

# **EXHIBIT 2**

**THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

ELECTRONIC FRONTIER FOUNDATION,

Plaintiff,

V.

Civil Action No. C 08-1023 JSW

OFFICE OF THE DIRECTOR OF NATIONAL  
INTELLIGENCE and UNITED STATES  
DEPARTMENT OF JUSTICE,

**Defendants.**

## DECLARATION OF PAUL P. COLBORN

I, Paul P. Colborn, declare the following:

1. I am a Special Counsel in the Office of Legal Counsel (“OLC” or the “Office”), a component of the United States Department of Justice. I joined OLC in 1986 and have had the responsibility since 1987 of supervising OLC’s responses to requests under the Freedom of Information Act (“FOIA”). In connection with that responsibility, I am supervising OLC’s response to the FOIA request submitted to OLC by the plaintiff in the above-captioned action. This declaration is based on personal knowledge and information disclosed to me in my official capacity.

2. On December 21, 2007, OLC received a FOIA request from plaintiff seeking “all agency records from September 1, 2007 to the present concerning briefings, discussions, or other exchanges that the Justice Department officials have had with 1) members of the Senate or House of Representatives and 2) representatives or agents of telecommunications companies

concerning amendments to [the Foreign Intelligence Surveillance Act], including any discussion of immunizing telecommunications companies or holding them otherwise unaccountable for their role in government activities.” (A copy of plaintiff’s request is attached as Exhibit A.) Plaintiff also asked that OLC process the request on an expedited basis pursuant to 28 C.F.R. § 16.5(d)(1)(ii).

3. On January 8, 2008, the Office began searching for documents responsive to plaintiff’s FOIA request both by conducting a keyword search of the central computer database that contains all formal OLC opinions since 1945 and by directly asking attorneys to identify any documents in their files that might be responsive to their request. One day later, on January 9, 2008, OLC issued a letter acknowledging plaintiff’s request and formally granting expedited processing. (A copy of OLC’s January 9 response is attached as Exhibit B.)

4. As soon as the decision was made to expedite plaintiff’s request, it was given priority status and moved to the front of the OLC request queue. Plaintiff’s request is one of two expedited requests currently in the queue, and it has priority over the other expedited request. As such, it is being processed ahead of one expedited and nineteen non-expedited FOIA requests currently pending.

5. Shortly thereafter, a paralegal in the Office initiated keyword searches of the WordPerfect, Microsoft Word, and Microsoft Outlook files of attorneys in the Office who were identified as most likely to have responsive documents. Conducting these keyword searches is a time-intensive process. To perform the searches, OLC must request that the Department’s computer support department—the Justice Consolidated Office Network (“J-CON”)—copy attorneys’ electronic files either to a shared computer drive accessible to OLC personnel or to an individual computer used by an OLC paralegal. Once J-CON copies the relevant files, an

OLC paralegal runs keywords searches of the electronic documents using the “find” or “search” function that is part of WordPerfect, Word, and Outlook. Inevitably, the keyword searches identify more documents than are actually responsive to a FOIA request. To sort responsive and nonresponsive documents, paralegals must open and review each document that contains a search term. If after reviewing a document on their computer screen, the paralegal cannot say with certainty that the document is nonresponsive, the document (and any relevant attachments) is printed for further review by an OLC attorney.

6. OLC is a fairly small office. Currently, the entire Office consists of a chief of staff, three administrative support personnel, four paralegals, and fewer than twenty-five attorneys (including the head of the Office and his deputies). No single person works exclusively on FOIA matters, and those attorneys and paralegals who process FOIA requests for the Office must balance other competing work assignments, including urgent requests for legal advice from other components of the Department and other Executive Branch agencies.

7. Regrettably, before we could complete the processing of plaintiff’s request, the Office had to shift all of its available FOIA resources to completing another, very expansive FOIA request that was already in litigation and subject to a processing deadline of the end of February. Processing this request consumed nearly all of the Office’s available FOIA resources during February 2008. Three paralegals and one attorney spent nearly three weeks collecting, reviewing, and processing more than 15,000 pages of hard-copy and electronic documents that were identified as potentially responsive to that request. As a result, the Office was forced to set aside other FOIA work, including plaintiff’s request.

