

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC FRONTIER FOUNDATION,

Plaintiff,

v.

DEPARTMENT OF JUSTICE,

Defendant.

Civil Action No. 1:06-cv-01773-RBW

DECLARATION OF DAVID M. HARDY

I, David M. Hardy, declare as follows:

(1) I am currently the Section Chief of the Record/Information Dissemination Section ("RIDS"), Records Management Division ("RMD"), at the Federal Bureau of Investigation Headquarters ("FBIHQ") in Washington, D.C. I have held this position since August 1, 2002. Prior to joining the FBI, from May 1, 2001 to July 21, 2002, I was the Assistant Judge Advocate General of the Navy for Civil Law. In that capacity, I had direct oversight of Freedom of Information Act ("FOIA") policy, procedures, appeals, and litigation for the Navy. From October 1, 1980 to April 30, 2001, I served as a Navy Judge Advocate at various commands and routinely worked with FOIA matters. I am also an attorney who has been licensed to practice law in the state of Texas since 1980.

(2) In my official capacity as Section Chief of RIDS, I supervise approximately 200 employees who staff a total of ten (10) units and a field operational service center unit whose collective mission is to effectively plan, develop, direct, and manage responses to requests for access to FBI records and information pursuant to the FOIA; Privacy Act; Executive Order 12958, as amended; Presidential, Attorney General, and FBI policies and procedures; judicial decisions; and Presidential and Congressional directives. My responsibilities also include the review of FBI information for classification purposes as mandated by Executive Order 12958, as

amended,¹ and the preparation of affidavits/declarations in support of Exemption 1 claims asserted under the FOIA.² I have been designated by the Attorney General of the United States as an original classification authority and a declassification authority pursuant to Executive Order 12958, as amended, §§ 1.3 and 3.1. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information from its files pursuant to the provisions of the FOIA, 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a. Specifically, I am aware of the treatment which has been afforded the FOIA request of plaintiff, the Electronic Frontier Foundation ("EFF"), for specific types of FBI documents related to the FBI's Investigative Data Warehouse ("IDW"), a database of 659 million records, including terrorist watch lists, intelligence cable and financial transactions, that is culled from more than 50 government agency sources in addition to the FBI. More specifically, plaintiff's August 25, 2006 FOIA request seeks access to FBI records pertaining to the "listing, describing or discussing" of the categories of individuals covered by the IDW; the "listing, describing or discussing" of the categories of records in the IDW; the "listing, describing or discussing" of the criteria for inclusion of information in the IDW; the "describing or discussing" of any FBI determination that the IDW is, or is not, subject to the requirements of the Privacy Act of 1974; and the "describing or discussing" of any FBI determination that the IDW is, or is not, subject to federal records retention requirements, including the filing of Standard Form (SF) 115, which is titled "Request for Records Disposition Authority." In addition, plaintiff's September 1, 2006, FOIA request seeks access to FBI records pertaining to the "describing of data expungement, restriction or

¹ 60 Fed. Reg. 19825 (1995) and 69 Fed. Reg. 15315 (2003).

² 5 U.S.C. § 552 (b)(1).

correction procedures" for the IDW; all privacy impact statements created for the IDW; and all results of audits conducted to ensure proper operation of the IDW.

(4) The purpose of this declaration is to provide the Court and plaintiff with an overview of the FBI's RIDS, and an explanation for the delay associated with the FBI's processing of documents responsive to plaintiff's FOIA request. For the reasons which will be discussed below in greater detail, the FBI is submitting this declaration in support of a stay of proceedings for approximately 71 months (three months for the case to rise to the top of the backlog queue and 68 months for processing), no later than February 28, 2013, to allow the FBI to complete the processing and release of documents responsive to plaintiff's request. This length of time is based on the volume of 72,000 pages that the FBI has identified as potentially responsive. However, the FBI anticipates that after review and determination of the volume of documents which are within the scope of plaintiff's request are completed, the actual number of documents to be processed, and the time required to process those documents, could be much lower. Thus, the FBI anticipates that the stay, once issued, could be shortened by the Court at a later date to reflect updated estimates of processing time. The FBI will promptly advise the Court and plaintiff of any significant reductions in its estimates of the time required to process the request.

