

1 David L. Sobel (*pro hac vice*)  
sobel@eff.org  
2 ELECTRONIC FRONTIER FOUNDATION  
1875 Connecticut Ave. NW  
3 Suite 650  
Washington, DC 20009  
4 Telephone: (202) 797-9009 x104  
Facsimile: (202) 707-9066

5 Kurt Opsahl (191303)  
6 kurt@eff.org  
Marcia Hofmann (250087)  
7 marcia@eff.org  
ELECTRONIC FRONTIER FOUNDATION  
8 454 Shotwell Street  
San Francisco, CA 94110  
9 Telephone: (415) 436-9333 x116  
Facsimile: (415) 436-9993

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

13 ELECTRONIC FRONTIER FOUNDATION, )  
14 )  
Plaintiff, )

15 v. )  
16 )

17 OFFICE OF THE DIRECTOR OF NATIONAL )  
INTELLIGENCE, )  
18 )  
19 Defendant. )  
20 )  
21 )  
22 )

NO. 07-5278 SI

**REPLY IN SUPPORT OF MOTION FOR  
AN AWARD OF ATTORNEY'S FEES  
AND COSTS**

Judge: Hon. Susan Illston  
Date: May 23, 2008  
Time: 9:00 a.m.  
Courtroom: 10, 19th Floor

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES**.....**III**

**INTRODUCTION** ..... **1**

**I. EFF IS ENTITLED TO AN AWARD OF ATTORNEY’S FEES AND COSTS.** ..... 1

**A. EFF’S LITIGATION RESULTED IN A SUBSTANTIAL PUBLIC BENEFIT.** ..... 1

**B. EFF DID NOT PURSUE THIS ACTION FOR COMMERCIAL BENEFIT OR PRIVATE INTERESTS.** 4

**C. ODNI’S OPPOSITION TO EFF’S MOTION FOR A PRELIMINARY INJUNCTION DID NOT HAVE A REASONABLE BASIS IN THE LAW BECAUSE THE GOVERNMENT WAS RECALCITRANT IN ITS OPPOSITION TO A VALID CLAIM.**..... 7

**II. EFF SEEKS REASONABLE FEES AND COSTS.**..... 9

**A. EFF SEEKS REASONABLE HOURLY RATES CONSISTENT WITH THE PREVAILING MARKET RATE FOR FOIA AND OTHER TYPES OF LEGAL WORK IN THIS COMMUNITY.**..... 9

**B. EFF EXPENDED A REASONABLE NUMBER OF HOURS ON THIS LITIGATION.** ..... 11

**III. EFF SHOULD BE AWARDED FEES ASSOCIATED WITH PREPARING THIS REPLY AND FURTHER WORK DONE TO PREPARE FOR AND PARTICIPATE IN THE HEARING ON THIS MOTION.**..... 15

**CONCLUSION** ..... **15**

**TABLE OF AUTHORITIES**

**Cases**

1

2

3 *ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24 (D.D.C. 2004) ..... 8

4 *Blue v. Bureau of Prisons*, 570 F.2d 529 (5th Cir. 1978) ..... 2, 4

5 *Camacho v. Bridgeport Financial Inc.*, No. 07-15297, 2008 WL 1792808, 2008 U.S. App. LEXIS

6 8665 (9th Cir. Apr. 22, 2008) ..... 10

7 *Cazalas v. Dep’t of Justice*, 709 F.2d 1051 (5th Cir. 1983)..... 6

8 *Church of Scientology of Cal. v. United States Postal Service*, 700 F.2d 486 (9th Cir. 1983)..... 4, 6

9 *Comite De Jornaleros De Redondo Beach v. City of Redondo Beach*, No. CV 04-9396 CBM

10 (JTLx), 2006 WL 4081215, 2006 U.S. Dist. LEXIS 95610 (C.D. Cal. Dec. 12, 2006)..... 11, 12

11 *Edmonds v. FBI*, 417 F.3d 1319 (D.C. Cir. 2005)..... 4

12 *Education/Instruction v. Dep’t of Justice*, 87 F.R.D. 112 (D. Mass. 1980)..... 6

13 *Elec. Frontier Foundation v. Office of the Director of National Intelligence*, No. 07-5278 SI, 2007

14 WL 4208311, 2007 U.S. Dist. LEXIS 89585 (N.D. Cal. Nov. 37, 2007) .....2, 3, 5, 8

15 *Elec. Privacy Info. Ctr. v. Dep’t of Justice*, 416 F. Supp. 2d 24 (D.D.C. 2006) ..... 8

16 *Ellis v. United States*, 941 F. Supp. 1068 (D. Utah 1996) ..... 6

17 *Exner v. FBI*, 443 F. Supp. 1349 (S.D. Cal. 1978)..... 9

18 *Fenster v. Brown*, 617 F.2d 740 (D.C. Cir. 1979)..... 6

19 *Fischer v. SJB-P.D. Inc.*, 214 F.2d 1115 (9th Cir. 2000)..... 12

20 *Gerstein v. CIA*, No. C-06-4643 MMC, 2006 WL 3462658, 2006 U.S. Dist. LEXIS 89847 (N.D.

21 Cal. Nov. 29, 2006)..... 8

22 *Gerstein v. CIA*, No. C-06-4643 MMC, 2006 WL 3462659, 2006 U.S. Dist. LEXIS 89883 (N.D.

23 Cal. Nov. 29, 2006)..... 8

24 *Golden Gate Audubon Society v. United States Army Corps of Engineers*, 732 F. Supp. 1014 (N.D.