8. After we finished processing this other FOIA request on February 29, 2008, we immediately returned to plaintiff’s request and devoted appropriate resources to process the

request as soon as practicable. During the first two weeks of March, three paralegals devoted the majority of their time to the matter; as a result, we have made significant progress toward completing processing of plaintiff's request. OLC attorneys have completed searches of their files for potentially responsive documents, and we have completed all keyword searches of the computer database containing the Office's official opinions and the WordPerfect, Microsoft Word, and Microsoft Outlook files of attorneys believed to have potentially responsive documents.


9. To date, we have reviewed more than 5,000 documents (totaling more than 10,000 pages) that were identified (either through electronic keyword searches or by an OLC attorney) as potentially responsive. We have culled this initial group of documents to approximately 2,000 pages, and we are now in the process of reviewing the subgroup of documents more closely—to determine responsiveness, to eliminate duplicates, to assess which, if any, FOIA exemptions may apply, and to identify which documents, if any, should be referred to other agencies for consultations. We anticipate completing this review and issuing at least an interim response by no later than March 25, 2008. Based on a preliminary assessment of the documents, we believe that the interim response will likely address many materials responsive to plaintiff's request. We have, however, already identified a number of documents requiring consultations with other agencies; consequently, a final OLC response will take more time. Additionally, we are currently reviewing a small number of classified documents for potential responsiveness. The potential existence of responsive classified material could contribute significantly to the complexities attendant to processing plaintiff's request. Responsive documents that contain classified information must undergo an additional time-intensive review to ensure that all documents are appropriately classified in accordance with Executive Order 12958, as amended.

Allowing enough time for the agencies to review and provide us their views, as well as to conduct any necessary review of any classified information, OLC anticipates that we could issue a final response to plaintiff's request by April 22, 2008.

10. For the reason's set forth above, plaintiff's request that OLC complete processing its FOIA request within ten days from today's date is not practicable, particularly given the need to consult with other Department components and agencies. OLC is devoting appropriate resources and effort to processing plaintiff's FOIA request as soon as practicable. As noted above, OLC anticipates providing plaintiff with an interim response no later than March 25, 2008, and a final response by April 22, 2008.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 18, 2008.

  
\_\_\_\_\_  
Paul P. Colborn

## EXHIBIT A



**Electronic Frontier Foundation**

**454 Shotwell Street  
San Francisco, CA 94110  
+1 415 436 9333 (tel)  
+1 415 436 9993 (fax)**

**FAX COVER SHEET**

**DATE:** December 21, 2007  
**TO:** Bette Farris, OLC  
**Fax Number:** (202) 514-0563  
**FROM:** Marcia Hofmann, Electronic Frontier Foundation  
**RE:** Freedom of Information Act Request and Request for Expedited Processing  
**Pages sent:** 20 including cover page

**COMMENTS:**

NOTICE This fax is intended for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential, and exempt from disclosure. If you are not the intended recipient or his or her agent, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited and asked to please notify us immediately by telephone. Thank you.

PLEASE CALL IF THERE IS A PROBLEM





Electronic Frontier Foundation

December 21, 2007

VIA FACSIMILE — (202) 514-0563

Bette Farris, Supervisory Paralegal  
Office of Legal Counsel  
Department of Justice  
Room 5515  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530-0001

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

Dear Ms. Farris:

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 Justice Office of Legal Counsel 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.

On August 5, 2007, President Bush signed into law the Protect America Act, legislation which amended the Foreign Intelligence Surveillance Act ("FISA") to expand the government's power to intercept communications without warrants, as well as shield telecommunications companies from future liability for their role in such activity.

