosure of the records, suggesting “Hemisphere” is a way to bypass the traditional subpoena process.<sup>3</sup>

Accordingly, EFF hereby requests the following records:

1. Any and all DEA or Department of Justice (“DOJ”) memoranda, policies, procedures, forms, training and practice manuals concerning the “Hemisphere” program;
2. The case name, docket number, and court of all criminal prosecutions, current or past, in which officers and agents used the “Hemisphere” program to obtain records or data;
3. Any communications or discussions with AT&T or any other telecommunications providers concerning technical or legal difficulties the DEA or DOJ has encountered in obtaining records and data through “Hemisphere;”
4. Any communications or discussions between DEA or DOJ and other law enforcement agencies, including, but not limited to Immigrations and Customs Enforcement (“ICE”), the Federal Bureau of Investigation (“FBI”), state and local law enforcement agencies, and fusion centers related to coordinating or managing the “Hemisphere” program or any data obtained through “Hemisphere;”
5. Any DEA or DOJ contracts or compensation agreements with AT&T or any other telecommunications provider concerning the “Hemisphere” program;
6. Any DEA or DOJ contracts or compensation agreements with fusion centers or local law enforcement agencies to manage or coordinate the “Hemisphere” program and any data obtained through “Hemisphere;” and
7. Any briefings, discussions, or other exchanges between DEA or DOJ officials and members of the Senate or House of Representatives concerning the existence and operation of “Hemisphere.”

### **Request for Expedited Processing**

For the reasons discussed below, a “compelling need” exists for the records sought in this request, and, as such, EFF is entitled to expedited processing under 5 U.S.C. § 552(a)(6)(E)(v)(II) and 28 C.F.R. §§ 16.5(d)(1)(ii) and (iv).

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<sup>3</sup> See Rachel Swan, “The Wireless: Law Enforcement’s Secret Partnership with Phone Companies Makes Everything Transparent Except the Law,” *SF Weekly*, January 15 2014, <http://www.sfweekly.com/2014-01-15/news/hemisphere-at-and-t-wiretapping-gangs/full/> (last visited February 4, 2014).

Expedited Processing under 28 C.F.R. § 16.5(d)(1)(ii)

EFF is entitled to expedited processing because the request pertains to information about which there is an “urgency to inform the public about an actual or alleged federal government activity,” and the request is “made by a person primarily engaged in disseminating information.” 28 C.F.R. § 16.5(d)(1)(ii). The information requested easily satisfies this standard.

First, the records sought by this request undeniably concern a “federal government activity.” *Id.* The records requested here—documents concerning law enforcement’s acquisition of sensitive electronic information from telecommunications providers outside of the standard statutory and judicial process — raises significant issues concerning potential government intrusions into personal affairs and private communications and activities.

Second, there is an “urgency to inform the public” about the government’s activity. *Id.* As recent news articles suggest, it appears DEA is obtaining information from “Hemisphere” outside of the statutory and constitutional procedures that govern law enforcement access to phone records. Clearly, when the government is acting beyond its proscribed powers, an “urgency to inform the public” exists.

Moreover, with the vigorous public debate surrounding electronic surveillance programs, a wealth of bills pending before both the U.S. House of Representatives<sup>4</sup> and the Senate,<sup>5</sup> and the recently issued reports by the President’s Review Group<sup>6</sup> and the Privacy and Civil Liberties Oversight Board (“PCLOB”)<sup>7</sup> over the NSA’s surveillance activities, the

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<sup>4</sup> H.R. 2399 (LIBERT-E Act), H.R. 2440 (FISA Court in the Sunshine Act of 2013), H.R. 2475 (Ending Secret Law Act), H.R. 2586 (FISA Court Accountability Act), H.R. 2603 (Relevancy Act), H.R. 2684 (Telephone Surveillance Accountability Act of 2013), H.R. 2736 (Government Surveillance Transparency Act of 2013), H.R. 2761 (Presidential Appointment of FISA Court Judges Act), H.R. 2818 (To repeal the USA PATRIOT Act and the FISA Amendments Act of 2008), and H.R. 2849 (Privacy Advocate General Act of 2013).