25 Cal. 1989)..... 9, 13

26 *Guam Contractors Ass’n v. Dep’t of Labor*, 570 F. Supp. 163 (N.D. Cal. 1983)..... 4

27 *Housing Rights Center v. Sterling*, No. 03-859 DSF (Ex), 2005 WL 3320738, 2005 U.S. Dist.

28 LEXIS 31872 (C.D. Cal. 2005)..... 10

*Long v. IRS*, 932 F.2d 1309 (9th Cir. 1991)..... 9

*Lytle v. Carl*, 382 F.3d 978 (9th Cir. 2004)..... 11

*Oberdorfer v. Glickman*, No. CV-98-1588-HU, 2001 WL 34045732, 2001 U.S. Dist. LEXIS 14677

(D. Ore. Sept. 14, 2001)..... 12

1 *O'Neill, Lysaght & Sun v. Drug Enforcement Admin.*, 951 F. Supp. 1413 (C.D. Cal. 1996) ..... 7

2 *Perez v. Cozen & O'Connor Group Long Term Disability Coverage*, No. 05-0440 DMS (AJB),  
2007 WL 2142292, 2007 U.S. Dist. LEXIS 53996 (S.D. Cal. March 27, 2007) ..... 10

3 *Piper v. Dep't of Justice*, 339 F. Supp. 2d 13 (D.D.C. 2004) ..... 6

4 *Poulsen v. United States Customs and Border Protection*, No. C 06-1743 SI, 2007 WL 160945,  
2007 U.S. Dist. LEXIS 8488 (N.D. Cal. Jan. 17, 2007) ..... 6

5 *Powell v. Dep't of Justice* 569 F. Supp. 1192 (N.D. Cal. 1983) ..... 12, 14

6 *Republic of New Afrika v. FBI*, 645 F. Supp. 117 (D.D.C. 1986) ..... 6

7 *Tax Analysts v. Dep't of Justice*, 965 F.2d 1092 (D.C. Cir. 1992)..... 7

8 *Taylor v. Albina Community Bank*, No. 00-1089-ST, 2002 WL 31973738, 2002 U.S. Dist. LEXIS  
25580 (D. Ore. Oct. 2, 2002)..... 12

9 *U.S. v. \$60,201.00*, 291 F. Supp. 1126 (C.D. Cal. 2003)..... 12

10 *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973)..... 2

11 *Welch v. Metro Life Ins. Co.*, 480 F.3d 942 (9th Cir. 2007) ..... 12

12 *Williams v. Dep't of the Army*, No. C 92-20088 JW, 1993 WL 372245, 1993 U.S. Dist. LEXIS  
15336 (N.D. Cal. Sept. 30, 1993) ..... 7

13

14

15 **Statutes**

16 32 C.F.R. § 1700.12..... 5

17 5 U.S.C. § 552 ..... 5

18

19

20

21

22

23

24

25

26

27

28

**INTRODUCTION**

1  
2 Plaintiff Electronic Frontier Foundation sought entry of a preliminary injunction requiring  
3 Defendant Office of the Director of National Intelligence (“ODNI”) to disclose information  
4 relevant to a highly controversial, time-sensitive congressional debate within ten days. EFF  
5 substantially prevailed on this motion and moved for an award of attorney’s fees for work  
6 associated with preparing the complaint, motion for a preliminary injunction, application for an  
7 order shortening time, and the instant motion. ODNI does not dispute that EFF is eligible for such  
8 an award. However, the agency opposes EFF’s motion by disputing that 1) EFF is entitled to the  
9 fees that it seeks, 2) EFF’s hourly rates are reasonable, and 3) the hours spent by EFF on this  
10 litigation are reasonable. As explained below, EFF is entitled to its reasonable fees, and its motion  
11 should be granted. EFF also respectfully requests that the Court award the fees associated with  
12 preparing this reply brief.  
13  
14

**ARGUMENT**

15  
16 **I. EFF is Entitled to an Award of Attorney’s Fees and Costs.**

17 ODNI concedes that EFF substantially prevailed on its motion for a preliminary injunction,  
18 and is therefore eligible for a fee award. Def. Opp. at 4. However, the government claims that EFF  
19 should not be permitted to recover fees for several reasons. As explained below, the government’s  
20 arguments are unavailing.  
21

22 **A. EFF’s Litigation Resulted in a Substantial Public Benefit.**

23 First, ODNI contends that EFF’s success in this case was “extremely limited,” amounting to  
24 mere “minor procedural relief,” and so should not weigh in favor of an entitlement to fees. Def.  
25 Opp. 5-6. In fact, EFF has to date obtained nearly all the relief it sought in its complaint.<sup>1</sup>  
26

27 <sup>1</sup> “Plaintiff prays that this Court: A) order Defendant ODNI to *process immediately* the requested  
28 records in their entirety; B) order Defendant ODNI, upon completion of such expedited processing,  
to *disclose the requested records* in their entirety and *make copies available* to Plaintiff; C) *provide*

1 Furthermore, EFF overwhelmingly prevailed on its motion for a preliminary injunction. *Elec.*  
 2 *Frontier Foundation v. Office of the Director of National Intelligence*, No. 07-5278 SI, 2007 WL  
 3 4208311, 2007 U.S. Dist. LEXIS 89585, at \*23 (N.D. Cal. Nov. 37, 2007). ODNI makes much of  
 4 the fact that EFF prevailed “in part.” However, the only aspect of EFF’s argument that was not  
 5 successful was the request that the Court order the government to produce an index pursuant to  
 6 *Vaughn v. Rosen*, 484 F.2d 820, 826-8 (D.C. Cir. 1973) ten days after ODNI finished processing  
 7 EFF’s requests. This request was a very small part of the total relief EFF sought, as demonstrated  
 8 by the fact that EFF’s motion devoted virtually no argument to this issue, and the Court’s decision  
 9 contained only four sentences of discussion about it. *Elec. Frontier Foundation*, No. 07-5278 SI,  
 10 2007 U.S. Dist. LEXIS 89585, at \*23.<sup>2</sup>