Since the passage of this law, the Administration has tried to convince Congress to amend FISA to make it impossible for courts to impose liability on telecommunications companies for participating in a massive and illegal warrantless spying operation conducted by the National Security Agency. *See* Signing Statement, *President Bush Commends Congress on Passage of Intelligence Legislation*, Aug. 6, 2007; James Risen, *Bush Signs Law to Widen Reach for Wiretapping*, *NY Times*, Aug. 6, 2007; Mark Hosenball and Michael Isikoff, *Case Dismissed?: The Secret Lobbying Campaign Your Phone Company Doesn't Want You to Know About*, *Newsweek*, updated Sept. 26, 2007, available at <http://www.newsweek.com/id/41142>; Eric Lichtblau, James Risen and Scott Shane, *Wider Spying Fuels Aid Plan for Telecom Industry*, *NY Times*, Dec. 16, 2007.

We are seeking all agency records from September 1, 2007 to the present concerning briefings, discussions, or other exchanges that Justice Department officials have had with 1) members of the Senate or House of Representatives and 2) representatives or agents of telecommunications companies<sup>1</sup> concerning amendments to FISA, including any discussion of immunizing

<sup>1</sup> The phrase "representatives or agents of telecommunications companies" is intended to include lobbyists and lawyers acting on behalf of such companies. According to Newsweek, these

Freedom of Information Act Request and Request for Expedited Processing  
 December 21, 2007  
 Page 2

telecommunications companies or holding them otherwise unaccountable for their role in government surveillance activities. This request includes, but is not limited to, all e-mail, appointment calendars, telephone message slips, or other records indicating that such briefings, discussions, or other exchanges took place.

### **Request for Expedited Processing**

This request warrants expedited processing because it pertains to information about which there is "[a]n urgency to inform the public about an actual or alleged federal government activity," and it is "made by a person primarily engaged in disseminating information." 28 C.F.R. § 16.5(d)(1)(ii). The information we request easily satisfies this standard.

As an initial matter, it is worth noting that OLA recently granted expedited processing for two FOIA requests nearly identical to this one (see EFF request letters seeking expedited processing and OLA letter granting expedited processing attached hereto).

The federal government activity at issue here — DOJ efforts to secure immunity for telecoms engaged in illegal surveillance — raises serious questions about the DOJ's interests in revision of the FISA. Moreover, the Protect America Act includes a sunset provision requiring Congress to decide within weeks whether to reauthorize the legislation. This decisionmaking process has involved, and will continue to involve, congressional debate about whether to expand the law further, and if so, how much. Because Congress will imminently consider modifying FISA again, there is an urgency to inform the public about the lobbying forces pushing for reform of the law. The information we have requested will help the public and Congress fully participate in the current and ongoing debate over whether the government's authority to conduct electronic surveillance should be further expanded and facilitated by telecommunications companies.

The purpose of this request is to obtain information directly relevant to the DOJ's communications with members of Congress and telecommunications carriers about updating FISA to grant the companies retroactive immunity for illegal activities. There is an urgency to inform the public about the information we seek. Therefore, this request clearly meets the standard for expedited processing set forth in DOJ regulations.

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individuals may include, but are not limited to, "powerhouse Republican lobbyists Charlie Black and Wayne Berman (who represent AT&T and Verizon, respectively), former GOP senator and U.S. ambassador to Germany Dan Coats (a lawyer at King & Spaulding who is representing Sprint), former Democratic Party strategist and one-time assistant secretary of State Tom Donilon (who represents Verizon), former deputy attorney general Jamie Gorelick (whose law firm also represents Verizon) and Brad Berenson, a former assistant White House counsel under President George W. Bush who now represents AT&T." Mark Hosenball and Michael Isikoff, *Case Dismissed?*, *Newsweek*, updated Sept. 26, 2007.

Freedom of Information Act Request and Request for Expedited Processing  
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Further, as I explain below in support of our request for “news media” treatment, EFF is “primarily engaged in disseminating information.”