OVERVIEW OF THE FBI'S FOIA/PRIVACY ACT BACKLOG

(5) The number of FOIA and Privacy Act requests received by the FBI increased dramatically from the early 1980s. The Freedom of Information and Privacy Acts ("FOIPA") Section [the predecessor to RIDS] began processing requests in 1975. Initially overwhelmed by the number of requests, by 1981, the FBI had achieved a steady backlog between 4,000-7,000 requests. Beginning in 1985, the unavailability of additional employees and a steady, large stream of new requests increased the backlog substantially until in 1996 there were in excess of 16,000 requests. In 1996, the median time for a pending request was in excess of three years.

(6) During the years that the backlog continued to grow, the FBI repeatedly sought

additional funding for the creation of new FOIPA positions. It was not until the 1997 fiscal year budget that Congress appropriated funds which provided for the funding of 129 additional employees, and in the 1998 fiscal year budget provided for the funding of 239 additional employees. In 2002, RIDS moved to paperless processing through its FOIPA Document Processing System ("FDPS"). The FDPS allows the user to scan FBI files, documents, and correspondence, and enables the user to process pages electronically rather than manually. RIDS is now using this system to process virtually all of its FOIA/Privacy Act requests. The new process required the FBI to redistribute some of its FOIPA personnel to other sections within the RMD in order to support the scanning and archival services necessary for automated processing. Despite an additional reduction of RIDS personnel following September 11, 2001, to support the war on terrorism, the new efficiencies allowed the FBI to make great strides in reducing further its FOIA/Privacy Act backlog. For example, the backlog of requests in RIDS in various stages of processing between December 31, 1996 and December 31, 2006, dropped from 16,244 to 1,672, resulting in a reduction of 14,572 requests. The median time for a pending request dropped from 1,160 days on December 31, 1996, to 156 days on December 31, 2006.

(7) During 2006, there was an increase in requests, up from an average of 911 per month in 2005 to an average of 1,277 per month. Despite this increase, the FBI met or surpassed its primary goal of reducing the time required to process requests. The median time for processing small queue requests (less than 500 pages) decreased by 10% and the median time for processing medium queue requests (501 pages-2500 pages) decreased by 16%. However, the median time for the processing of large queue requests (over 2500 pages) increased by 22%. This increase was due to a concerted effort to reduce the backlog of the older, larger cases. This effort resulted in the number of pending large queue requests decreasing from 122 to 51.

(8) RIDS has taken all possible steps - using available technologies - to aid in the streamlining and reduction of the FOIA/Privacy Act backlog. These include the use of direct on-line computer searches to locate responsive records, the use of forms which eliminate delays

associated with word processing, the formation of specific teams to target backlog issues, the development of alternative methods to handle consultations with other government agencies, and the formation of the RIDS FOIPA LSU, which handles all FOIA/Privacy Act litigation. RIDS has a FOIPA Process Board and an Information Technology Change Management Board to improve existing processes, including the use of information technology enhancements to the existing automated processing system. These boards provide a systematic methodology to implement continuous process improvement for the future.