11  
 12 ODNI simply ignores the fact that information made public through this litigation  
 13 indisputably contributed “to the fund of information that citizens may use in making vital political  
 14 choices.” *Blue v. Bureau of Prisons*, 570 F.2d 529, 534 (5th Cir. 1978). As explained in its  
 15 opening brief, EFF has posted all records released through this action on the EFF web site and  
 16 publicized their availability through press releases. Hofmann Decl. in Support of Mot. Attorney’s  
 17 Fees (“First Hofmann Decl.”) Exs. 1 & 2 (Dkt. 49). As a result, several media outlets immediately  
 18  
 19

---

20 *for expeditious proceedings* in this action; D) award Plaintiff its costs and reasonable attorneys fees  
 21 incurred in this action; and E) grant such other relief as the Court may deem just and proper.”  
 22 Compl. at 6-7 ¶¶ A-E (Dkt. No. 1) (emphasis added). ODNI cites *Fischer v. SJB-P.D. Inc.*, 214  
 23 F.2d 1115 (9th Cir. 2000) to argue that EFF “achieved extremely limited success in this case.” Def.  
 24 Opp. 6. *Fischer* flies in the face of the government’s position, however, since it goes on to explain,  
 25 “[t]he Supreme Court has instructed that when attempting to determine whether a victory is  
 ‘technical,’ the district court must ‘compare’ the relief the plaintiff originally sought in complaint  
 with the relief ultimately obtained.” *Id.* at 1120-21 (quoting *Farrar v. Hobby*, 506 U.S. 103, 115  
 (1992)).

26 <sup>2</sup> While the Court did not order ODNI to prepare a *Vaughn* index on the schedule requested by  
 27 EFF, the government eventually produced three *Vaughn* declarations in support of its motion for  
 28 summary judgment. See Declaration of John F. Hackett, Declaration of Rhea D. Siers, and  
 Declaration of Ronald L. Burgess, Jr. (Dkt. No. 37).

1 published articles about these records and their significance to the raging national debate about  
2 whether federal surveillance law should be amended to immunize telecommunications carriers  
3 against liability for facilitating unlawful government surveillance. First Hofmann Decl. Exs. 3, 4 &  
4 5. In fact, the information expeditiously disclosed as a result of this Court's order continues to fuel  
5 that debate, as demonstrated by an article published less than two weeks ago by NEWSWEEK based  
6 in part on a declaration filed by a government official in this case. Michael Isikoff and Michael  
7 Hosenball, *Just Between Us*, NEWSWEEK, Apr. 30, 2008 (attached to Supplemental Declaration of  
8 Marcia Hofmann ("Supp. Hofmann Decl.") as Ex. A).<sup>3</sup> ODNI itself posted the records released  
9 through this litigation on its web site, demonstrating that the *government* considers the public  
10 interest in the material to be very strong. First Hofmann Decl. Ex. 6. It is inconsistent for ODNI to  
11 claim now that the public benefit created by this litigation has been "marginal, at best." Def. Opp.  
12 5.  
13  
14

15 Furthermore, the government argues that EFF's victory on the motion for a preliminary  
16 injunction was somehow negated by the fact that ODNI offered to provide an initial release of  
17 records on November 30, 2007. Def. Opp. 5. As an initial matter, ODNI's offer appears to have  
18 been prompted by EFF's filing of the motion, since the government was unwilling to propose any  
19 processing date prior to that event. Hofmann Decl. in Support of App. Shorten Time ¶¶ 4, 6-7 (Dkt.  
20 No. 12) (detailing EFF's unsuccessful attempts to negotiate a mutually acceptable processing  
21 schedule). More importantly, ODNI was under no *obligation* to produce anything by November 30,  
22 2007 or any other date until the Court *ordered* it to do so. *See, e.g., Edmonds v. FBI*, 417 F.3d  
23

24 \_\_\_\_\_  
25 <sup>3</sup> This article discusses information made public through *Elec. Frontier Foundation v Office of the*  
26 *Director of National Intelligence et al.*, No. 08-1023 JSW (N.D. Cal. filed Feb. 20, 2008), a second  
27 FOIA case in which EFF sought the expedited processing and release of records from ODNI (as  
28 well as the Department of Justice). However, the NEWSWEEK story also cites assertions made by a  
government official in support of the motion for summary judgment in this case. Declaration of  
Ronald L. Burgess, Jr. ¶ 5 (Dkt. No. 37).

1 1319, 1323 (D.C. Cir. 2005) (After the court ordered the FBI to process records by a date certain,  
2 “timely production of nonexempt documents by the FBI could no longer be described as a  
3 voluntary change in the defendant’s conduct. To the contrary, the plaintiff then had an enforceable  
4 judgment, and if the defendant failed to comply, it faced the sanction of contempt.”) (citations and  
5 quotation marks omitted).  
6

7 Finally, EFF’s successful effort to secure the expedited processing of its FOIA requests is  
8 sufficient to justify an award of attorney’s fees. As the D.C. Circuit has held, “we reject the  
9 government’s . . . suggestion that whatever benefit [the requester] obtained from expedited  
10 processing was too insubstantial to entitle her to a fee award. Plainly, *there is a value to obtaining*  
11 *something earlier than one otherwise would.*” *Edmonds*, 417 F.3d at 1324 (emphasis added). The  
12 government cites *Guam Contractors Ass’n v. Dep’t of Labor*, 570 F. Supp. 163 (N.D. Cal. 1983) to  
13 claim that EFF has achieved only “limited scheduling relief” that should not warrant an award of  
14 fees. Def. Opp. 6. However, as the D.C. Circuit noted *after* Congress amended the FOIA in 1996 to  
15 include the expedited processing provision, “expedited processing of a FOIA request is a statutory  
16 right, not just a matter of court procedure.” *Edmonds*, 417 F.3d at 1323 n.2. EFF obtained a court  
17 order to vindicate this right, which the D.C. Circuit has found adequate to justify an award of fees.  
18 *Id.* at 1326.  
19