### **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). In requesting this classification, we note that the Department of Homeland Security and Department of State have recognized that EFF qualifies as a “news media” requester based upon the publication activities set forth below (see DHS stipulation and State Department letter attached hereto). In addition, the National Security Agency 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 EFF FOIA request and NSA response, in which EFF requested expedited processing because it sought information “urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity,” and NSA granted the request). We further note that the U.S. Court of Appeals for the D.C. Circuit has stressed that “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 protect and enhance our core civil liberties in the digital age.”<sup>2</sup> One of EFF’s primary objectives is “to educate the press, policymakers and the general public about online civil liberties.”<sup>3</sup> 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 46,682,194 hits in July 2007 — an average of 62,744 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 has regularly published an online newsletter, the EFFector, since 1990. The EFFector currently has more than 77,000 subscribers. A complete archive of past EFFectors is available at <http://www.eff.org/effector/>.

Furthermore, EFF publishes a blog that highlights the latest news from around the Internet. DeepLinks (<http://www.eff.org/deeplinks/>) reports and analyzes newsworthy developments in

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<sup>2</sup> Guidestar Basic Report, Electronic Frontier Foundation, <http://www.guidestar.org/pqShowGsReport.do?npId=561625> (last visited Dec. 18, 2007).

<sup>3</sup> *Id.*

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technology. It also provides miniLinks, which direct readers to other news articles and commentary on these issues. DeepLinks had 510,633 hits in July 2007.<sup>4</sup>

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, 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.

Most recently, EFF has begun broadcasting 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>. These podcasts were downloaded more than 2,600 times from EFF's in July 2007.

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 28 C.F.R. § 16.11(k). To determine whether a request meets this standard, Department of Justice components determine 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." 28 C.F.R. §§ 16.11(k)(i), (ii). This request clearly satisfies these criteria.

First, the DOJ's relationship with telecommunications companies concerns "the operations or activities of the government." 28 C.F.R. § 16.11(k)(2)(i). Furthermore, the DOJ's push to amend

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<sup>4</sup> These figures include hits from RSS feeds through which subscribers can easily track updates to DeepLinks and miniLinks.

Freedom of Information Act Request and Request for Expedited Processing  
December 21, 2007  
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FISA unquestionably constitutes government operations or activities.

Second, disclosure of the requested information will "contribute to an understanding of government operations or activities." 28 C.F.R. § 16.11(k)(2)(ii) (internal quotation marks omitted). EFF has requested information that will shed light on how and why the DOJ is lobbying to immunize telecommunications companies from liability for their role in conducting illegal surveillance.

Third, the requested material will "contribute to public understanding" of the DOJ's efforts to modify FISA. 28 C.F.R. § 16.11(k)(2)(iii) (internal quotation marks omitted). This information will contribute not only to EFF's understanding of the reasons why and manner in which the DOJ is lobbying for legal reform, 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.

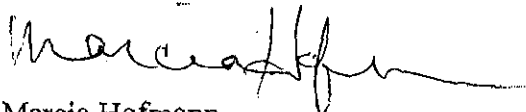
Fourth, the disclosure will "contribute significantly" to the public's knowledge and understanding of the DOJ's push to amend FISA to protect telecommunications companies. 28 C.F.R. § 16.11(k)(2)(iv) (internal quotation marks omitted). Disclosure of the requested information will help inform the public about the Justice Department's efforts to reform the law and the interests behind them, as well as contribute to the public debate about whether FISA should be further modified.

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)(3). EFF is a 501(c)(3) nonprofit organization, and will derive no commercial benefit from the information at issue here.

Under penalty of perjury, I hereby affirm that the foregoing is true and correct to the best of my knowledge.

Thank you for your consideration of this request. As applicable Department regulations provide, we will anticipate your determination within ten (10) calendar days. 28 C.F.R. § 16.5(d)(1). Please be advised that, given the urgency of this matter, EFF intends to seek immediate judicial relief if a response to this request for expedition is not issued in a timely manner.

Sincerely,

A handwritten signature in black ink, appearing to read "Marcia Hofmann", with a long, sweeping horizontal line extending to the right.

