

# **EXHIBIT 4**

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

ELECTRONIC FRONTIER  
FOUNDATION,

Plaintiff,

v.

OFFICE OF THE DIRECTOR OF  
NATIONAL INTELLIGENCE

and

UNITED STATES DEPARTMENT OF  
JUSTICE,

Defendants.

Civil Action No. 08-1023 (JSW)

DECLARATION OF THOMAS E. HITTER

I, Thomas E. Hitter, declare the following to be true and correct:

1) I am an Attorney-Advisor with the Office of Information and Privacy (OIP), United States Department of Justice. In this capacity, I am responsible for reviewing the actions of the Initial Request (IR) Staff before release determinations are made. The IR Staff is responsible for searching for and reviewing records within OIP and the senior leadership offices of the Department of Justice, including the Offices of the Attorney General, Legal Policy, and Legislative Affairs, in response to requests made under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121

Stat. 2524. The IR Staff determines whether records responsive to access requests exist and, if so, whether they can be released in accordance with the FOIA. In processing such requests, the IR Staff consults with personnel in the senior leadership offices and, when appropriate, with other components within the Department of Justice as well as with other Executive Branch entities.

2) I make the statements herein on the basis of my personal knowledge, as well as on information that I acquired while performing my official duties.

3) As previously stated in Melanie Ann Pustay's declaration dated March 18, 2008 [hereinafter Pustay Declaration], which is hereby incorporated by reference, by letters dated December 21, 2007, Marcia Hofmann, on behalf of plaintiff Electronic Frontier Foundation, submitted three FOIA requests to OIP for records from the Offices of the Attorney General, Legal Policy, and Legislative Affairs "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 concerning amendments to FISA, including any discussion immunizing telecommunications companies or holding them otherwise unaccountable for their role in government surveillance activities," (footnote omitted). Plaintiff also requested expedited processing and a fee waiver. OIP received the request on December 27, 2007. (See Pustay Declaration, attached hereto as Exhibit A.)<sup>1</sup>

4) On April 4, 2008, the Court in the above-captioned matter granted plaintiff's motion

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<sup>1</sup> The Pustay Declaration addresses OIP's acknowledgment of these requests, searches for responsive records, and processing of plaintiff's request through March 18, 2008.

for a preliminary injunction. The Court ordered defendants to “respond to Plaintiff’s FOIA request and provide an initial release of documents no later than April 17, 2008.” The Court further ordered defendants “to provide a final release of all responsive, non-exempt documents no later than April 21, 2008.” The Court also directed the defendants to “file with the Court and serve upon Plaintiff’s counsel, an affidavit or declaration attesting to Defendants’ compliance and setting forth the basis for withholding any responsive documents it does not release,” by April 21, 2008. This declaration is provided to the Court and plaintiff, pursuant to this order.<sup>2</sup>

5) As stated in the Pustay Declaration, OIP’s search located 147 documents, totaling 1552 pages, in the Office of Legislative Affairs (OLA) that were potentially responsive. Also, nine documents, totaling 233 pages, of potentially responsive material were located in the Office of Legal Policy (OLP). Lastly, 355 documents, totaling 913 pages, of potentially responsive material were located in the Office of the Attorney General.

6) Throughout the pendency of this litigation, OIP has continued to review the universe of material initially located and identified as responsive. We have determined that many of the records located are not, in fact, responsive to plaintiff’s FOIA request. In those instances, non-responsive documents were removed or the non-responsive portions, of otherwise responsive documents, have been blacked-out and only the responsive portions of the documents have been processed. Furthermore, many pages were found duplicative, and were removed accordingly.

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<sup>2</sup> OIP submits this declaration without prejudice to its rights to provide additional information regarding the processing of Plaintiff’s FOIA request or the reasons for any withholdings. OIP specifically reserves the right to submit additional information in summary judgment or other subsequent proceedings in this case.

7) By letter dated April 3, 2008, OIP released to plaintiff, one document, consisting of five pages, without excision.

8) By memorandum dated April 4, 2008, OIP referred six documents, totaling 141 pages, to the Department of Justice's National Security Division (NSD) for processing and direct response to plaintiff. Please refer to the declaration of GayLa D. Sessoms (NSD) regarding the processing of these documents.

9) By memorandum dated April 4, 2008, OIP referred three documents, totaling nine pages, to the Department of Justice's Civil Division for processing and direct response to plaintiff. Please refer to the declaration of James M. Kovakas (Civil Division) regarding the processing of these documents.