(9) Currently, the FBI is taking two steps to update its technology and facilities that have the potential to reduce dramatically the amount of time it takes the FBI to respond to FOIA and Privacy Act requests: (a) development of the electronic investigative case file (the Sentinel Project) and (b) establishment of an FBI Central Records Complex. The Sentinel Project is an on-going, multi-year project that will result in the elimination of paper investigative case files. With an embedded Records Management Application ("RMA"), FBI employees will be able to search for and retrieve these records electronically. Concurrently, the FBI has begun the process of designing and building a new, state-of-the art Central Records Complex ("CRC") in Frederick County, Virginia. This initiative will consolidate all closed FBI paper records from more than 265 different storage locations to one central site. When requested, paper records will be scanned and forwarded electronically. These initiatives will significantly improve RIDS's search and record retrieval capabilities by increasing search accuracy, by decreasing search time, by reducing lost files and missing serials, and eliminating the manual movement of files. RIDS expects these initiatives, after they are fully implemented, to reduce by 40% the time required to process a FOIA/Privacy Act request. Phase One of the Sentinel Program is scheduled to be launched in the spring of 2007. During 2006, RIDS completed its first phase of moving to an interim facility in Frederick County, Virginia, to recruit and train new employees in anticipation of the construction of the CRC. While this move is essential to future FBI FOIA/Privacy Act operations, it has created significant strains on the FBI's FOIA/Privacy Act resources.

STRAINS ON THE FBI'S FOIA RESOURCES

(10) Two significant factors impact the FBI's ability to process recently located records: (a) the physical relocation of a portion of RIDS personnel and resources from FBIHQ to the interim facility in Frederick County, Virginia; and (b) several urgent and competing litigation deadlines, both of which will be discussed in further detail below.

RMD Relocation to Frederick County, Virginia

(11) The decision to locate the permanent CRC site in Frederick County, Virginia, is currently pending with the U.S. General Services Administration. The FBI has begun the temporary relocation of RMD sections to interim sites in Frederick County, Virginia, and will continue with a full relocation of its workforce once the permanent CRC is built and ready for occupancy, sometime around the year 2010. The interim sites are approximately 90 miles out of the Washington, D.C. Metropolitan area - about a 1 ½-hour drive from FBIHQ.

(12) RIDS began relocation of its operations in February 2006 by establishing an advance team to prepare for the eventual relocation of RIDS in incremental stages. During the summer of 2006, RIDS began the first phase by relocating five and one half of its ten FBIHQ unit functions to an interim site - specifically half of the Service Request Unit, and all of Work Process Unit One, Work Process Unit Two, FOIPA Unit One, FOIPA Unit Two, and Classification Unit Two. To ensure continuing RIDS operations during the move, half of the Service Request Unit function and the functions of FOIPA Unit Three, Classification Unit One, Classification Unit Three, and the Litigation Support Unit remain at FBIHQ. These FBIHQ units, with a total of 85 employees currently on board, consist of the most senior and experienced RIDS employees.

(13) As evidenced by the FBI's 2006 FOIA/Privacy Act statistics, RIDS is making every effort to minimize disruption to operations during this transition period. This has been made all the more challenging as many employees have opted not to transfer with their unit function, opting to either retire or find other jobs rather than relocate to Frederick County,

Virginia. Unfortunately, many of these employees were among the most senior and experienced in their area of expertise. Since RMD announced its off-site relocation plans, a total of 58 former RIDS employees have either resigned, retired, or found other jobs in the Washington, D. C. Metropolitan area, rather than relocate with their unit. To date, a total of 64 RIDS employees from FBIHQ have relocated with their unit to Frederick County, Virginia.

(14) The FBI is engaged in aggressive and intense recruitment and hiring efforts in the Frederick County, Virginia area. In response to several recent postings for new hires, RIDS selected 333 individuals for interviews in June and November of 2005 and in January, February, March, August, October, and December of 2006, collectively. Of the 333 individuals selected for interviews, 82 candidates advised they were no longer interested prior to their interview; of the remaining 251 candidates interviewed, 94 either declined the initial offer of conditional employment following their interview or were disqualified during their background investigation; 35 employees have come on board; and the remaining are still pending in the background process. Past experience has shown that approximately 33% of those in FBI background investigations successfully complete the hiring process. With approximately 200 employees currently on the rolls, RIDS is 111 positions under its funded staffing level of 311 employees due to attrition and the reasons explained in Paragraph 13, supra. In addition, in light of the continuing resolution pursuant to which much of the federal government is operating, and which has resulted in a hiring freeze until further notice, RMD may not be able to hire any new support employees in the immediate future. The new RIDS employees who have less than one year of experience are in various stages of professional development, but none are yet operating as experienced employees. It takes an average of three years to adequately train a new employee in the FOIA/Privacy Act process to be able to work independently in a productive, efficient, and effective manner. Accordingly, RIDS has only a limited number of experienced employees processing FOIA/Privacy Act requests at this time.