Marcia Hofmann  
Staff Attorney

Enclosures



U.S. Department of Justice

Office of Information and Privacy

Telephone: (202) 514-3642

Washington, D.C. 20530

AUG 27 2007

Ms. Marcia Hofmann  
Electronic Frontier Foundation  
Suite 650  
1875 Connecticut Avenue, NW  
Washington, DC 20009

Re: OLA/07-R0909  
OLA/07-R0910  
MLF:JNJ

Dear Ms. Hofmann:

This is to acknowledge receipt of your two letters dated August 16, 2007, which were received in this Office on August 17, 2007, in which you requested all records of communications between the Department of Justice and Congress and between Justice and telecommunications companies from December 2005 to the present concerning amendments to the Foreign Intelligence Surveillance Act. This response is made on behalf of the Office of Legislative Affairs.

I have determined that for purposes of these requests, it is appropriate to afford them expedited processing. At this time, your requests have been assigned to a FOIA Specialist in this Office and a records search has been initiated in the Office of Legislative Affairs.

We have not yet made a decision on your requests for fee waivers. We will do so after we determine whether fees will be assessed for these requests.

If you have any questions or wish to discuss the processing of your requests, you may contact Julie N. Johns, the analyst processing your requests, by telephone at the above number or you may write to her at the above address.

Sincerely,

A handwritten signature in black ink, appearing to read "Carmen L. Mallon", is written over a horizontal line.

Carmen L. Mallon  
Chief of Staff



SEP-10-2007 11:24 From:

7034822144

To: 2027979066

P.2/5

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE  
DIRECTOR OF THE INTELLIGENCE STAFF

Mr. John F. Hackett  
Chief, Information Management Office  
Office of the Director of National Intelligence  
Washington, DC 20511

Ms. Marcia Hofmann  
Electronic Frontier Foundation  
1875 Connecticut Avenue, N.W.  
Suite 600  
Washington, DC 20009

Reference: DF-2007-00079

Dear Ms. Hofmann:

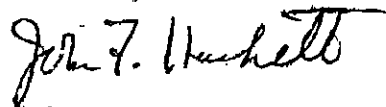
On 4 September 2007 the Office of the Director of National Intelligence received your facsimile dated 31 August 2007, wherein you requested under the Freedom of Information Act (FOIA) records concerning:

**"... ODNI's communications with telecommunications companies about updating FISA to provide them retroactive legal immunity for illegal activities."**

We accept your request and have assigned it the reference number above. Please use this number when corresponding with us so that we can identify it easily. In addition, your request for expedited processing is granted and your request will be processed as soon as practicable.

If you have any questions you may contact the FOIA Requester Service Center at 571-204-4774.

Sincerely,



John F. Hackett  
Director, Information Management Office

SEP-10-2007 11:24 From:

7034822144

To:2027979066

P.3/5

**IMS/IRRG/PIPD/carey/.../6 September 2007**

**Distribution:**

**Orig - Adse**

**1 - PIPD/DF-2007-00079 ACC**

**FOIA\RFC 00079 DNI Hofmann ACC.doc**



SEP-10-2007 11:24 From:

7034822144

To: 2027979066

P. 4/5

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE  
DIRECTOR OF THE INTELLIGENCE STAFF

Mr. John F. Hackett  
Chief, Information Management Office  
Office of the Director of National Intelligence  
Washington, DC 20511

Ms. Marcia Hofmann  
Electronic Frontier Foundation  
1875 Connecticut Avenue, N.W.  
Suite 600  
Washington, DC 20009

Reference: DF-2007-00080

Dear Ms. Hofmann:


On 4 September 2007 the Office of the Director of National Intelligence received your facsimile dated 31 August 2007, wherein you requested under the Freedom of Information Act (FOIA) records concerning:

**"...exchanges that Director McConnell or other ODNI officials have had with members of the Senate or House of Representatives concerning amendments to FISA ..."**

We accept your request and have assigned it the reference number above. Please use this number when corresponding with us so that we can identify it easily. In addition, your request for expedited processing is granted and your request will be processed as soon as practicable.