<sup>5</sup> S. 1016 (Preserving Freedom from Unwarranted Surveillance Act of 2013), S. 1121 (Fourth Amendment Restoration Act of 2013), S. 1130 (Ending Secret Law Act), S. 1168 (Restore Our Privacy Act), S. 1182 (A bill to modify the Foreign Intelligence Surveillance Act of 1978), S. 1215 (FISA Accountability and Privacy Protection Act of 2013), S. 1452 (A bill to enhance transparency for certain surveillance programs authorized by the Foreign Intelligence Surveillance Act of 1978), S. 1460 (FISA Judge Selection Reform Act of 2013), and S. 1467 (FISA Court Reform Act of 2013).

<sup>6</sup> “Liberty and Security in a Changing World: Report and Recommendations of The President’s Review Group on Intelligence and Communications Technologies,” December 12, 2013, [http://www.whitehouse.gov/sites/default/files/docs/2013-12-12\\_rg\\_final\\_report.pdf](http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf) (last visited February 4, 2014).

<sup>7</sup> “Report on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court,”

need to inform the public about the operation of domestic electronic surveillance is even more pressing. The information requested will help the public and Congress fully understand the current state of electronic surveillance, allowing for fuller participation in the ongoing debate over whether to expand or restrict the government's collection of electronic data and create new procedures governing access to this information. Delay in processing this FOIA request could inhibit the ability of Congress and the public to fully analyze and debate the implications of any statutory changes currently being debated.

In *ACLU v. Dep't of Justice*, 321 F. Supp.2d 24 (D.D.C. 2004), the court held that impending congressional consideration of expiring PATRIOT Act provisions created a "compelling" need for information concerning the FBI's use of its investigative authorities, ordering expedited processing of a FOIA request as a result. *ACLU*, 321 F. Supp.2d at 30-31. In two recent FOIA cases brought by EFF, the court found that requests warranted expedited treatment where Congress is considering legislation "and the records may enable the public to participate meaningfully in the debate over such pending legislation." *EFF v. ODNI*, 542 F. Supp.2d 1181, 1187 (N.D. Cal. 2008) ("*EFF I*") (citing *EFF v. ODNI*, 2007 WL 4208311 (N.D. Cal. Nov. 27, 2007) (unpublished) ("*EFF I*"). Even though the court could not "predict the timing of passage of the legislation" the court granted expedited processing, holding "that delayed disclosure of the requested materials may cause irreparable harm to a vested constitutional interest in 'the uninhibited, robust, and wide-open debate about matters of public importance that secures an informed citizenry.'" *EFF II*, 542 F. Supp.2d at 1187 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Similarly, there is an urgency to inform the public about the information sought here.

Further, as explained below in support of the request for "news media" treatment, EFF is "primarily engaged in disseminating information" under 28 C.F.R. § 16.11(c)(1)(i).

Therefore, this request meets the standard for expedited processing set forth in 28 C.F.R. § 16.5(d)(1)(ii).

*Expedited Processing under 28 C.F.R. § 16.5(d)(1)(iv)*

EFF is also entitled to expedited processing under 28 C.F.R. § 16.5(d)(1)(iv) because the subject of the request concerns "a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence."

The disclosure of the existence of the "Hemisphere" program has generated "widespread and exceptional media interest." *See, e.g.*, Steven Musil, "DEA Supplied With Access to Vast Database of AT&T Phone Records," *C/NET*, September 2, 2013;<sup>8</sup> James Ball "US

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January 23, 2014, <http://www.pclob.gov/SiteAssets/Pages/default/PCLOB-Report-on-the-Telephone-Records-Program.pdf> (last visited February 4, 2014).

<sup>8</sup> [http://news.cnet.com/8301-13578\\_3-57600982-38/dea-supplied-with-access-to-vast-database-of-at-t-phone-records/](http://news.cnet.com/8301-13578_3-57600982-38/dea-supplied-with-access-to-vast-database-of-at-t-phone-records/) (last visited February 4, 2014).