Pending FOIA Litigations

(15) Simultaneously with this resource drain, RIDS has experienced a significant increase in its FOIA litigation workload, including several urgent and competing federal district court litigation deadlines:

(16) In Gerstein v. CIA, et al., Civ. A. No. 06-4643 (N.D. Cal.), plaintiff seeks, inter alia, access to all documents related to criminal referrals submitted to the U.S. Department of Justice or the FBI since January 1, 2001 regarding unauthorized disclosures of classified information to the press or public. The Court has ordered the FBI to expedite plaintiff's request, which has resulted in the FBI's intense search and identification of over 2,500 pages of potentially responsive records, with the search still ongoing. The FBI sought and received an additional 120 days from the original date of January 5, 2007, initially ordered by the Court to complete its review and processing of this material. The FBI must now complete the processing by April 27, 2007.

(17) In the FBI's largest FOIA litigation in its history, Rosenfeld v. U.S. Department of Justice, et al., Civ. A. Nos. 90-3576-MHP, 85-1709-MHP and 85-2247-MHP (N.D. Cal.), the FBI has been ordered by the Court to conduct hand searches of its COINTELPRO files for numerous subjects and to open 13 new FOIA requests on individual subjects. In order to comply with these demands, the FBI has again had to realign its personnel resources and has made a substantial commitment of resources to address these court-ordered issues.

(18) In Hidalgo v. FBI, Civ. A. No. 06-CV-1513 (D.D.C.), the FBI has recently had to review and process over 3,000 pages of documents responsive to plaintiff's request for documents related to an acknowledged FBI informant, by a Court-ordered completion date of March 16, 2007.

(19) In Vampire Nation v. Department of Justice, et al., Civ. A. No. 06-CV-01950 (D.D.C.) and Electronic Frontier Foundation v. Department of Justice, et al., Civ. A. No. 06-CV-1708 (D.D.C.), the FBI requested Open America stays from each of the Courts and the

motions are still pending. If these requests are either denied by the Courts or the requested processing time is substantially reduced, additional shifting of already strained employee resources will become necessary.

(20) In the past, the backlog in RIDS has been exacerbated by the high volume of administrative appeals which require review and response by RIDS personnel. RIDS personnel work closely with the staff of the U.S. Department of Justice, Office of Information and Privacy ("OIP") to review and assist with OIP's responses and determinations regarding pending appeals. During 2006, the FBI received a total of 1015 administrative appeals. As of February 28, 2007, 520 administrative appeals were pending resolution. While this number does not represent an increase, the aggregate number of appeals remains another significant drain on resources because inevitably, the time spent by RIDS personnel handling these appeals reduces the amount of time that they are able to devote for regular processing duties.

HOW A FOIA REQUEST IS PROCESSED IN RIDS

(21) Over the years, FOIA management at FBIHQ has continuously re-engineered the process of responding to FOIA/Privacy Act requests in an effort to better serve the needs of requesters who seek information from the FBI. In 2002, reorganization of various divisions at FBIHQ resulted in the formation of the RMD, which now handles all FOIA/Privacy Act requests through the RIDS. These most recent re-engineering efforts have resulted in a new organizational plan which will be discussed in more detail below.

