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20 **UNITED STATES DISTRICT COURT**
21 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

| | | |
|---------------------------------------|---|-------------------------------------|
| 22 ELECTRONIC FRONTIER FOUNDATION, |) | NO. C 07-5278 EMC |
| |) | |
| 23 Plaintiff, |) | DECLARATION OF MARCIA |
| |) | HOFMANN IN SUPPORT OF MOTION |
| 24 v. |) | FOR PRELIMINARY INJUNCTION |
| |) | |
| 25 OFFICE OF THE DIRECTOR OF NATIONAL |) | Date: |
| 26 INTELLIGENCE, |) | Time: |
| |) | Courtroom: |
| 27 Defendant. |) | |
| |) | |
| |) | |
| |) | |

28 1. I am an attorney of record for the plaintiff in this matter and a member in good standing of the California State Bar, and am admitted to practice before this Court. I have personal knowledge of the matters stated in this declaration. If called upon to do so, I am competent to testify to all matters set forth herein.

2. Plaintiff Electronic Frontier Foundation (“EFF”) is a non-for-profit corporation

1 established under the laws of California with its principal place of business in San Francisco.

2 3. Attached hereto as Exhibit A is a true and correct copy of the following newspaper
3 article: James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y.
4 TIMES, Dec. 16, 2005, available at <http://www.nytimes.com/2005/12/16/politics/16program.html>
5 (subscription required).

6 4. Attached hereto as Exhibit B is a true and correct copy of the following webpage:
7 President's Radio Address, Dec. 17, 2005, available at
8 <http://www.whitehouse.gov/news/releases/2005/12/20051217.html>.

9 5. Attached hereto as Exhibit C is a true and correct copy of the following newspaper
10 article: Eric Lichtblau, *Spy Agency Mined Vast Data Trove, Officials Report*, N.Y. TIMES, Dec. 24,
11 2005, available at <http://www.nytimes.com/2005/12/24/politics/24spy.html> (subscription required).

12 6. Attached hereto as Exhibit D is a true and correct copy of the following newspaper
13 article: Leslie Cauley and John Diamond, *Telecoms Let NSA Spy on Calls*, USA TODAY, Feb. 6,
14 2006, available at http://www.usatoday.com/news/washington/2006-02-05-nsa-telecoms_x.htm.

15 7. Attached hereto as Exhibit E is a true and correct copy of the following newspaper
16 article: James Risen, *Bush Signs Law to Widen Reach for Wiretapping*, N.Y. TIMES, Aug. 5, 2007,
17 available at <http://www.nytimes.com/2007/08/06/washington/06nsa.html> (subscription required).

18 8. Attached hereto as Exhibit F is a true and correct copy of the following presidential
19 signing statement: *President Bush Commends Congress on Passage of Intelligence Legislation*,
20 Aug. 6, 2007, available at <http://www.whitehouse.gov/news/releases/2007/08/20070805.html>.

21 9. Attached hereto as Exhibit G is a true and correct copy of the following newspaper
22 article: Chris Roberts, *Transcript: Debate on the Foreign Intelligence Surveillance Act*, EL PASO
23 TIMES, Aug. 22, 2007 available at http://www.elpasotimes.com/news/ci_6685679.

24 10. Attached hereto as Exhibit H is a true and correct copy of the following magazine
25 article: Mark Hosenball and Michael Isikoff, *Case Dismissed?: The Secret Lobbying Campaign*
26 *Your Phone Company Doesn't Want You to Know About*, NEWSWEEK, updated Sept. 26, 2007,
27 available at <http://www.newsweek.com/id/41142>.

28 11. Attached hereto as Exhibit I is a true and correct copy of the following bill currently

1 pending before the Senate: Foreign Intelligence Surveillance Act of 1978 Amendments Act of
2 2007, S. 2248, 110th Cong. (introduced Oct. 18, 2007).

3 12. Attached hereto as Exhibit J is a true and correct copy of the following news article:
4 Tim Starks, *Senate Panel OKs Surveillance Bill*, CQ TODAY, Oct. 18, 2007, available at
5 <http://public.cq.com/docs/cqt/news110-000002608382.html>.