10) By memorandum dated April 4, 2008, OIP referred three documents, totaling nine pages, to the Office of the Director of National Intelligence (ODNI) for processing and direct response to plaintiff. Please refer to the declaration of John F. Hackett (ODNI) regarding the processing of these documents.

11) By memorandum dated April 4, 2008, OIP referred two classified documents, totaling fifteen pages, to the Federal Bureau of Investigation (FBI) for processing and direct response to plaintiff. Please refer to the declaration of David M. Hardy (FBI) regarding the processing of these documents.

12) By letter dated April 21, 2008, OIP provided plaintiff with a final response to its FOIA requests. OIP released fifty-two documents, totaling 293 pages, in their entirety, and two documents, totaling three pages, were released with excisions made pursuant to Exemptions 2 and 5 of the FOIA, 5 U.S.C. § 552(b)(2) and (5). OIP also informed plaintiff that the responsive

portions of one document, totaling two pages, was being withheld pursuant to FOIA Exemption 5 and the remaining portions were not responsive to the request. The responsive portions of this document consists of electronic mail (e-mail messages) in which Department of Justice officials discuss the positions certain senators have taken on proposed amendments to the Foreign Intelligence Surveillance Act. Accordingly, a copy of this two-page document was withheld in full.

13) With respect to the information withheld pursuant to FOIA Exemption 2, which protects information related solely to the internal personnel rules and practices of an agency, redactions were made on document number OLA-90 which consists of one page. The redacted information consists of contact information of intelligence agency employees. This information was withheld at the request of the ODNI.

14) With respect to the information withheld pursuant to FOIA Exemption 5, which pertains to certain inter- and intra-agency communications protected by the deliberative process privilege, redactions were made on document number OAG-22 which consists of two pages. The redacted information consists of a brief analysis between Department personnel regarding testimony before Congress. This withholding was made on behalf of the Department's Office of Legal Counsel.

15) In addition to the documents found by OIP during the course of its search, as explained further below, OIP received referrals of documents from three agencies for processing and direct response to plaintiff. By electronic mail (e-mail) message sent April 4, 2008, the NSD forwarded nine documents, totaling thirty-two pages, to OIP for processing and direct response to plaintiff. Upon review, OIP determined that seven of these documents, totaling twenty-eight

pages, were duplicates of documents located during OIP's search, and were being processed pursuant to the request to OIP. The remaining two documents, totaling four pages, were released in full to plaintiff in OIP's letter dated April 21, 2008.

16) By Facsimile dated April 18, 2008, the NSD, on behalf of the Office of Legal Counsel, forwarded one classified document, totaling three pages, to OIP for processing and direct response to plaintiff. This document was released in part to plaintiff in OIP's letter dated April 21, 2008, with excisions made by NSD pursuant to Exemption 1 of the FOIA, 5 U.S.C. § 552(b)(1). It is my understanding that the withheld information is currently and properly classified under Executive Order 12958, as amended. Specifically, it is my understanding that the withheld information contained in these documents meets the criteria for classification as set forth in subparagraphs (c) and (g) of Section 1.4 of Executive Order 12958, as amended, which authorizes the classification of information concerning "intelligence activities (including special activities), intelligence sources or methods, or cryptology," and "vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection systems relating to national security, which includes defense against transnational terrorism." It is my understanding that the withheld information is classified at the secret and top secret levels, which means that its unauthorized disclosure could reasonably be expected to cause serious and in some instances exceptionally grave damage to the national security of the United States. It is also my understanding that none of the information being withheld is appropriate for discretionary release. Additionally, it is my understanding that the withheld information is protected from disclosure pursuant to other statutes, in this instance, 50 U.S.C. § 403-1(i), 18 U.S.C. § 798, and 50 U.S.C. § 402 note and is therefore also withheld pursuant to Exemption 3.