(22) The mission of RIDS is to effectively plan, develop, direct, and manage responses to requests for access to FBI records and information. RIDS provides program and policy management that pertains to the research, review, analysis, processing, and classification/declassification work related to the FOIA and Privacy Act; Executive Order 12958, as amended; Presidential, Attorney General, and FBI policies and procedures; judicial decisions; and Presidential and Congressional directives. RIDS also provides prepublication review of material written by current and/or former FBI employees concerning FBI matters as mandated by

the FBI's employment agreement, executes the FBI's historic declassification program, and assists in managing defense discovery efforts in large counterterrorism criminal trials. RIDS currently employs approximately 200 personnel, most of whom are Legal Administrative Specialists ("LASs"), and who are assigned among the 11 units within RIDS. RIDS employees intake, review, process, and release information in response to FOIA and Privacy Act requests. To accomplish this mission, RIDS consists of the following 11 Units: one Service Request Unit ("SRU"), two Work Process Units ("WPU"), three Classification Units ("CU"), four FOIPA Units ("FOIPA Disclosure Units"),³ and the Litigation Support Unit ("LSU").

(a) Service Request Unit: the Service Request Unit ("SRU") includes the Negotiation Team, which works with individuals whose requests generate a large volume of records in an attempt to narrow the scope of responsive records and facilitate a more rapid response. Since 1995, this team has eliminated over 13 million pages from FOIA/Privacy Act requests. The Unit also has a RIDS Public Information Official, who is responsible for assisting requesters with issues concerning their request. The Government Response Team ("GRT"), also a part of SRU, provides timely feedback to other federal agencies and other DOJ components with regard to referrals of documents which are either FBI-originated or contain FBI-originated information.⁴ Referred documents are sent to the FBI for consultation or for direct response to the requester. Finally, SRU handles administrative appeals and criminal discovery matters.

(b) Work Process Units

(i) The two WPUs are responsible for reviewing and sorting all correspondence/incoming requests for information from the public, Congress, Presidential Libraries, foreign governments, other federal and state agencies, and other FBI entities (i.e., FBI

³ One of the four FOIPA Disclosure Units operates at an off-site location in Savannah, Georgia.

⁴ The Government Response Team ("GRT") was formerly known as the "Government Response and Prepublication Review Unit." However, an internal reorganization resulted in shifting the GRT and its functions to the SRU, and shifting the Prepublication Review Team to the RIDS front office.

field offices, Legats). The WPU's handle various initial tasks required to "perfect" a FOIA/Privacy Act request, including sending letters to acknowledge requests, advising a requester to provide identifying data so that an accurate records search can be made and/or to submit a notarized signature/Privacy Act waiver, and advising a requester when no responsive records are located. The WPU's also open new requests, assign a FOIA/Privacy Act Request Number, and enter the perfected requests into the FDPS tracking system. The WPU's are responsible for preparing "perfected" requests for transfer to the four Disclosure Units. A request is considered "perfected" when all administrative tasks have been completed and all responsive documents have been scanned into FDPS. Once a request has been perfected, it is placed in the backlog for assignment to a FOIPA Disclosure Unit for processing. The WPU's conduct searches of the general indices for identifiable records, confirm responsive documents, stamp files for retention, address fee issues (other than fee waiver reviews), retrieve and forward files for scanning into FDPS, respond to status inquiries, and maintain requests prior to their transfer to the FOIPA Disclosure Units.

(ii) After the WPU's perfect a request, it is sent to the "perfected backlog." To ensure fairness to all requesters and to equitably administer the deluge of FOIA/Privacy Act requests received by the FBI, a request is assigned based on the date of receipt on a "first in/first out" basis within each of three queues according to sound administrative practices.⁵ The FBI uses a three-queue system as a way to fairly assign and process new requests.⁶ The three-queue system established "multi-track" processing for requests, based on the amount of time and work involved in handling a particular request.⁷ The system nevertheless preserves the principle that, within the three queues, requests are still assigned and processed on

⁵ See 28 C.F.R. § 16.5(a).