If you have any questions you may contact the FOIA Requester Service Center at 571-204-4774.

Sincerely,



John F. Hackett  
Director, Information Management Office

SEP-10-2007 11:24 From:

7034822144

To: 2027979066

P.5/5

IMS/IRRG/PIPD/carey/.../6 September 2007

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1 - PIPD/DF-2007-00080 ACC

FOIA\RFC 00080 DNI Hofmann ACC.doc

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC FRONTIER  
FOUNDATION

Plaintiff,

v.

DEPARTMENT OF HOMELAND  
SECURITY,

Defendant.

Civil Action No. 06-1988 (ESH)

**STIPULATED DISMISSAL OF PLAINTIFF'S SECOND CAUSE OF ACTION**

Plaintiff Electronic Frontier Foundation (EFF) and Defendant Department of Homeland Security (DHS), by counsel, hereby stipulate and agree as follows:

1. Defendant DHS has granted news media status to Plaintiff EFF based on the representations contained in EFF's FOIA requests, which demonstrate that EFF is an "entity that is organized and operated to publish or broadcast news to the public." 6 C.F.R. § 5.11(b)(6). Defendant DHS will continue to regard Plaintiff EFF as a "representative of the news media" absent a change in circumstances that indicates that EFF is no longer an "entity that is organized and operated to publish or broadcast news to the public." 6 C.F.R. § 5.11(b)(6).

2. Accordingly, the parties herewith agree to the dismissal of Plaintiff EFF's Second Cause of Action, related to EFF's status as a "representative of the news media."

3. The parties further agree that each will pay its own fees and costs for work on the dismissed claim.

SO STIPULATED AND AGREED this 27<sup>th</sup> day of February, 2007.

Case 1:06-cv-01988-ESH Document 15 Filed 02/27/2007 Page 2 of 2

/s/ David L. Sobel

DAVID L. SOBEL  
D.C. Bar 360418

MARCIA HOFMANN  
D.C. Bar 484136

ELECTRONIC FRONTIER FOUNDATION  
1875 Connecticut Avenue, N.W.  
Suite 650  
Washington, D.C. 20009  
(202) 797-9009

*Counsel for Plaintiff*

PETER D. KEISLER  
Assistant Attorney General

JEFFREY A. TAYLOR  
United States Attorney

ELIZABETH J. SHAPIRO  
D.C. Bar 418925  
Assistant Branch Director  
U.S. Department of Justice  
Civil Division, Federal Programs Branch

/s/ John R. Coleman

JOHN R. COLEMAN  
Trial Attorney  
U.S. Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Avenue, NW, Room 6118  
Washington, D.C. 20530  
(202) 514-4505

*Counsel for Defendant*



**United States Department of State**

*Washington, D.C. 20520*

May 1, 2007

Case Number: 200701765

Ms. Marcia Hofmann  
Electronic Frontier Foundation  
1875 Connecticut Avenue, N.W., Suite 650  
Washington, DC 20009

Dear Ms. Hofmann:

This is in response to your Freedom of Information Act (FOIA) request, dated March 19, 2007 for copies of documents concerning copyright matters between the U.S. and Canada.

We will begin the processing of your request based upon the information provided in your communication. We will notify you as soon as responsive material has been retrieved and reviewed.

We wish to advise you that the cut-off date for retrieving records is either the date you have given the Department by specifying a particular time frame or the date the search is initiated.

**Fees:** The Freedom of Information Act requires agencies to assess fees to recover the direct costs of processing requests, unless a fee waiver has been granted.

By making a FOIA request, you have agreed to pay all applicable fees up to \$25.00 unless a fee waiver has been granted. You may

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Office of Information Programs and Services  
U.S. Department of State SA-2  
Washington, DC 20522-8100  
Web site: [foia.state.gov](http://foia.state.gov)

Inquiries: 1-202-261-8484  
FAX: 1-202-261-8579  
email: [FOIAStatus@state.gov](mailto:FOIAStatus@state.gov)

-2-

specify a willingness to pay a greater or lesser amount. If the estimated fees exceed this limit, you will be notified.