17) By e-mail message sent April 15, 2008, the ODNI forwarded one document, totaling one page, for processing and direct response to plaintiff. In its letter dated April 21, 2008, OIP advised plaintiff that the referred document is being withheld in its entirety pursuant to Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5) which pertains to certain inter- and intra-agency communications protected by the presidential communications privilege. This document is an e-mail from a Department of Justice official written to several White House officials providing a candid analysis of and comments on, a briefing given to certain members of Congress regarding amendments to the FISA. The underlying purposes of the presidential communications privilege are the same as those of the deliberative process privilege, but they take on a distinct significance at the level of presidential decisionmaking. Advisers must feel free to give the most candid and thorough advice possible in order for the President's decisionmaking process to be effective. The President is the ultimate decisionmaker on Executive Branch positions regarding amendments to the FISA. He, and his advisors must be free to solicit the advice of the Department of Justice without fear of those communications being disclosed. Because the protected document was sent by a high-ranking Department of Justice official to the White House regarding a presidential decision, the document and a description of the document are protected by the presidential communications privilege and, as such, the document is exempt in full and contains no reasonably segregable, non-exempt information.

18) In sum, OIP has released fifty-fifty documents in full, three in part, withheld two documents in their entirety, and referred fourteen documents to other offices for processing and direct response to the requester. The processing of plaintiff's request is complete.



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

  
THOMAS E. HITTER

Executed this 21<sup>st</sup> day of April, 2008.

# **EXHIBIT A**

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

ELECTRONIC FRONTIER  
FOUNDATION,

Plaintiff,

v.

OFFICE OF THE DIRECTOR OF  
NATIONAL INTELLIGENCE

and

UNITED STATES DEPARTMENT OF  
JUSTICE,

Defendants.

Civil Action No. 08-1023 (JSW)

DECLARATION OF MELANIE ANN PUSTAY

I, Melanie Ann Pustay, declare the following to be true and correct:

1) I am the Director of the Office of Information and Privacy (OIP), United States Department of Justice. In this capacity, I am responsible for overseeing the actions of the Initial Request (IR) Staff. The IR Staff is responsible for searching for and reviewing records of the Senior Leadership Offices of the Department of Justice, including the Offices of the Attorney General, Legal Policy, and Legislative Affairs, in response to requests made under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2000 & Supp. IV 2004). The IR Staff determines whether records responsive to access requests exist and, if so, whether they can be released in

accordance with the FOIA. In processing such requests, the IR Staff consults with personnel in the senior leadership offices and, when appropriate, with other components within the Department of Justice, as well as with other Executive Branch agencies.

2) I make the statements herein on this basis of my personal knowledge, as well as on information that I acquired while performing my official duties.

OIP's Processing of Plaintiff's Requests

3) By letters dated December 21, 2007, Marcia Hofmann, on behalf of plaintiff Electronic Frontier Foundation, submitted three FOIA requests to OIP for records from the Offices of the Attorney General, Legal Policy, and Legislative Affairs dated "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 concerning amendments to FISA, including any discussion of immunizing telecommunications companies or holding them otherwise unaccountable for their role in government surveillance activities" (footnote omitted). Plaintiff also requested expedited processing and a fee waiver. OIP received the request on December 27, 2007. (Copies of plaintiff's three initial request letters are attached hereto as Exhibit A.)

4) By letter dated December 28, 2007, OIP acknowledged receipt of plaintiff's FOIA requests and granted plaintiff's request for expedited processing. Plaintiff was advised that searches had been initiated in the Offices of the Attorney General, Legal Policy, and Legislative Affairs. OIP also advised plaintiff that we were deferring a decision on its fee waiver request until we determined whether any fees would be incurred in the processing of plaintiff's requests. (A copy of OIP's December 28, 2007 letter is attached hereto as Exhibit B.)

5) As soon as plaintiff's requests were granted expedited processing, each request was given priority at OIP and moved ahead of requests received at an earlier date in OIP's regular queue. Pursuant to Department of Justice regulation 28 C.F.R. § 16.5(d)(4) (2007) these requests are being processed as soon as practicable.

6) By memoranda dated December 28, 2007, records searches were initiated in the Offices of the Attorney General, Legal Policy, and Legislative Affairs. These Offices were advised that the requests had been granted expedited processing. The practice for these three Offices is to notify each individual staff member in that Office of the receipt of OIP's memoranda requesting that a search be conducted, and each staff member's files, both paper and electronic, are then searched as necessary for records responsive to the request. A search of this nature typically involves hand searches of large paper files, as well as a vast number of e-mail files. Furthermore, because the files at issue are current, they were physically located in the individual offices of senior Department officials. Most of these officials personally conducted the search for any responsive records that they might possess. While the officials in these Offices make every effort to respond to our search memoranda in a timely fashion, it is not always possible for senior Department officials to stop their pressing day-to-day duties in order to immediately perform a search for records responsive to a FOIA request. These officials and employees performed the necessary searches as soon as it was practicable to do so.