20 **B. EFF Did Not Pursue This Action For Commercial Benefit or Private Interests.**

21 As a non-profit organization with no commercial interest in the requested information, EFF  
22 should recover attorney’s fees and costs pursuant to FOIA. *Church of Scientology of Cal. v. United*  
23 *States Postal Service*, 700 F.2d 486, 494 (9th Cir. 1983). Nothing suggests that this Court should  
24 ignore Congress’ clearly stated “preference for public interest groups, indigents and disinterested  
25 scholars over private commercial enterprises’ efforts for disclosure.” *Blue*, 570 F.2d at 534.  
26

27 In its opposition, ODNI conflates the proposed FISA legislation with the Hepting litigation  
28



1 and confuses EFF's role in the *Hepting* case with the financial interests of its clients in the  
2 litigation, incorrectly asserting that EFF itself seeks damages in the class action lawsuit. Def. Opp.  
3 7.<sup>4</sup> None of this confusion turns EFF into a private commercial enterprise, nor shows a profit  
4 motive for EFF's representation of the AT&T customers in *Hepting* who were subjected to illegal  
5 surveillance.

6  
7 EFF's non-commercial goal in seeking the records in this case was to inform the public and  
8 our elected representatives about the nature of ODNI's role in seeking the legislation. In its motion  
9 for a preliminary injunction, EFF demonstrated extensive and ongoing interest in this legislation by  
10 Congress, the Administration, and the media. Mot. Prelim. Inj. 2-7. Indeed, ODNI conceded that  
11 there was an urgency to inform the public about the subject of the requested material when it  
12 granted EFF's requests for expedited processing. Hofmann Decl. in Support of Mot. Prelim. Inj.  
13 Exs. M & N.<sup>5</sup> Furthermore, this Court has already recognized that the release of this information  
14 serves a vital public interest. *Elec. Frontier Foundation*, No. 07-5278 SI, 2007 U.S. Dist. LEXIS  
15 89585, at \*20 (“[T]he Protect America Act is set to expire in February 2008, and Congress is  
16 currently considering legislation that would amend the FISA further. Plaintiff seeks information  
17 from defendant specifically so that plaintiff, Congress, and the public may participate in the debate  
18 over the pending legislation on an informed basis.”).

19  
20 ODNI seeks to muddy the waters by citing to cases in which FOIA was used as a substitute  
21

22  
23 <sup>4</sup> Later in the opposition, ODNI suggests that it is EFF's “adversary” in the *Hepting* litigation. Opp.  
24 at 9. Not only is EFF not the plaintiff in that litigation, the defendant is AT&T, not ODNI. The  
United States is an intervenor in the litigation.

25  
26 <sup>5</sup> Under the FOIA and ODNI regulations, FOIA requests must be processed expeditiously when  
27 they seek the disclosure of information about which there is “[a]n urgency to inform the public  
28 about an actual or alleged Federal Government activity,” and were “made by a person primarily  
engaged in disseminating information,” as provided in 5 U.S.C. § 552(a)(6)(E)(v)(II) and 32 C.F.R.  
§ 1700.12(c)(2). By determining that EFF's requests for expedited processing satisfied this  
standard, ODNI also implicitly conceded that EFF is “*primarily engaged in disseminating  
information.*” It is inconsistent for the government to now argue that EFF's FOIA requests were  
primarily motivated by a desire to obtain a litigation advantage in *Hepting*.

1 for discovery. Each decision, however, is inapposite.<sup>6</sup> The records requested in this case are not a  
2 substitute for civil discovery, and ODNI makes no attempt to explain how communications about  
3 pending legislation between ODNI and Congress or telecom industry lobbyists constitute matters  
4 for civil discovery in *Hepting*. In any event, the cases cited by ODNI are readily distinguishable.  
5 For example, in *Ellis v. United States*, 941 F. Supp. 1068, 1079 (D. Utah 1996), “the disclosure of  
6 the records did not add to the fund of information necessary to make important political choices.”  
7 In *Republic of New Afrika v. FBI*, 645 F. Supp. 117, 121 (D.D.C. 1986), “[t]he RNA concede[d]  
8 that it has not made its discoveries public” and “RNA’s stated goal is to provide a future basis for  
9 challenging the legality of government actions.” Here, to the contrary, the information provided has  
10 already been made public and added to the fund of information used to make political choices.  
11

12 As the Ninth Circuit has noted, “[a] public benefit may result even though the specific  
13 document sought is for plaintiff’s sole use.” *Church of Scientology*, 700 F.2d at 493. For example,  
14 in *Cazalas v. Dep’t of Justice*, 709 F.2d 1051, 1053 (5th Cir. 1983), a former assistant United  
15 States attorney sought documents “revealing the reasons for her dismissal,” and had a “strong  
16 personal interest” in the material. The court held that an “acknowledgment of appellant’s strong  
17 personal interest in securing certain letters and notes is not necessarily inconsistent with an equally  
18 strong public interest in also receiving these items.” *Id.* Likewise, in *Piper v. Dep’t of Justice*, 339  
19 F. Supp. 2d 13, 21 (D.D.C. 2004), the court found it appropriate to award fees where the plaintiff  
20  
21