Based upon the information that you have provided, we have placed you in the "news media" requester category. This category requires us to assess:

- duplication costs after first 100 pages.(see 22 CFR 171, enclosed)

Therefore, without an agreement to pay fees please be advised that your request will be processed without cost up to the required duplication of the first 100 pages.

Please let us know if you are willing to pay the fees that will incurred in the processing of your request. You may set a limit of the maximum amount that you wish to pay.

Based upon the information provided in your letter, your request for a fee waiver has been denied. If you wish to appeal this decision, you may write to the Chief, Requester Liaison Division, at the address given on the bottom of this page. Your appeal should address the points listed in the enclosed sheet entitled "Requests for Fee Waivers." Your appeal must be sent to us within 30 days from the date that you receive this letter.

While we will make every effort to meet the time limits cited in the Freedom of Information Act (5 USC § 552), unusual circumstances

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Office of Information Programs and Services  
U.S. Department of State SA-2  
Washington, DC 20522-8100  
Web site: [foia.state.gov](http://foia.state.gov)

Inquiries:  
Phone: 1-202-261-8484  
FAX: 1-202-261-8579  
email: [FOIAStatus@state.gov](mailto:FOIAStatus@state.gov)

- 3 -

may arise for extending the time limit (see enclosure). We appreciate your patience in this matter.

If you have any questions, please do not hesitate to contact us. We can provide faster service if you include the case number of your request in your communications with us.

We are pleased to be of service to you.

Sincerely,



Katrina M. Wood  
Requester Communications Branch

Enclosure: As stated.



**Electronic Frontier Foundation**  
Protecting Rights and Promoting Freedom on the Electronic Frontier

January 23, 2007

**BY FACSIMILE — (301) 688-4762**

National Security Agency  
ATTN: FOIA Office (DC34)  
9800 Savage Road STE 6248  
Ft. George G. Meade, MD 20755-6248

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 National Security Agency 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.

On January 9, 2007, the Washington Post reported:

When Microsoft introduces its long-awaited Windows Vista operating system this month, it will have an unlikely partner to thank for making its flagship product safe and secure for millions of computer users across the world: the National Security Agency.

For the first time, the giant software maker is acknowledging the help of the secretive agency, better known for eavesdropping on foreign officials and, more recently, U.S. citizens as part of the Bush administration's effort to combat terrorism. The agency said it has helped in the development of the security of Microsoft's new operating system -- the brains of a computer -- to protect it from worms, Trojan horses and other insidious computer attackers.

Alec Klein and Ellen Nakashima, "For Windows Vista Security, Microsoft Called in Pros," *Washington Post*, Jan. 9, 2007, at D01 (attached hereto).

We are seeking all agency records (including, but not limited to, electronic records) related to the NSA's review of and input on the configuration of the Microsoft Windows Vista operating system ("Vista").



### **Request for Expedited Processing**

This request warrants expedited processing because it pertains to information that "is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity." 32 CFR § 286.4(d)(3)(ii). According to DOD regulations, information is "urgently needed" when it "has a particular value that will be lost if not disseminated quickly. Ordinarily this means a breaking news story of general public interest." 32 CFR § 286.4(d)(3)(ii)(A). The information we request easily satisfies this standard.

The government activity at issue here — the NSA's involvement in the configuration of Microsoft's latest operating system — raises serious questions about the Department of Defense's interest in Vista's development. Indeed, the NSA's involvement in the system's configuration has already attracted substantial media interest since the publication of the *Washington Post* story. Specifically, a Google News search for "Vista and 'National Security Agency'" returned 67 results from news outlets throughout the world since January 9, 2007 (see first page of Google News search results attached hereto).