Office of Legislative Affairs

7) By memorandum dated January 29, 2008, the Office of Legislative Affairs (OLA) informed OIP that it had identified both classified and unclassified records potentially responsive to plaintiff's request to OLA, including potentially responsive electronic mail (e-mail) messages of one

record custodian, that needed to be searched.

8) On February 1, 2008, after the FOIA Specialist assigned to plaintiff's requests left the Department, OIP reassigned plaintiff's requests to a Senior FOIA Specialist.

9) During the week of February 25, 2008, a FOIA Specialist contacted a staff member in OLA to arrange a time for OIP to retrieve the potentially responsive material OLA identified.

10) On March 7, 2008, a FOIA Specialist retrieved the unclassified potentially responsive records from OLA. On March 11, 2008, a FOIA Specialist retrieved the one classified potentially responsive record from OLA.

11) On March 11, 2008, the Senior FOIA Specialist assigned to plaintiff's request completed an initial review of the potentially responsive documents retrieved from OLA.

12) On March 11, 2008, a Senior Attorney at OIP contacted the Justice Management Division requesting a remote access point in the Justice Consolidated Office Network that allows OIP to search e-mail messages of certain record custodians in the Senior Leadership Offices. This was done in order to most efficiently search the e-mail records of the custodian in OLA who had indicated he had responsive e-mail.

13) On March 12 through 14, 2008, OIP conducted an e-mail search in the Enterprise Vault of the OLA custodian who indicated that there may be responsive e-mail records. Those e-mail messages that appeared responsive to plaintiff's request were printed for further processing and review by OIP's IR Staff.

14) On March 17, 2008, the Senior FOIA Specialist assigned to plaintiff's requests completed an initial review of the potentially responsive e-mail messages located in OLA.

Office of Legal Policy

15) By memorandum dated February 27, 2008, the Office of Legal Policy (OLP) advised OIP that its search was complete. OLP forwarded to OIP records potentially responsive to plaintiff's request to OLP.

16) On February 29, 2008, a FOIA Specialist conducted an initial review of the potentially responsive documents forwarded to OIP by OLP.

Office of the Attorney General

17) On February 28, 2008, an Attorney-Advisor at OIP contacted the Office of the Attorney General regarding the status of that Office's search.

18) On March 4, 2008, a staff member in the Office of the Attorney General contacted the Senior FOIA Specialist assigned to plaintiff's request. She advised him that at least one staff member in the Office of the Attorney General had identified records that were potentially responsive to plaintiff's request and that other staff members were still searching.

19) On March 4, 2008, the Senior FOIA Specialist assigned to plaintiff's request retrieved potentially responsive records from the Office of the Attorney General files that had been identified as of that date.

20) On March 11, 2008, OIP searched the electronic database of the Departmental Executive Secretariat, which uses a central database to control and track certain incoming and outgoing correspondence for the Office of the Attorney General and for certain records of OLA. Those documents that appeared responsive to plaintiff's request were retrieved for further processing and review by OIP's IR Staff.

21) On March 13, 2008, a senior official in the Office of the Attorney General advised me that the search in that Office was complete. On March 14, 2008, potentially responsive records from the Office of the Attorney General were forwarded to OIP for further review.

22) On March 17, 2008, the Senior FOIA Specialist assigned to plaintiff's request completed an initial review of the potentially responsive records forwarded by the Office of the Attorney General to OIP.

#### Current Status Of Plaintiff's FOIA Requests

23) All searches for responsive records have now been completed. In the Office of Legislative Affairs, 147 documents, totaling 1552 pages, were located. Also, nine documents, totaling 233 pages, of responsive material were located in the Office of Legal Policy. Lastly, 355 documents, totaling 913 pages, of responsive material were located in the Office of the Attorney General. OIP is in the process of further review of these documents. During that process it is likely that adjustments to these page counts will be made as duplicate and non-responsive material is identified and culled from the other documents.

24) The records located all require further review, including consultations with multiple Department components and other Executive Branch agencies, before a response can be provided. Such consultations are required by Department of Justice regulation 28 C.F.R. § 16.4(c)(1), and are appropriate because other components within the Department and other Executive Branch agencies have an interest in the documents. In fact, none of the documents originate with OIP and so disclosure determinations necessarily must be made in consultation with the originating offices. Many of these consultations will need to be conducted in stages, as certain offices need to know the views of other offices in order to make their disclosure determinations. Until these steps are



completed, OIP cannot complete the processing of the documents and make a final response to plaintiff.