---

22  
23 <sup>6</sup> In *Fenster v. Brown*, 617 F.2d 740 (D.C. Cir. 1979), this Court noted, “a court would ordinarily  
24 award fees, for example, where a newsman was seeking information to be used in a publication or  
25 a public interest group was seeking information to further a project benefiting the general public.”  
26 *Poulsen v. United States Customs and Border Protection*, No. C 06-1743 SI, 2007 WL 160945,  
27 2007 U.S. Dist. LEXIS 8488, at \*3 (N.D. Cal. Jan. 17, 2007) (quoting *Fenster*, 617 F.2d at 742  
28 n.4). *See also Tax Analysts v. Dep’t of Justice*, 965 F.2d 1092 (D.C. Cir. 1992) (Even “news  
organizations might not be entitled to fees” where the organization “did not need the attorney’s  
fees incentive and because the material it obtained was already publicly available.” *Id.* (emphasis  
added); *Education/Instruction v. Dep’t of Justice*, 87 F.R.D. 112, 116 (D. Mass. 1980) (awarding  
attorney’s fees even where “plaintiffs in *NAACP v. Harris* unsuccessfully sought to obtain some of

1 sought documents to help “write a book about his mother's kidnapping and the FBI investigation  
2 into it and resulting DOJ criminal prosecution.” Moreover, in *O'Neill, Lysaght & Sun v. Drug*  
3 *Enforcement Admin.*, 951 F. Supp. 1413, 1424 (C.D. Cal. 1996), the plaintiff, a for-profit law firm,  
4 sought information “for the specific benefit of [its client's] habeas petitions.” Nevertheless, the  
5 court held that “The nature of OL & S's interest in the disclosed records is neither private nor  
6 personal,” despite the DEA's argument “OL & S only wants access to this information to support  
7 its client's habeas petitions[.]” *Id.* at 1424-25.

9 Tellingly, this Court has found that the use of material obtained through the FOIA for  
10 lobbying purposes may serve a public benefit. *See Williams v. Dep't of the Army*, No. C 92-20088  
11 JW, 1993 WL 372245, 1993 U.S. Dist. LEXIS 15336, at \*13 (N.D. Cal. Sept. 30, 1993) (“whether  
12 Plaintiff desired his records for his own personal use or for some greater public use (*e.g.* lobbying  
13 with respect to government immunity under the Feres doctrine) does not affect the Court's  
14 determination above that there was some public benefit to this litigation.”). Accordingly, while  
15 EFF does have an interest in informing the public about the ODNI's role in promoting to amend  
16 federal surveillance law legislation, this motivation does not obviate the strong and predominant  
17 public interest in EFF's successful litigation of this FOIA case.

19 **C. ODNI's Opposition To EFF's Motion for a Preliminary Injunction Did Not**  
20 **Have a Reasonable Basis in the Law Because the Government was**  
21 **Recalcitrant in Its Opposition to a Valid Claim.**

22 Finally, the government claims that EFF should not be awarded fees because ODNI's  
23 “conduct in this litigation” demonstrates that the agency “had a reasonable basis for its positions.”  
24 Def. Opp. 9. As ODNI correctly notes, however, the final factor weighs in the requester's favor  
25 where the government “was *recalcitrant in its opposition to a valid claim* or otherwise engaged in  
26 obdurate behavior.” *Tax Analysts*, 965 F.2d at 1097 (emphasis added). The record reflects that the

27  
28 the same documents as are the subject of this lawsuit via the discovery process.”)

1 agency has engaged in precisely this sort of behavior in opposing EFF's motion for a preliminary  
2 injunction.

3 As EFF pointed out in its opening papers, the government regurgitated arguments in this  
4 case that have been rejected repeatedly by this Court and others. *See, e.g., Gerstein v. CIA*, No. C-  
5 06-4643 MMC, 2006 WL 3462659, 2006 U.S. Dist. LEXIS 89883 (N.D. Cal. Nov. 29, 2006);  
6 *Gerstein v. CIA*, No. C-06-4643 MMC, 2006 WL 3462658, 2006 U.S. Dist. LEXIS 89847 (N.D.  
7 Cal. Nov. 29, 2006); *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 416 F. Supp. 2d 24 (D.D.C. 2006)  
8 (hereafter "*EPIC*"); *ACLU v. Dep't of Justice*, 321 F. Supp. 2d 24 (D.D.C. 2004).

10 The government claims that its decision to recycle its feeble arguments was based on  
11 "ODNI's decision to provide this Court with a factual presentation that was missing from those  
12 cases." Def. Opp. 11. But as this Court noted, "[t]he *EPIC* case was based on facts *nearly identical*  
13 to those presented here." *Elec. Frontier Foundation*, No. 07-5278 SI, 2007 U.S. Dist. LEXIS  
14 89585, at \*\*12-13 (emphasis added). In fact, the government made the same unsuccessful  
15 arguments nearly word for word just a few weeks ago when it opposed EFF's motion for a  
16 preliminary injunction in an almost identical FOIA case pending before Judge White. *Elec.*  
17 *Frontier Foundation v Office of the Director of National Intelligence et al.*, No. 08-1023 JSW  
18 (N.D. Cal. filed Feb. 20, 2008). In rejecting the government's arguments yet again, Judge White  
19 observed that the facts of that case were "remarkably similar to the facts presented in *EFF*, wherein  
20 Judge Illston found that Plaintiff had carried its burden of demonstrating that it is likely to prevail  
21 on the merits of its claim." *Id.*, slip op. at 5 (Apr. 4, 2008) (attached to Supp. Hofmann Decl. at Ex.  
22 B).