⁶ This system went into effect on July 10, 1997, superseding the previous system of two queues (one for 100 pages or less, the other for requests greater than 100 pages).

⁷ See 5 U.S.C. § 552(a)(6)(D)(I) and 28 C.F.R. § 16.5(b).

a first-in/first out basis. The placement of a request in one of the three queues depends on the total amount of material responsive to that request - 500 pages or less ("small queue"), 501 to 2,500 pages ("medium queue"), or more than 2,500 pages ("large queue"). This standard operating procedure, coupled with the FBI's "first in/first out" policy, permits requests to be addressed in the order in which they are received, while obviating the inequities to other requesters whose interests relate only to a small number of documents. As described earlier, individuals whose requests have been placed in the large queue are given the opportunity, through contact with SRU's Negotiation Team, to reduce the scope of their requests and accelerate assignment of their requests by relocating them to a more advantageous queue.

(b) Classification Units: The three Classification Units ("CUs") are responsible for complying with the classification/declassification review of FBI records under Executive Order 12958, as amended, and for conducting mandatory declassification review consistent with Executive Order 12958, as amended. The CUs review documents responsive to FOIA/Privacy Act requests, criminal and civil discovery requests, Congressional and Presidential mandates, Presidential Library requests, mandatory declassification requests, Office of Inspector General Reports, and other federal agency requests in order to determine whether such material should remain classified or be declassified. In addition, the CUs review and prepare classified material for review by the Department of Justice Review Committee ("DRC").⁸

(c) FOIPA Units: The four FOIPA Disclosure Units perform the actual processing of records pursuant to the provisions of the FOIA and Privacy Act. "Processing" involves a page-by-page, line-by-line review of the responsive documents to determine which, if any, FOIA and/or Privacy Act exemptions may apply. This includes redaction of the exempt material and notation of the applicable exemption(s) in the margin of each page and/or

⁸ The DRC is the FBI's appellate authority with regard to the implementation and administration of Executive Order 12958, as amended, and related directives and guidelines concerning classified information. See 28 C.F.R. § 17.14.

preparation of deleted page information sheets when pages are withheld in their entireties, which is now done electronically in FDPS. During the course of their review, the FOIPA Disclosure Units consult with other government agencies for their determination as to the releasability of the other agency's information contained within FBI records, or refer non-FBI documents to those originating agencies for processing and direct response to the requester. The FOIPA Disclosure Units ensure that FOIA and/or Privacy Act exemptions have been applied properly, no releasable material has been withheld, no material meriting protection has been released, all necessary classification reviews have been completed by transferring applicable cases to the CUs, and other government agency information and/or entire documents originating with other government agencies have been properly handled.

(d) Litigation Support Unit: The Litigation Support Unit ("LSU") is responsible for providing legal support and administrative assistance to the FBI's Office of the General Counsel and Chief Division Counsels and Assistant Division Counsels in the FBI's field offices, in all FOIA/Privacy Act requests that result in federal litigation. The LSU coordinates the progress of the FBI's response to a particular FOIA/Privacy Act request as it progresses through the units described above, the receipt of substantive litigation-related information from involved FBI Special Agents ("SAs") in the field offices and the operational Divisions at FBIHQ, and the referral of documents to other DOJ components and government agencies. The LSU prepares the administrative record, drafts both procedural and substantive declarations, codes documents processed by the Disclosure Units,⁹ and drafts detailed declarations justifying the

⁹ A coded format is used in cases to assist the Court and parties in reviewing information which the FBI withholds within the context of processed documents. Each instance of information withheld pursuant to the FOIA is accompanied by a coded designation that corresponds to specified categories. For example, if "(b)(7)(C)-1" appears on a document, the "(b)(7)(C)" designation refers to Exemption (b)(7)(C) of the FOIA, which concerns "Unwarranted Invasion of Privacy." The numerical designation "(-1)" following the "(b)(7)(C)" narrows the main category to the more specific subcategory of "Names and/or Identifying Data of Third Party Individuals Merely Mentioned in FBI Records." Although adding codes is a time-consuming process, it helps the Court and the parties in those jurisdictions that accept coded declarations to
(continued...)

assertion of all applicable FOIA/Privacy Act exemptions.