25) Additionally, OIP has located the existence of classified material, which adds significantly to the complexities attendant to processing a FOIA request. The responsive document that contains classified information must undergo an additional time-intensive review to ensure that the document is appropriately classified in accordance with Executive Order 12958, as amended. Such review also includes a page-by-page and line-by-line review of the document to determine which, if any, FOIA exemptions may apply. In light of the sensitive nature of classified information, potentially responsive material must also be reviewed by offices and agencies with equities in the document to ensure that no improper disclosures are made.

26) OIP will make every effort to process these requests as soon as practicable and is willing to provide the court with status reports every thirty days regarding its progress. I anticipate that OIP's first round of consultations will be sent to other Department components and other Executive Branch agencies that have an interest in the documents by March 28, 2008.

27) By April 14, 2008, OIP anticipates being able to provide plaintiff with an interim response concerning those documents which do not require further consultations.

28) I anticipate that OIP's second round of consultations will be sent to the remaining Department components and other Executive Branch agencies that have an interest in the documents by April 30, 2008.

29) By May 23, 2008, assuming all consultation responses have been returned, OIP anticipates being able to provide plaintiff with a final response addressing the remaining documents.

30) Plaintiff's request that OIP complete the processing of its three FOIA requests within ten days is simply not practicable. OIP is devoting appropriate resources and effort to processing

plaintiff's FOIA requests as soon as practicable. Plaintiff's request for release of records within ten days is not practicable because OIP has identified records that require consultations with other agencies, as well as a classified record that requires multiple layers of review. Imposing a ten-day deadline would increase the chances of an inadvertent disclosure of classified national security information, as well as information otherwise protected from release under FOIA. In addition, although plaintiff's requests have been granted expedited treatment and are being processed accordingly, due to the many consultations that must be conducted with other offices, and due to the pressing concerns those other offices face on a daily basis, the proposed response time is practicable.

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

  
MELANIE ANN PUSTAY

Executed this 18 day of March, 2008.

# EXHIBIT

# A

OFFICE OF INFORMATION  
AND PRIVACY

DEC 27 2007



Electronic Frontier Foundation

RECEIVED

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: Carmen L. Mallon, OIP, DOJ  
Fax Number: (202) 514-1009  
FROM: Marcia Hofmann, Electronic Frontier Foundation  
RE: Freedom of Information Act Requests and Requests for Expedited Processing  
Pages sent: 30 including cover page

COMMENTS:

Dear Ms. Mallon,

Following please find three separate FOIA requests and requests for expedited processing, along with the supporting enclosures referenced by all three. If you have any questions or concerns, please call at (415) 436-9333 x. 116.

Thank you,

A handwritten signature in cursive script, appearing to read 'Marcia'.

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

AG/08-R0183  
JNT**Electronic Frontier Foundation**

December 21, 2007

VIA FACSIMILE — (202) 514-1009

Carmen L. Mallon  
 Chief of Staff  
 Office of Information and Privacy  
 Department of Justice  
 Suite 11050  
 1425 New York Avenue, N.W.  
 Washington, DC 20530-0001

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

Dear Ms. Mallon:

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 the Attorney General 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

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 +1 415 436 9333 (v) +1 415 436 9993 (f) [www.eff.org](http://www.eff.org)

Freedom of Information Act Request and Request for Expedited Processing  
 December 21, 2007  
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companies<sup>1</sup> concerning amendments to FISA, including any discussion of immunizing 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 the DOJ and Office of the Director of National Intelligence recently granted expedited processing for FOIA requests nearly identical to this one (see DOJ and ODNI letters 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

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<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 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.

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December 21, 2007  
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standard for expedited processing set forth in DOJ 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 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

<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](http://feed://www.eff.org/rss/linenoisemp3.xml) and [feed://www.eff.org/rss/linenoiseogg.xml](http://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.

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Freedom of Information Act Request and Request for Expedited Processing  
December 21, 2007  
Page 5

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.