25 EFF should never have had to litigate this case to enforce its uncontested right to expedited  
26 processing. The government's refusal to comply with well-established law or to even discuss a  
27 reasonable processing schedule with EFF prior to the filing of the motion for a preliminary  
28

1 injunction is solely responsible for any fees EFF has incurred here. In light of this Court's firm  
2 rejection of the government's arguments multiple times, an award of attorney's fees is particularly  
3 appropriate to encourage the government to reconsider its flawed approach toward expedited  
4 processing and promote better uses of the Court's time and resources.

5 **II. EFF Seeks Reasonable Fees and Costs.**

6 Once the Court determines that a requester is both eligible for and entitled to attorney's  
7 fees, the only remaining issue is the amount that the Court should award. *Long v. IRS*, 932 F.2d  
8 1309, 1314 (9th Cir. 1991) (If a court determines that a requester is "both eligible for and entitled  
9 to recover fees, the award must be given and the only room for discretion concerns the  
10 reasonableness of the amount requested."). ODNI makes no argument that EFF should not be  
11 awarded costs, but complains that EFF seeks unreasonable fees. Def Opp. 12-23. The government  
12 bears the burden of demonstrating that EFF seeks an unreasonable award, which it cannot satisfy  
13 through conclusory complaints. *Golden Gate Audubon Society v. United States Army Corps of*  
14 *Engineers*, 732 F. Supp. 1014, 1021 (N.D. Cal. 1989) (quoting *Nat'l Ass'n of Concerned Veterans*  
15 *v. Secretary of Defense*, 675 F.2d 1319, 1338 (D.C. Cir. 1982) ("[A]n opposing party does not meet  
16 his burden merely by asserting broad challenges to the application. It is not enough for an opposing  
17 party simply to state, for example, that the hours claimed are excessive and the rates submitted too  
18 high.") As explained below, the government's complaints are unavailing.

19 **A. EFF Seeks Reasonable Hourly Rates Consistent with the Prevailing Market**  
20 **Rate For FOIA and Other Types of Legal Work in This Community.**

21 ODNI claims that EFF has not met its burden of showing that attorneys of similar  
22 experience in San Francisco bill their paying clients at the rates EFF seeks, particularly for FOIA  
23 work. Def. Opp. 13. Of course, courts have awarded reasonable attorney's fees in FOIA cases  
24 based on prevailing rates that are not specific to FOIA work. *See, e.g., Exner v. FBI*, 443 F. Supp.  
25 1349, 1354 (S.D. Cal. 1978) (awarding fees in a FOIA case based on counsel's customary billing  
26  
27  
28

1 rate for commercial litigation). In any event, EFF seeks hourly rates that are well within the range  
2 of those charged by attorneys performing similar work in the San Francisco area. As the  
3 declaration of Thomas H. Steele states, EFF's attorneys have proposed hourly rates that are  
4 comparable to the those used by Morrison & Foerster, a prominent law firm in San Francisco, to  
5 bill clients for services performed in connection with state freedom of information work. Decl. of  
6 Thomas H. Steele ¶¶ 8-10.

8 Rather than the prevailing market rates favored by the Ninth Circuit, ODNI argues that the  
9 appropriate measure of fees should be the *Laffey* matrix, which is “designed to provide objective  
10 guidance in appropriate hourly rates for attorneys in the Washington, D.C. area.” Def. Opp. 17.  
11 However, ODNI has not cited a single precedent in which a judge in this Court has applied the  
12 *Laffey* matrix in a FOIA case.<sup>7</sup> It is well established in the Ninth Circuit that the reasonableness of  
13 an attorney's rates is determined by comparing them to “the rate prevailing in the community for  
14 similar work performed by attorneys of comparable skill, experience, and reputation.” *Camacho v.*  
15 *Bridgeport Financial Inc.*, No. 07-15297, 2008 WL 1792808, 2008 U.S. App. LEXIS 8665, at \*13  
16 (9th Cir. Apr. 22, 2008) (quoting *Barjon v. Dalton*, 132 F.3d 496, 502 (9th Cir. 1997)). This  
17 inquiry requires the Court to “determine the prevailing hourly rate in the Northern District.”  
18 *Camacho*, No. 07-15297, 2008 U.S. App. LEXIS 8665, at \*\*13-14. *See also* Supplemental  
19 Declaration of Kurt Opsahl ¶¶ 3-6.

---

22 <sup>7</sup> It is also worth noting that one case in the Southern District of California determined use of the  
23 *Laffey* matrix to be “contrary to Ninth Circuit law, which instructs district courts to use the rate  
24 prevailing in the community for similar work performed by *attorneys of comparable skill,*  
25 *experience, and reputation.*” *Perez v. Cozen & O'Connor Group Long Term Disability Coverage*,  
26 No. 05-0440 DMS (AJB), 2007 WL 2142292, 2007 U.S. Dist. LEXIS 53996, at \*7 (S.D. Cal.  
27 March 27, 2007) (emphasis in original) (citing *Farhat v. Hartford Life and Accident Ins.*, No. C 05-  
28 0797 PJH, 2006 WL 2521571, 2006 U.S. Dist. LEXIS 64865, at \*4 (N.D. Cal. Aug. 30, 2006)) (in  
turn quoting *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1211 (9th Cir. 1986)) (internal  
quotation marks omitted). *See also Housing Rights Center v. Sterling*, No. 03-859 DSF (Ex), 2005  
WL 3320738, 2005 U.S. Dist. LEXIS 31872, at \*10 (C.D. Cal. 2005) (noting that the non-fee-

1           **B.       EFF Expended a Reasonable Number of Hours on This Litigation.**

2           The government also complains that EFF’s attorneys have spent an unreasonable number of  
3 hours on this litigation. Def. Opp. 18-23. ODNI’s various arguments are addressed briefly below.