(23) To promote administrative efficiency, LASs work on more than one request at a time. Certain cases may require that the usual processing be halted midstream. This can occur for a variety of reasons, including the resolution of classification issues, the location of additional records, or consultation with other government agencies as to the nature and propriety of releasing certain information. In the interest of efficiency during this waiting period, the LAS may fully process other requests. Large requests are often processed on parallel tracks with smaller requests in an attempt to ensure that one requester does not consume a disproportionate share of RIDS resources.

(24) Consistent with standard administrative procedure, any records referred to the FBI from other DOJ components or other government agencies in response to a particular request are added to that pending FOIA/Privacy Act request. This process is an equitable way for RIDS to maintain administrative control of FOIA/Privacy Act requests. Under this system, the same LAS assigned to process a particular request will also handle the review of records referred by other DOJ components or government agencies. By ensuring continuity in the processing of FOIA requests, this system is not only fair to all persons seeking information under the FOIA, but is also administratively efficient.

CHRONOLOGY OF PLAINTIFF'S FOIA REQUEST

(25) Set forth below is a chronology and description of the correspondence pertaining to plaintiff's FOIA request.¹⁰ Copies of this correspondence are attached hereto as **Exhibits A-C**.

⁹(...continued)
more clearly explain the nature of the withheld material.

¹⁰ The correspondence is set out in the chronological order that it was received at, or generated by, RIDS at FBIHQ. In its review of this Complaint, the FBI determined that it had never received plaintiff's request letter dated August 25, 2006, (see Exhibit C) allegedly sent to RIDS at FBIHQ by facsimile on the same date as the letter. However, RIDS at FBIHQ has no record of receiving plaintiff's request letter on that date and never sent an acknowledgment letter as standard practice requires. Moreover, plaintiff does not allege receipt of an acknowledgment
(continued...)

(26) By letter dated September 1, 2006, addressed to RIDS at FBIHQ and sent by facsimile on the same date, Marcia Hofmann, Esq. submitted a FOIA request on behalf of plaintiff, the Electronic Frontier Foundation ("EFF"), for specific types of FBI concerning "the FBI's "Investigative Data Warehouse" ("IDW")", a "659 million-record database" which is described as "one of the most powerful data analysis tools available to law enforcement and counterterrorism [FBI] agents." Specifically, plaintiff EFF requested "agency records (including, but not limited to, electronic records) concerning 1) all records describing data expungement, restriction or correction procedures for the IDW; 2) all privacy impact statements created for the IDW; and 3) all results of audits conducted to ensure proper operation of the IDW." Ms. Hofmann also attached a newspaper article concerning the IDW from the website of the Washington Post newspaper. Ms. Hofmann also requested a waiver of all duplication and search/review fees associated with this FOIA request for plaintiff based on its status as a non-profit public interest organization that routinely and systematically disseminates information to the public through its website, its online newsletter, and its publication of white papers and books. **(See Exhibit A).**

(27) By letter dated September 21, 2006, addressed to plaintiff, FBIHQ acknowledged receipt of plaintiff's FOIA request, notified plaintiff that its FOIA request had been assigned FOIPA Request No. 1058805-000, advised plaintiff that a search of the indices to the Central Records System at FBIHQ was being conducted for the records it had requested concerning the IDW, and further advised plaintiff that it would be informed of the results of this search as soon as possible. **(See Exhibit B.)**

(28) By letter dated August 25, 2006, addressed to RIDS at FBIHQ and sent to the FBI