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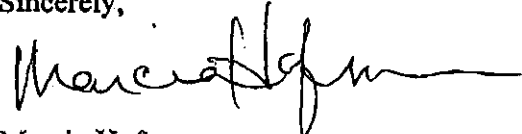
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Furthermore, a fee waiver is appropriate here because EFF has no commercial interest in the disclosure of the requested records. 28 C.F.R. § 16.11(k)(3). EFF is a 501(c)(3) nonprofit organization, and will derive no commercial benefit from the information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



Marcia Hofmann  
Staff Attorney

Enclosures

OLA/08-R0184  
JNJ

Electronic Frontier Foundation

December 21, 2007

VIA FACSIMILE — (202) 514-1009

Carmen L. Mallon  
Chief of Staff  
Office of Information and Privacy  
Department of Justice  
Suite 11050  
1425 New York Avenue, N.W.  
Washington, DC 20530-0001

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

Dear Ms. Mallon:

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 Legislative Affairs 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

454 Shotwell Street, San Francisco, CA 94110 USA  
+1 415 436 9333 (v) +1 415 436 9993 (f) [www.eff.org](http://www.eff.org)

## Freedom of Information Act Request and Request for Expedited Processing

December 21, 2007

Page 2

companies<sup>1</sup> concerning amendments to FISA, including any discussion of immunizing 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

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Freedom of Information Act Request and Request for Expedited Processing  
 December 21, 2007  
 Page 3

standard for expedited processing set forth in DOJ 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 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.

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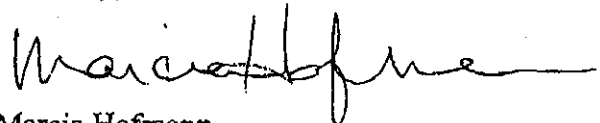
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Sincerely,



Marcia Hofmann  
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Enclosures

OLP/08-20185  
JNT

December 21, 2007

VIA FACSIMILE — (202) 514-1009

Carmen L. Mallon  
Chief of Staff  
Office of Information and Privacy  
Department of Justice  
Suite 11050  
1425 New York Avenue, N.W.  
Washington, DC 20530-0001

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Freedom of Information Act Request and Request for Expedited Processing  
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Freedom of Information Act Request and Request for Expedited Processing  
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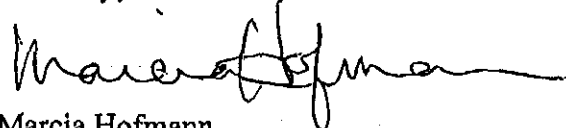
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Sincerely,



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", with a long horizontal line extending to the right.

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:

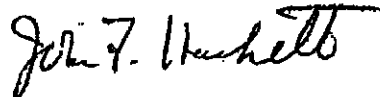
On 4 September 2007 the Office of the Director of National Intelligence received your facsimile dated 31 August 2007, wherein you requested under the Freedom of Information Act (FOIA) records concerning:

**"... 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

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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:

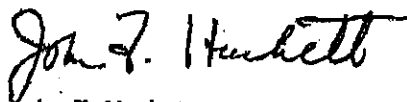
On 4 September 2007 the Office of the Director of National Intelligence received your facsimile dated 31 August 2007, wherein you requested under the Freedom of Information Act (FOIA) records concerning:

**"...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

Distribution:

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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.

/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)

For more information:  
Phone: 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  
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Inquiries:  
Phone: 1-202-261-8484  
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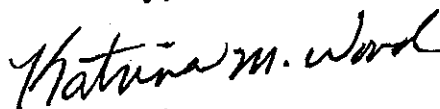
- 3 -

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.

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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)



**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 20785-5000

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 Stigall*

PAMELA N. PHILLIPS  
Chief  
FOIA/PA Office

# EXHIBIT

# B



Office of Information and Privacy

Telephone: (202) 514-3642

Washington, D.C. 20530

DEC 28 2007

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

Re: OAG/08-R0183  
OLA/08-R0184  
OLP/08-R0185  
MAP:NDD

Dear Ms. Hofmann:

This is to acknowledge receipt of your three letters dated December 21, 2007, which were received in this Office on December 27, 2007, in which you requested all records concerning communications Department of Justice officials had with Congress and/or telecommunications companies from September 1, 2007, to the present regarding amendments to the Foreign Intelligence Surveillance Act. This response is made on behalf of the Offices of the Attorney General, Legislative Affairs and Legal Policy.

With regard to your requests for expedited processing, 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 record searches have been initiated in the Offices of the Attorney General, Legislative Affairs and Legal Policy.

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,

Melanie Ann Pustay  
Director