

1 Marcia Hofmann (SBN 250087)
marcia@eff.org
2 ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
3 San Francisco, CA 94110
Telephone: (415) 436-9333
4 Facsimile: (415) 436-9993

5 David L. Sobel (*pro hac vice pending*)
david@eff.org
6 ELECTRONIC FRONTIER FOUNDATION
1875 Connecticut Ave. NW
7 Suite 650
Washington, DC 20009
8 Telephone: (202) 797-9009 x104
Facsimile: (202) 707-9066

9 Attorneys for Plaintiff
10 ELECTRONIC FRONTIER FOUNDATION

11 **UNITED STATES DISTRICT COURT**
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

14 ELECTRONIC FRONTIER FOUNDATION,)
15)
16 Plaintiff,) **COMPLAINT FOR INJUNCTIVE**
17 v.) **RELIEF**
18)
19 OFFICE OF THE DIRECTOR OF NATIONAL)
INTELLIGENCE,)
20 Defendant.)

21 1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for
22 injunctive and other appropriate relief. Plaintiff seeks the expedited processing and release of
23 records that Plaintiff requested from Defendant Office of the Director of National Intelligence,
24 concerning the agency’s efforts to push for changes to federal surveillance law and ensure that
25 telecommunications companies are not held responsible for their role in warrantless government
26 surveillance activities. There is no dispute that the requested records concern a matter about which
27 there is “[a]n urgency to inform the public about an actual or alleged federal government activity,”
28

1 and were “made by a person primarily engaged in disseminating information.” 5 U.S.C. §
2 552(a)(6)(E)(v)(II); 32 C.F.R. § 1700.12(c)(2). Therefore, Plaintiff is statutorily entitled to the
3 expedited treatment it seeks.

4 PARTIES

5 2. Plaintiff Electronic Frontier Foundation (“EFF”) is a not-for-profit corporation
6 established under the laws of the State of California, with offices in San Francisco, California and
7 Washington, DC. EFF is a donor-supported membership organization that works to inform
8 policymakers and the general public about civil liberties issues related to technology, and to act as
9 a defender of those liberties. In support of its mission, EFF uses the FOIA to obtain and
10 disseminate information concerning the activities of federal agencies.

11 3. Defendant Office of the Director of National Intelligence (“ODNI”) is a Department
12 of the Executive Branch of the United States Government. ODNI is an “agency” within the
13 meaning of 5 U.S.C. § 552(f)(1).

14 JURISDICTION

15 4. This Court has both subject matter jurisdiction over this action and personal
16 jurisdiction over the parties pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552(a)(6)(C)(i). This Court
17 also has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

18 VENUE AND INTRADISTRICT ASSIGNMENT

19 5. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §
20 1391(e).

21 6. Assignment to the San Francisco division is proper pursuant to Local Rule 3-2(c)
22 and (d) because a substantial portion of the events giving rise to this action occurred in this district
23 and division, where Plaintiff maintains its principal place of business.

24 FACTUAL ALLEGATIONS

25 **I. The Administration’s Campaign to Shield Telecommunications Companies 26 From Liability for Their Role in Unlawful Surveillance Activity**

27 7. On December 15, 2005, the *New York Times* reported:

28 Months after the Sept. 11 attacks, President Bush secretly authorized the National
Security Agency to eavesdrop on Americans and others inside the United States to

1 search for evidence of terrorist activity without the court-approved warrants
2 ordinarily required for domestic spying, according to government officials.

3 Under a presidential order signed in 2002, the intelligence agency has monitored the
4 international telephone calls and international e-mail messages of hundreds, perhaps
5 thousands, of people inside the United States without warrants over the past three
6 years in an effort to track possible "dirty numbers" linked to Al Qaeda, the officials
7 said.

8 James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec.
9 15, 2005. The following day, President Bush confirmed in a radio address that he had authorized a
10 surveillance program to intercept international communications in which one participant was
11 suspected of having a connection to the terrorist organization al Qaeda. President's Radio Address,
12 Dec. 17, 2005, [http://www.whitehouse.gov/news/releases/2005/12/
13 20051217.html](http://www.whitehouse.gov/news/releases/2005/12/20051217.html).

14 8. Shortly thereafter, the *New York Times* reported that the NSA's surveillance activity
15 was far more extensive than the operation President Bush had described. According to the *Times*:

16 The National Security Agency has traced and analyzed large volumes of telephone
17 and Internet communications flowing into and out of the United States as part of the
18 eavesdropping program that President Bush approved after the Sept. 11, 2001,
19 attacks to hunt for evidence of terrorist activity, according to current and former
20 government officials.

21 The volume of information harvested from telecommunication data and voice
22 networks, without court-approved warrants, is much larger than the White House
23 has acknowledged, the officials said. It was collected by tapping directly into some
24 of the American telecommunication system's main arteries, they said.

25 As part of the program approved by President Bush for domestic surveillance
26 without warrants, the N.S.A. has gained the cooperation of American
27 telecommunications companies to obtain backdoor access to streams of domestic
28 and international communications, the officials said.

Eric Lichtblau, *Spy Agency Mined Vast Data Trove*, N.Y. TIMES, Dec. 24, 2005.