4           *EFF Has Successfully Litigated This Action.* As described above in Section I.A., EFF has  
5 obtained virtually all the relief it sought in this action. ODNI’s claim that it somehow “prevailed in  
6 significant part in this litigation” has no basis in fact. Def. Opp. 18. EFF elected not to challenge  
7 ODNI’s exemption claims and agreed to voluntarily dismiss the case — the government did not  
8 prevail on the exemption issues. *See* Stip. Voluntary Dismiss. (Dkt. No. 44). Further, as discussed  
9 above in Section I.C, the Court ruled against ODNI on all but a minor aspect of EFF’s motion for a  
10 preliminary injunction. Moreover, with respect to the interim release date that ODNI proposed and  
11 the Court ultimately adopted, it is immaterial what ODNI offered to do after EFF performed the  
12 work associated with preparing and filing the complaint and motion for a preliminary injunction.  
13 The critical fact is that the Court ordered ODNI to complete the processing of EFF’s requests by a  
14 date certain, which was relief that EFF sought in its complaint. ODNI’s claims about EFF’s  
15 “private motivation to litigate this case” are also meritless, as discussed in Section I.B.

16           *This Court Permits Quarter Hour Billing and Block Billing.* Ninth Circuit case law  
17 prohibits neither quarter hour billing nor block billing. *Lytle v. Carl*, 382 F.3d 978 (9th Cir. 2004)  
18 (“Plaintiff’s counsel . . . is not required to record in great detail how each minute of his time was  
19 expended.”) (citations omitted); *see also Comite De Jornaleros De Redondo Beach v. City of*  
20 *Redondo Beach*, No. CV 04-9396 CBM (JTLx), 2006 WL 4081215, 2006 U.S. Dist. LEXIS 95610,  
21 at \*13-14 (C.D. Cal. Dec. 12, 2006) (finding block billing acceptable where it identifies the general  
22 subject of the time expenditure). Indeed, “plaintiff’s counsel can meet his burden — although just  
23 barely — by simply listing his hours and identifying the general subject matter of his time  
24 seeking party conceded that “he sees rates between \$125 and \$650 per hour in California on a  
25  
26  
27  
28

1 expenditures.” Fischer, 214 F.3d at 1121.

2 The Court may in its discretion reduce hours that are billed in block format, particularly  
3 where it is “difficult to determine how much time was spent on particular activities.” *Welch v.*  
4 *Metro Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir. 2007). Block billing may not pose a problem,  
5 however, when each item listed in a time entry relates to the same overall task. *Oberdorfer v.*  
6 *Glickman*, No. CV-98-1588-HU, 2001 WL 34045732, 2001 U.S. Dist. LEXIS 14677, at \*14 n.2  
7 (D. Ore. Sept. 14, 2001) (“Although this 3.25 hour entry has three different tasks listed, it does not  
8 run afoul of the ‘block billing’ problem because it is clear that, while discrete, all three tasks  
9 related to the preliminary injunction and should be chargeable to that one task.”); *Taylor v. Albina*  
10 *Community Bank*, No. 00-1089-ST, 2002 WL 31973738, 2002 U.S. Dist. LEXIS 25580, at \*11 (D.  
11 Ore. Oct. 2, 2002) (“discrete but related tasks are compensable”). Here, ODNI complains about  
12 block billing with respect to four of Ms. Hofmann’s time entries. Def. Opp. 20. Each of these  
13 entries, however, lists items related to a single overarching task — specifically, preparing the  
14 motion for a preliminary injunction and the papers filed along with it. First Hofmann Decl. ¶ 10.  
15 These entries offer sufficient detail for the Court to determine how Ms. Hofmann spent her time.  
16

17 Likewise, the Court has the authority to reduce time billed by the quarter-hour if it finds  
18 that the practice results in an excessive request for compensation. *Welch*, 480 F.3d at 948-949. Fees  
19 may be awarded on the basis of quarter-hour billing, particularly where the hours expended are low  
20 enough to pose little threat of overbilling. *Comite De Jornaleros*, No. CV 04-9396 CBM (JTLx),  
21 2006 U.S. Dist. LEXIS 95610, at \*\*14-15; *U.S. v. \$60,201.00*, 291 F. Supp. 1126, 1131 (C.D. Cal.  
22 2003). The declarations of EFF’s attorneys already reflect an exercise billing judgment and seek  
23 compensation for low numbers of hours involving discrete tasks. Indeed, the amount EFF seeks is  
24 modest in light of *Powell v. Dep’t of Justice* 569 F. Supp. 1192, 1202-1204 (N.D. Cal. 1983), in  
25  
26  
27  
28 regular basis. This is much more in line with this Court’s experience than is the Laffey Matrix.”)



1 which this Court awarded attorney's fees for time spent by counsel reviewing FOIA documents,  
2 among other tasks, and applied a multiplier of 1.5 to the entire award. Quarter hour billing has not  
3 created an excessive fee request here.<sup>8</sup>

4 *EFF's Time Spent Drafting the Complaint, Motion for a Preliminary Injunction and Reply*  
5 *Is Reasonable.* ODNI contends that EFF's hours should be reduced because the complaint, motion  
6 for a preliminary injunction and reply are all based in part on filings in other cases. This Court  
7 encountered a similar situation in *Golden Gate Audubon Soc'y*, 732 F. Supp. 1014, in which the  
8 plaintiffs' counsel said that they expended 48.25 hours to prepare a partial motion for summary  
9 judgment and accompanying papers based in part on existing filings in a prior action. According to  
10 the Court:  
11

12 [T]he question is whether it was reasonable to spend 48.25 hours to prepare  
13 plaintiffs' summary judgment brief (which addressed central issues in the case),  
14 given their utilization of existing pleadings. We conclude, based on this Court's  
15 experience, and the complexity of the case and the issues raised, that the answer  
16 to this question is clearly yes. Indeed, had plaintiffs not had the opportunity or  
foresight to employ portions of the other brief, or utilize existing affidavits, we  
expect their hours would have considerably exceeded 48.25.