Drug Agency Partners With AT&T For Access to ‘Vast Database’ of Call Records,” *The Guardian*, September 2, 2013;<sup>9</sup> Mike Levine, “DEA Program Puts Phone Company Inside Government Offices,” *ABC News*, September 1, 2013;<sup>10</sup> Jon Brodtkin, “AT&T Gives DEA 26 Years of Phone Call Records to Wage War on Drugs,” *Ars Technica*, September 3, 2013;<sup>11</sup> Natasha Lennard, “DEA Can Access all AT&T Records,” *Salon*, September 3, 2013;<sup>12</sup> *see also Edmonds v. FBI*, 2002 WL 32539613, \*3 (D.D.C. 2002) (noting “extensive media coverage” satisfied by “numerous newspaper articles in the printed press . . . and on TV”), *rev’d on other grounds* 417 F.3d 1319 (D.C. Cir 2005).

Because the limited information about “Hemisphere” suggests that government surveillance was secretly conducted in violation of the law, the topic necessarily “affect[s] public confidence” in the government’s integrity. 28 C.F.R. § 16.5(d)(1)(iv).

Consequently, the records sought in this request satisfy the requirements for expedited processing under 28 C.F.R. § 16.5(d)(1)(iv).

### **Request for News Media Fee Status**

EFF asks that it not be charged search or review fees for this request because EFF qualifies as a representative of the news media pursuant to the FOIA and 28 C.F.R. § 16.11(b)(6). The Department of Homeland Security and National Security Agency, among other agencies, have recognized that EFF qualifies as a “news media” requester, based upon the publication activities set forth below (*see* DHS stipulation and NSA letter, attached hereto). Moreover, the U.S. Court of Appeals for the D.C. Circuit has stressed “different agencies [must not] adopt inconsistent interpretations of the FOIA.” *Al-Fayed v. CIA*, 254 F.3d 300, 307 (D.C. Cir. 2001) (*quoting Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1287 (D.C. Cir. 1983)).

EFF is a non-profit public interest organization that works “to educate the general public and foster discussion and public policy analysis” regarding “new forms of technology.”<sup>13</sup> To accomplish this goal, EFF routinely and systematically disseminates information in several ways.

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<sup>9</sup> <http://www.theguardian.com/world/2013/sep/02/nsa-dea-at-t-call-records-access> (last visited February 4, 2014).

<sup>10</sup> <http://abcnews.go.com/blogs/headlines/2013/09/dea-program-puts-phone-company-inside-government-offices/> (last visited February 4, 2014).

<sup>11</sup> <http://arstechnica.com/tech-policy/2013/09/att-gives-dea-26-years-of-phone-call-records-to-wage-war-on-drugs/> (last visited February 4, 2014).

<sup>12</sup> [http://www.salon.com/2013/09/03/dea\\_can\\_access\\_all\\_att\\_records/](http://www.salon.com/2013/09/03/dea_can_access_all_att_records/) (last visited February 4, 2014).

<sup>13</sup> Guidestar Nonprofit Report, Electronic Frontier Foundation, <https://www.guidestar.org/organizations/04-3091431/electronic-frontier-foundation.aspx> (last visited February 4, 2014).

First, EFF maintains a frequently visited web site, <http://www.eff.org>, which received 1,314,234 unique visitors in July 2013 — an average of 1,776 per hour. The web site reports the latest developments and contains in-depth information about a variety of civil liberties and intellectual property issues.

Since 1990, EFF has regularly published an online newsletter, the EFFector, which currently has more than 235,000 subscribers. A complete archive of past EFFectors is available at <http://www.eff.org/effector/>. Furthermore, EFF publishes a blog, DeepLinks, which highlights the latest news from around the Internet and reports and analyzes newsworthy developments in technology. DeepLinks can be accessed at <http://www.eff.org/deeplinks/>. In July 2013, DeepLinks had 116,494 unique visitors. EFF also maintains a presence on the social media networks Twitter (more than 168,000 followers), Facebook (more than 67,000 followers), and Google Plus (more than 2,200,000 followers).

