



Electronic Frontier Foundation

Protecting Rights and Promoting Freedom on the Electronic Frontier

February 21, 2012

VIA FAX—(202) 261-8579

Office of Information Programs and Services
A/GIS/IPS/RL
U. S. Department of State
Washington, D. C. 20522-8100

**RE: Freedom of Information Act Request and
Request for Expedited Processing**

Dear Sir or Madam:

This letter constitutes an expedited request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and is submitted to the Department of State on behalf of the Electronic Frontier Foundation (EFF). We make this request as part of EFF's FOIA Litigation for Accountable Government (FLAG) Project, which works to obtain government documents and make them widely available to the public.

In October 2007, the United States Trade Representative (USTR), Ambassador Susan Schwab, and representatives of the European Union (EU) and Japan announced that they would negotiate a new agreement to strengthen international intellectual property enforcement. Formal negotiations began in June 2008, and, ultimately, the parties held eleven rounds of negotiations. In October 2011, eight countries, including the United States, signed the final agreement — the Anti-Counterfeiting Trade Agreement (ACTA).

In January 2012, the EU and 22 member-states signed ACTA. In order for the agreement to become part of EU law, the European Parliament must vote to adopt it. Because ACTA contains criminal measures and because criminal sanctions for intellectual property infringement are not part of the harmonized European Community *acquis*, each EU member-state must ratify the agreement. Following the January 2012 signing, widespread protest and a growing opposition to the agreement has occurred throughout Europe. While the debate on the propriety of ACTA continues in Europe, within the United States, the Office of the USTR has maintained that ACTA is a sole-executive agreement, negotiated under the President's authority; as a consequence of this interpretation, Congressional debate on the agreement has essentially been circumvented entirely.

Prior to the signing of any international agreement by an agency, the Secretary of State (or her designee) must give her approval for the proposed agreement negotiated pursuant to her authorization, and her opinion on any proposed agreement negotiated by an agency which has separate authority to negotiate such agreement. 22 C.F.R. § 181.4(b). This process, known as the "Circular 175 procedure," ensures that all "international agreements of the United States are fully consistent with United States foreign policy objectives." 22 C.F.R. § 181.4(a). The Department of State's Foreign Affairs Manual

provides that “All legal memoranda accompanying Circular 175 requests. . . will discuss thoroughly the legal authorities underlying the type of agreement recommended,” 11 FAM 723.4, ¶ a, 724.3, ¶ h, and the considerations for the recommendation, 11 FAM 723.2, .3. For a full description of the Circular 175 process, please see <http://www.state.gov/s/l/treaty/c175/>.

Accordingly, EFF hereby requests all agency records concerning ACTA either submitted to the State Department or created by the State Department in conjunction with the “Circular 175 procedure,” including:

1. Any Circular 175 Memoranda concerning ACTA, including any attachments or exhibits included with the Circular 175 Memoranda;
2. Any Memoranda of Law concerning ACTA, prepared by the Office of the Legal Adviser, including any attachments or exhibits included with the Memoranda of Law.

Request for Expedited Processing

This request warrants expedited processing because it pertains to information about which there is an “urgency to inform the public concerning an actual or alleged Federal Government activity,” and it is “made by a person primarily engaged in disseminating information.” 5 U.S.C. § 552(a)(6)(E)(i)(II); 22 C.F.R. § 171.12(b)(2).

The federal government activity involved here—the signing of a sweeping international intellectual property agreement—raises significant concerns for consumers’ privacy and civil liberties, for innovation and the free flow of information, and for legitimate commerce on the Internet. The State Department’s analysis and approval of the signing of a significant international agreement is unquestionably an “actual” action of the federal government. *See* 22 C.F.R. § 171(b)(2)(ii).