9. On February 6, 2006, *USA Today* reported, "[t]he National Security Agency has
secured the cooperation of large telecommunications companies, including AT&T, MCI and
Sprint, in its efforts to eavesdrop without warrants on international calls by suspected terrorists,
according to seven telecommunications executives." Leslie Cauley and John Diamond, *Telecoms
Let NSA Spy on Calls*, USA TODAY, Feb. 6, 2006.

10. Approximately forty-one lawsuits have been filed throughout the United States

1 Director [of National Intelligence Mike] McConnell, including the important issue
2 of providing meaningful liability protection to those who are alleged to have
3 assisted our Nation following the attacks of September 11, 2001.

4 Signing Statement, *President Bush Commends Congress on Passage of Intelligence Legislation*,
5 Aug. 6, 2007, available at <http://www.whitehouse.gov/news/releases/2007/08/20070805.html>. On
6 information and belief, the assertions quoted above are substantially correct.

7 14. In an interview discussing the government's warrantless surveillance activities
8 published by the *El Paso Times* on August 22, 2007, Director McConnell stated:

9 [U]nder the president's program, the terrorist surveillance program, the private
10 sector had assisted us. Because if you're going to get access you've got to have a
11 partner and they were being sued. Now if you play out the suits at the value they're
12 claimed, it would bankrupt these companies. So my position was that we have to
13 provide liability protection to these private sector entities.

14 Chris Roberts, *Transcript: Debate on the Foreign Intelligence Surveillance Act*, EL PASO TIMES,
15 Aug. 22, 2007. On information and belief, the assertions quoted above are substantially correct.

16 15. According to a recent article published by *Newsweek*, "[t]he nation's biggest
17 telecommunications companies, working closely with the White House, have mounted a secretive
18 lobbying campaign to get Congress to quickly approve a measure wiping out all private lawsuits
19 against them for assisting the U.S. intelligence community's warrantless surveillance programs."
20 Michael Isikoff and Mark Hosenball, *The Phone Companies' Secret Lobbying Campaign*,
21 NEWSWEEK, Sept. 20, 2007. On information and belief, the assertions quoted above are
22 substantially correct.

23 **II. Plaintiff's FOIA Requests and Request for Expedited Processing**

24 16. In two letters sent by facsimile to ODNI and dated August 31, 2007, Plaintiff
25 requested under the FOIA all records from April 2007 to August 31, 2007 concerning briefings,
26 discussions, or other exchanges that Director McConnell or other ODNI officials have had
27 concerning amendments to FISA with a.) representatives of telecommunications companies, and
28 b.) offices of members of the Senate or House of Representatives, including any discussion of
immunizing telecommunications companies or holding them otherwise unaccountable for their role
in government surveillance activities.

17. In its August 31 letters, Plaintiff also formally requested that the processing of these

1 requests be expedited because they pertain to information about which there is “[a]n urgency to
2 inform the public about an actual or alleged federal government activity,” and were “made by a
3 person primarily engaged in disseminating information.” 5 U.S.C. § 552(a)(6)(E)(v)(II); 32 C.F.R.
4 § 1700.12(c)(2).

5 18. By two facsimiles sent September 10, 2007, ODNI acknowledged receipt of Plaintiff’s
6 FOIA requests, and informed Plaintiff that its requests for expedited processing had been granted.

7 19. Notwithstanding Defendant ODNI’s purported decision to expedite the processing of
8 Plaintiff’s FOIA requests, to date, the agency has neither completed the processing of Plaintiff’s
9 requests, nor informed Plaintiff of an anticipated date for the completion of the processing of the
10 requests.

11 20. Not only has ODNI failed to expedite the processing of Plaintiff’s requests, it has also
12 exceeded the generally applicable twenty-day deadline for the processing of *any* FOIA request.

13 21. Plaintiff has exhausted the applicable administrative remedies.

14 22. Defendant ODNI has wrongfully withheld the requested records from Plaintiff.

15 **CAUSE OF ACTION**

16 **Violation of the Freedom of Information Act for Wrongful Withholding of Agency Records**

17 23. Plaintiff repeats and realleges paragraphs 1-22.

18 24. ODNI has wrongfully withheld agency records requested by Plaintiff by failing to
19 comply with the statutory time limit for the processing of FOIA requests.

20 25. Plaintiff has exhausted the applicable administrative remedies with respect to ODNI’s
21 wrongful withholding of the requested records.

22 26. Plaintiff is entitled to injunctive relief with respect to the release and disclosure of the
23 requested documents.

24 **REQUESTED RELIEF**

25 WHEREFORE, Plaintiff prays that this Court:

26 A. order Defendant ODNI to process immediately the requested records in their
27 entirety;

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

- 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 for expeditious proceedings in this action;
- D. award Plaintiff its costs and reasonable attorneys fees incurred in this action; and
- E. grant such other relief as the Court may deem just and proper.

DATED: October 17, 2007

By _____
Marcia Hofmann, Esq.
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333
Facsimile: (415) 436-9993

David L. Sobel (*pro hac vice pending*)
ELECTRONIC FRONTIER FOUNDATION
1875 Connecticut Ave. NW
Suite 650
Washington, DC 20009
Telephone: (202) 797-9009 x104
Facsimile: (202) 707-9066

Attorneys for Plaintiff
ELECTRONIC FRONTIER FOUNDATION