In addition to reporting hi-tech developments, EFF staff members have presented research and in-depth analysis on technology issues in no fewer than forty white papers published since 2003. These papers, available at <http://www.eff.org/wp/>, provide information and commentary on such diverse issues as electronic voting, free speech, privacy and intellectual property.

EFF has also published several books to educate the public about technology and civil liberties issues. *Everybody's Guide to the Internet* (MIT Press 1994), first published electronically as *The Big Dummy's Guide to the Internet* in 1993, was translated into several languages, and is still sold online.<sup>14</sup> EFF also produced *Protecting Yourself Online: The Definitive Resource on Safety, Freedom & Privacy in Cyberspace* (HarperEdge 1998), a “comprehensive guide to self-protection in the electronic frontier,” which can be purchased via Amazon.com.<sup>15</sup> Finally, *Cracking DES: Secrets of Encryption Research, Wiretap Politics & Chip Design* (O'Reilly 1998) revealed technical details on encryption security to the public. The book is available online at Amazon.com.<sup>16</sup>

Due to these extensive publication activities, EFF is a “representative of the news media” under the FOIA and agency regulations.

### **Request for a Public Interest Fee Waiver**

EFF is entitled to a waiver of duplication fees because disclosure of the requested information is in the public interest within the meaning of 5 U.S.C. § 552(a)(4)(a)(iii) and

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<sup>14</sup> See <https://mitpress.mit.edu/books/everybodys-guide-internet> (last visited February 4, 2014).

<sup>15</sup> See <http://www.amazon.com/Protecting-Yourself-Online-Definitive-Cyberspace/dp/0062515128> (last visited February 4, 2014).

<sup>16</sup> See <http://www.amazon.com/Cracking-Des-Encryption-Research-Politics/dp/1565925203> (last visited February 4, 2014).

28 C.F.R. § 16.11(k)(1)(i), (ii). To determine whether a request meets this standard, the agency determines whether “[d]isclosure of the requested information . . . is likely to contribute significantly to public understanding of the operations or activities of the government,” 28 C.F.R. § 16.11(k)(1)(i), and whether such disclosure “is not primarily in the commercial interest of the requester.” 28 C.F.R. § 16.11(k)(1)(ii). This request satisfies these criteria.

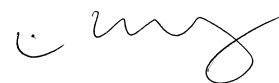
First, the requested records concerning the “Hemisphere” program clearly relate to “the operations or activities of the government.” 28 C.F.R. § 16.11(k)(1)(i). The program is a means by which law enforcement obtains phone record data from AT&T and perhaps other telecommunication providers. Second, disclosure of the requested information will contribute to a public understanding of government operations or activities. *Id.* EFF has requested information that will shed light on the DEA’s relationship with AT&T and potentially other telecommunications providers. This information will contribute not only to EFF’s understanding of current surveillance activities, but to the understanding of a reasonably broad audience of persons interested in the subject. EFF will make the information it obtains under the FOIA available to the public and the media through its web site and newsletter, which highlight developments concerning privacy and civil liberties issues, and/or other channels discussed more fully above. Finally, since only limited information has been made available regarding “Hemisphere,” the disclosure will “contribute significantly” to the public’s knowledge and understanding of surveillance activities – and the legality of that surveillance – undertaken by the federal government, particularly at a time of public debate and reexamination of electronic surveillance law and practice. *Id.*

Furthermore, a fee waiver is appropriate here because EFF has no commercial interest in the disclosure of the requested records. 28 C.F.R. § 16.11(k)(1)(ii). EFF is a 501(c)(3) nonprofit organization, and will derive no commercial benefit from the information at issue here.

Thank you for your consideration of this request. If you have any questions or concerns, please do not hesitate to contact me at (415) 436-9333 x177. As the FOIA provides, I will anticipate a determination on this request for expedited processing within 10 calendar days and a determination with respect to the disclosure of requested records within 20 working days.

I certify that, to the best of my knowledge and belief, all information within this request is true and correct.

Sincerely,



Hanni M. Fakhoury, Esq.  
Staff Attorney

Enclosures