Furthermore, the *Washington Post* reported that Microsoft plans to make Vista available to consumers on January 30, 2007, and the system will likely be used by more than 600 million computer users by 2010. Thus, the information we request is unquestionably the subject of a breaking news story of general public interest particularly in the days leading to the product launch.

The purpose of this request is to obtain information directly relevant to the NSA's involvement in Vista's development, which has attracted considerable interest from the press and public in the past several days. The information we request is the subject of a breaking news story of general public interest, and therefore clearly meets the standard for expedited processing set forth in DOD regulations.

Further, as I explain below in support of our request for "news media" treatment, EFF is "primarily engaged in disseminating information."

### **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 32 C.F.R. § 286.28(e)(7). In requesting this classification, we note that the Department of Homeland Security has recognized that EFF qualifies as a "news media" requester, based upon the publication activities set forth below (see DHS letter, attached hereto). We further note that the U.S. Court of Appeals for the D.C. Circuit has stressed that "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).



**NATIONAL SECURITY AGENCY  
CENTRAL SECURITY SERVICE**  
FORT GEORGE G. MEADE, MARYLAND 20785-6000

FOIA Case: 52276  
6 February 2007

Ms. Marcia Hofmann  
Electronic Frontier Foundation  
1875 Connecticut Avenue, NW  
Suite 650  
Washington, DC 20009

Dear Ms. Hofmann:

This is an initial response to your Freedom of Information Act (FOIA) request submitted via facsimile on 23 January 2007, which was received by this office on 24 January 2007, for all agency records (including, but not limited to, electronic records) related to the NSA's review of and input on the configuration of the Microsoft Windows Vista operating system ("Vista"). Your request has been assigned Case Number 52276.

As we began to process your request, we realized that the first page of the actual request was missing from your 18-page facsimile package. On 1 February 2007, a member of my staff contacted you to advise you of this fact. As a result, you submitted another facsimile of your original five-page request, which we received and have begun to process. There is certain information relating to this processing about which the FOIA and applicable Department of Defense (DoD) and NSA/CSS regulations require we inform you.

For purposes of this request and based on the information you provided in your letter, you are considered a representative of the media. Unless you qualify for a fee waiver or reduction, you must pay for duplication in excess of the first 100 pages. Your request for a fee waiver has been granted. In addition, please be advised your request for expedited treatment has been accepted. We are currently in the process of searching for responsive documents and will notify you of the status of your request as soon as that search has been completed.

Correspondence related to your request should include the case number assigned to your request, which is included in the first paragraph of this letter. Your letter should be addressed to National Security Agency, FOIA Office

FOIA Case: 52276

(DC34), 9800 Savage Road STE 6248, Ft. George G. Meade, MD 20755-6248 or may be sent by facsimile to 443-479-3612. If sent by fax, it should be marked for the attention of the FOIA office. The telephone number of the FOIA office is 301-688-6527.

Sincerely,

*for Marianne Stupar*

PAMELA N. PHILLIPS  
Chief  
FOIA/PA Office

## EXHIBIT B



U.S. Department of Justice

Office of Legal Counsel

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Washington, D.C. 20530

January 9, 2008

Marcia Hofmann  
Electronic Frontier Foundation  
454 Shotwell Street  
San Francisco, CA 94110

Dear Ms. Hofmann:

This is to acknowledge receipt of your Freedom of Information Act (FOIA) request dated December 21, 2007.

You have requested expedited processing of your request pursuant to the Department's standards permitting expedition for requests involving "[a]n urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information." *See* 28 C.F.R. § 16.5(d)(1)(ii). Based on the information you have provided, I have determined that your request for expedited processing under these standards should be granted. Your request has been assigned to a FOIA Specialist and searches have been initiated.

In an effort to speed up our searches, you may wish to narrow the scope of your request to limit the number of potentially responsive records. If you have any questions or wish to discuss the processing of your request, you may contact Bette Farris at 202-514-2038.

Sincerely,

A handwritten signature in black ink that reads "Bradley T. Smith".

Bradley T. Smith  
Attorney-Adviser