Moreover, the information sought by this request is “urgently needed,” 22 C.F.R. 171.12(b)(2)(i), in light of the growing discontent surrounding the agreement in the EU and the ongoing breaking news story to which it could contribute. Both domestic and international media groups are closely monitoring the growing opposition to the agreement throughout Europe. *See, e.g., ACTA: Germany Delays Signing Anti-Piracy Agreement*, BBC (Feb. 10, 2012);¹ *ACTA Loses More Support in Europe*, the Guardian (UK) (Feb. 15, 2012);² *A New Question of Internet Freedom*, N.Y. Times (Feb. 5, 2012)³; *Thousands Protest Against ACTA*, Wall Street Journal (Feb. 13, 2012).⁴ A Google News

¹ Available at <http://www.bbc.co.uk/news/technology-16980451>

² Available at <http://www.guardian.co.uk/technology/2012/feb/15/acta-loses-more-support-europe>

³ Available at <http://www.nytimes.com/2012/02/06/technology/06iht-acta06.html>

⁴ Available at <http://blogs.wsj.com/tech-europe/2012/02/13/thousands-protest-against-acta/>

search for “Anti-Counterfeiting Trade Agreement” returned over 4,000 articles, blog posts, or other relevant stories created within the past week. *See* Google News search, attached. As the debate within Europe continues, information concerning the State Department’s view of the proposed agreement is urgently needed in order to better understand the federal government’s position on the agreement and its status under American law.

Notably, the need for expeditious disclosure of information concerning legislation or agreements under immediate consideration by governments is not a novel question. 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 the information. As such, the court ordered expedited processing of a FOIA request seeking that information. Similarly, in two cases involving FOIA requests to the Office of the Director of National Intelligence, the court found irreparable harm exists where Congress is considering legislation “and the records may enable the public to participate meaningfully in the debate over such pending legislation.” *Elec. Frontier Found. v. Office of the Dir. of Nat’l Intelligence*, 542 F. Supp. 2d 1181, 1187 (N.D. Cal. 2008)(citing *Elec. Frontier Found. v. Office of the Dir. of Nat’l Intelligence*, 2007 U.S. Dist. LEXIS 89585 (Nov. 27, 2007)). 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.’” *Id.* (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Although the United States has already signed ACTA, the agreement does not yet have the force of law. And, as recent protests throughout Europe demonstrate, ACTA’s status is far from certain. Thus, as in the cases cited here, there is an urgency to inform the public about the State Department’s interpretation and understanding of ACTA prior to the agreement taking binding and operative legal effect. Therefore, this request readily meets the standard for expedited processing set forth in the FOIA and State Department’s regulations.

Further, as I explain below in support of our request for “news media” treatment, EFF is “primarily engaged in disseminating information.” 5 U.S.C. § 552(a)(6)(E)(i)(II); 22 C.F.R. § 171.12(b)(2).

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 22 C.F.R. § 171.11(o). In requesting this classification, we note that other agencies have recognized that EFF qualifies as a “news media” requester based upon the publication activities set forth below. *See* Department of Homeland Security stipulation attached. In addition, the NSA has previously determined that EFF is not only a “news media requester,” but also “primarily engaged in disseminating information” for purposes of expedited processing. *See* attached NSA response to prior EFF FOIA request.

EFF is a non-profit public interest organization that works “to protect and enhance our core civil liberties in the digital age.”⁵ One of EFF’s primary objectives is “to educate the press, policymakers and the general public about online civil liberties.”⁶ To accomplish this goal, EFF routinely and systematically disseminates information in several ways.

First, EFF maintains a frequently visited web site, <http://www.eff.org>, which received 43,403,630 hits in June 2007 — an average of 60,282 per hour. The web site reports the latest developments and contains in-depth information about a variety of civil liberties and intellectual property issues. EFF posts documents received in response to its FOIA requests here, along with accompanying analysis and commentary. *See* <https://www.eff.org/issues/foia>.

EFF has also regularly published an online newsletter, the EFFector, since 1990. The EFFector currently has more than 140,000 subscribers. A complete archive of past EFFectors is available at <https://www.eff.org/effector/>.