6 13. On August 31, 2007, I submitted a letter to the Office of the Director of National
7 Intelligence (“ODNI”) under the Freedom of Information Act (“FOIA”) seeking “all agency
8 records from April 2007 to the present concerning briefings, discussions, or other exchanges that
9 Director McConnell or other ODNI officials have had with representatives of telecommunications
10 companies concerning amendments to FISA, including any discussion of immunizing such
11 companies or holding them otherwise unaccountable for their role in government surveillance
12 activities.” EFF asked for expedited processing of this request because it pertains to information
13 about which there is “[a]n urgency to inform the public about an actual or alleged Federal
14 Government activity,” and it is “made by a person primarily engaged in disseminating
15 information.” A true and correct copy of this letter is attached hereto as Exhibit K.

16 14. On August 31, 2007, I submitted a second letter to ODNI under the FOIA seeking “all
17 agency records from April 2007 to the present concerning briefings, discussions, or other
18 exchanges that Director McConnell or other ODNI officials have had with members of the Senate
19 or House of Representatives concerning amendments to FISA, including, but not limited to, any
20 discussion of immunizing telecommunications companies or holding them otherwise
21 unaccountable for their role in government surveillance activities.” EFF also sought expedited
22 processing of this request because it pertains to information about which there is “[a]n urgency to
23 inform the public about an actual or alleged Federal Government activity,” and it is “made by a
24 person primarily engaged in disseminating information.” A true and correct copy of this letter is
25 attached hereto as Exhibit L.

26 15. By facsimiles transmitted on September 10, 2007, ODNI acknowledged receipt of
27 EFF’s requests and granted them expedited processing. True and correct copies of these facsimiles
28 are attached hereto as Exhibits M & N.

1 16. Notwithstanding ODNI's purported decision to grant expedited processing EFF's
2 August 31, 2007, FOIA requests, the agency has neither completed the processing of the requests
3 nor informed EFF of an anticipated date for the completion of such processing.

4 17. On October 22, 25, and 26, 2007, I contacted counsel for Defendant ODNI to explore
5 the possibility of negotiating a processing schedule for EFF's FOIA requests to eliminate the need
6 for further action in this case. I explained that legislation had been introduced and approved on
7 October 18, 2007 in the Senate Select Committee on Intelligence that is closely related to the
8 subject matter of the records underlying this case, and that Senate Majority Leader Harry Reid has
9 publicly stated that he intends for the bill to reach the Senate floor by mid-November. I told
10 opposing counsel that this development has significantly increased the urgency for the public to
11 obtain the records sought from ODNI, and that EFF would consider seeking preliminary injunctive
12 relief if the parties cannot reach an agreement to process EFF's requests in a timely manner. ODNI
13 has never responded to these communications.

14 18. Unless ODNI is ordered to process EFF's FOIA requests immediately, EFF's right to
15 expedition under the FOIA will be irretrievably lost, resulting in irreparable injury to EFF.

16 19. Any further delay in the processing of EFF's August 31, 2007 FOIA requests will
17 irreparably harm EFF's ability, and that of the public, to obtain in a timely fashion information
18 vital to the current and ongoing debate surrounding whether, and how, foreign intelligence
19 surveillance law should be amended, especially with regard to providing legal immunity to
20 telecommunications carriers for their past participation in unlawful government surveillance
21 operations.

22 20. Without expedited access to the information to which it is legally entitled, EFF's
23 ability to engage in an urgent and current public debate will be irretrievably lost.

24 21. Attached hereto as Exhibit O is a true and correct copy of *Electronic Frontier*
25 *Foundation v. Dep't of Justice*, No. 07-0656, slip op. (D.D.C. June 16, 2007).

26 22. Attached hereto as Exhibit P is a true and correct copy of ODNI's most recent annual
27 FOIA processing statistics: U.S. Office of the Director of National Intelligence, Freedom of
28 Information Act Report for Fiscal Year 2006, Compliance with Time Limits/Status of Pending

1 Requests, *available at* http://www.odni.gov/ODNI_FY06_Annual_FOIA.pdf.

2 I declare under penalty of perjury of the laws of the State of California that the foregoing is
3 true and correct to the best of my knowledge and belief. Executed October 29, 2007 in San
4 Francisco, California.

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6 By _____ /s/
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