17 *Id.* at 1017-1018.

18 The government's argument is weaker still because it neglects to account for the fact that  
19 this is the first "expedited" FOIA action Ms. Hofmann and Mr. Sobel have personally litigated in  
20 the Northern District of California. Supp. Hofmann Decl. ¶ 3; Supplemental Declaration of David  
21 L. Sobel ("Supp. Sobel Decl.") ¶ 3. Ms. Hofmann and Mr. Sobel needed to perform legal research  
22 and revise their papers to incorporate the preliminary injunction and FOIA case precedent specific  
23 to the Ninth Circuit. Supp. Hofmann Decl. ¶ 4; Supp. Sobel Decl. ¶ 4. In the course of this  
24 research, they found no precedent in this Court squarely granting a motion for a preliminary  
25

26  
27 <sup>8</sup> ODNI points out a mathematical error in Ms. Hofmann's hours. Def. Opp. 20 n.10. Ms. Hofmann  
28 has adjusted her fee request accordingly in her supplemental declaration. Supp. Hofmann Decl. ¶ 7.

1 injunction in the expedited processing context. For this reason, Ms. Hofmann and Mr. Sobel took  
2 extra care to craft their argument to help the Court reach what it might consider an unusual or novel  
3 conclusion based in significant part on the precedents of other courts. Ms. Hofmann and Mr. Sobel  
4 also needed to become familiar with the local rules and procedures of the Court and adapt their  
5 filings to conform to those requirements. Supp. Hofmann Decl. ¶ 5; Supp. Sobel Decl. ¶ 5.  
6 Particularly given these necessary adjustments, EFF's attorneys spent a reasonable amount of time  
7 on this work.  
8

9 *Time Spent Drafting the Application to Shorten Time.* ODNI claims that EFF should not  
10 recover fees for work associated with its application to shorten time for a hearing on the motion for  
11 a preliminary injunction, which EFF drafted and filed at the same time as the underlying motion.  
12 Def. Opp. 21. Prior to drafting the application, EFF asked ODNI to stipulate to an expedited  
13 hearing schedule, which ODNI refused to do. Hofmann Decl. in Support of App. Shorten Time ¶ 9  
14 (Dkt. No. 11). Only after EFF filed the application did ODNI agree to stipulate to a hearing date of  
15 November 26, 2007 or later. Joint Stip. Briefing & Hearing Schedule on Pl.'s Mot. Prelim. Inj. &  
16 Mot. Order Shortening Time (Dkt. No. 19). As a result, the Court ruled on the motion on  
17 November 27, 2007, three days before the accelerated hearing the Court had scheduled for  
18 November 30, 2007. This means that the Court issue an order days before it would have even held  
19 a hearing on the motion under a typical 35-day briefing schedule as provided in Local Rule 7-2.  
20 Therefore, EFF's application to shorten time was a critical factor in EFF's successful effort to  
21 secure a quick result on the motion for a preliminary injunction.<sup>9</sup>  
22  
23

24 \_\_\_\_\_  
25 <sup>9</sup>This issue is analogous to that faced by this Court in *Powell*, in which the plaintiff's counsel  
26 sought fees for the preparation of a contempt motion that the Court never decided. 569 F. Supp.  
27 1192. The Court awarded fees for this work, explaining, "plaintiff nonetheless prevailed since it  
28 was not until after the motion was filed that a significant portion of the documents were finally  
ultimately released." *Id.* at 1203. Here, as in *Powell*, the undecided motion contributed materially to the  
ultimate result obtained by the plaintiff, and so fees should be awarded for the work associated  
with it. Considering that the underlying motion for a preliminary injunction sought to secure

1 **III. EFF Should Be Awarded Fees Associated With Preparing This Reply and Further**  
2 **Work Done to Prepare for and Participate in the Hearing on This Motion.**

3 For all the reasons stated in EFF's opening brief and this reply, EFF is eligible for and  
4 entitled to attorney's fees for the work associated with preparing this reply brief. The reasonable  
5 hours expended by EFF's counsel on this reply are set forth in the accompanying supplemental  
6 declarations of Marcia Hofmann, David L. Sobel and Kurt Opsahl. We reserve the right to  
7 supplement these hours further to account for work associated with the hearing scheduled for May  
8 23, 2008.

9 **CONCLUSION**

10 For the reasons stated in its opening papers and above, EFF respectfully requests that its  
11 motion for an award of attorney's fees and costs be granted.

12  
13 DATED: May 9, 2008

14 By /s/ Marcia Hofmann

15 Kurt Opsahl, Esq.  
16 Marcia Hofmann, Esq.  
17 ELECTRONIC FRONTIER FOUNDATION  
18 454 Shotwell Street  
19 San Francisco, CA 94110  
20 Telephone: (415) 436-9333  
21 Facsimile: (415) 436-9993

22 David L. Sobel (pro hac vice)  
23 ELECTRONIC FRONTIER FOUNDATION  
24 1875 Connecticut Ave. NW  
25 Suite 650  
26 Washington, DC 20009  
27 Telephone: (202) 797-9009 x104  
28 Facsimile: (202) 707-9066

Attorneys for Plaintiff  
ELECTRONIC FRONTIER FOUNDATION

---

expeditious treatment of EFF's requests, and EFF's complaint asked the Court to "provide for  
expeditious proceedings in this action," it is wholly appropriate to award fees for the work  
associated with the application.