Furthermore, EFF publishes a blog that highlights the latest news from around the Internet. DeepLinks (<https://www.eff.org/deeplinks/>) reports and analyzes newsworthy developments in technology. In addition, EFF uses new media extensively to disseminate information to the public. EFF has almost 52,000 followers on Twitter and sends out hundreds of “tweets” per month with short summaries of EFF blog posts and information on current issues in surveillance, intellectual property, technology and civil liberties. These tweets have links that readers can and regularly do click on for more in-depth coverage. EFF also has 24,000 people who “like” the organization on Facebook and who receive EFF’s blog posts and updates through the site.

In addition to reporting hi-tech developments, EFF staff members have presented research and in-depth analysis on technology issues in no fewer than eighteen white papers published since 2002. 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 by Powell’s Books (<http://www.powells.com>). 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 (<http://www.amazon.com>). Finally, *Cracking DES: Secrets of Encryption Research,*

⁵ Guidestar Basic Report, Electronic Frontier Foundation, <http://www.guidestar.org/pqShowGs> Report.do?npId=561625 (last visited July 10, 2007).

⁶ *Id.*

Wiretap Politics & Chip Design (O'Reilly 1998) revealed technical details on encryption security to the public. The book is available online at <http://cryptome.org/cracking-des.htm> and for sale at Amazon.com.

EFF also broadcasts podcasts of interviews with EFF staff and outside experts. *Line Noise* is a five-minute audio broadcast on EFF's current work, pending legislation, and technology-related issues. A listing of *Line Noise* podcasts is available at <feed://www.eff.org/rss/linenoisemp3.xml> and <feed://www.eff.org/rss/linenoiseogg.xml>.

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 22 C.F.R. § 171.17(a). To determine whether a request meets this standard, the State Department decides whether "[d]isclosure of the requested information is likely to contribute significantly to public understanding of the operations or activities of the government," and whether such disclosure "is not primarily in the commercial interest of the requester." 22 C.F.R. § 171.17(a). This request satisfies the criteria.

First, the State Department's interpretation of a binding international agreement and any Circular 175's drafted in relation to that agreement constitutes "the operations or activities of the Federal government." 22 C.F.R. § 171.17(a)(1)(i).

Second, disclosure of the requested information will contribute significantly "to an understanding of government operations or activities." 22 C.F.R. § 171.17(a)(1)(ii), (iv). EFF has requested information that will shed light on the State Department's understanding and interpretation of ACTA and, in particular, the effect ACTA will have on the domestic legal landscape. This information, which is not in the public domain, has significant informative value and will contribute to public understanding of ACTA's effect on domestic law and its implications for the United State's international obligations. 22 C.F.R. § 171.17(a)(1)(ii), (iv).

Third, the requested material will contribute "to an understanding of the subject by the general public." 22 C.F.R. § 171.17(a)(1)(iii). This information will contribute not only to EFF's understanding of the State Department's interpretation of ACTA, but to the understanding of a reasonably broad audience of persons interested in the subject. EFF has extensive experience in this subject area, and EFF's team of international and domestic attorneys are well-versed in explaining complex legal principles to the public and the media through its web site and newsletter. EFF posts all documents it receives in response to its FOIA requests on its website and also uses this space to regularly highlight developments concerning innovation and civil liberties issues.

Fourth, the disclosure will "contribute significantly" to the public's knowledge and

understanding of the State Department's interpretation of ACTA, the agreement's effect on the domestic legal regime, and the ways in which the agreement will shape the United State's international obligations. 22 C.F.R. § 171.17(a)(1)(iv). Disclosure of the requested information will provide the public with the analytical underpinnings of the State Department's position on the matter, allowing the public to fully understand the scope of the agreement.

Furthermore, a fee waiver is appropriate here because EFF has no commercial interest in the disclosure of the requested records. 22 C.F.R. § 171.17(a)(2). 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 x. 137 or mark@eff.org. As the FOIA and applicable regulations provide, I will anticipate a determination on our request for expedited processing within 10 calendar days and a determination with respect to the disclosure of requested records within 20 working days.

I swear that the information contained within this letter is true and correct to the best of my knowledge.

Sincerely,

Mark Rumold
Open Government Legal Fellow

Attachment(s)