¹⁰(...continued)

letter for the August 25, 2006 request. Therefore, the first of plaintiff's FOIA requests for records about the IDW, that RIDS at FBIHQ received was plaintiff's request letter dated September 1, 2006 (see Exhibit A). After discussions with Mr. Sobel, the FBI agreed to treat the copy of plaintiff's request letter dated August 25, 2006, sent to the FBI through its counsel in this action on November 29, 2006, as if it had been received on the August 25th date.

through its counsel in this action on November 29, 2006, David Sobel, Esq. submitted a FOIA request on behalf of plaintiff for specific types of FBI concerning "the FBI's "Investigative Data Warehouse" ("IDW")", a "database [which] comprises more that 100 million pages of terrorism related documents, and billions of structured records such as addresses and phone numbers" which "provides [FBI] agents and analysts with instant access to photographs, biographical information, physical location information, and financial data for thousands of known and suspected terrorists." Specifically, plaintiff requested "the following agency records (including, but not limited to, electronic records) concerning the FBI's "Investigative Data Warehouse" ("IDW"): 1) records listing, describing or discussing of the categories of individuals covered by the IDW; 2) records listing, describing or discussing of the categories of records in the IDW; 3) records listing, describing or discussing of the criteria for inclusion of information in the IDW; 4) records describing or discussing of any FBI determination that the IDW is, or is not, subject to the requirements of the Privacy Act of 1974; and 5) records describing or discussing of any FBI determination that the IDW is, or is not, subject to federal records retention requirements." Mr. Sobel also requested a waiver of all duplication and search/review fees associated with this FOIA request for plaintiff based on its status as a non-profit public interest organization that routinely and systematically disseminates information to the public through its website, its online newsletter, and its publication of white papers and books. (See Exhibit C).

EXPLANATION OF THE FBI'S CENTRAL RECORDS SYSTEM

(29) The Central Records System ("CRS") enables the FBI to maintain all information which it has acquired in the course of fulfilling its mandated law enforcement responsibilities. The records maintained in the CRS consist of administrative, applicant, criminal, personnel, and other files compiled for law enforcement purposes. CRS is organized into a numerical sequence of files, called FBI "classifications," which are broken down according to subject matter. The subject matter of a file may correspond to an individual, organization, company, publication, activity, or foreign intelligence matter (or program). Certain records in the CRS are maintained

at FBIHQ, whereas records that are pertinent to specific field offices of the FBI are maintained in those field offices. While the CRS is primarily designed to serve as an investigative tool, the FBI searches the CRS for documents that are potentially responsive to FOIA/Privacy Act requests. The mechanism that the FBI uses to search the CRS is the Automated Case Support System ("ACS").

(30) On or about October 16, 1995, the ACS was implemented for all Field Offices, Legal Attaches ("Legats"), and FBIHQ in order to consolidate portions of the CRS that were previously automated. ACS can be described as an internal computerized subsystem of the CRS. Because the CRS cannot electronically query the case files for data, such as an individual's name or Social Security number, the required information is duplicated and moved to the ACS so that it can be searched. More than 105 million records from the CRS were converted from automated systems previously utilized by the FBI. Automation did not change the CRS; instead, automation has facilitated more economic and expeditious access to records maintained in the CRS.

(31) The retrieval of data from the CRS is made possible through the ACS using the General Indices, which are arranged in alphabetical order.¹¹ The entries in the General Indices fall into two categories:

(a) A "main" entry - A "main" entry, or "main" file, carries the name corresponding with a subject of a file contained in the CRS.

(b) A "reference" entry - "Reference" entries, sometimes called "cross-references," are generally only a mere mention or reference to an individual, organization, or other subject matter, contained in a document located in another "main" file on a different subject matter.

(32) Searches made in the General Indices to locate records concerning a particular subject, such as the Investigative Data Warehouse, are made by searching the subject requested in the index.

¹¹ The General Indices, which became fully automated on September 24, 1987, also include index cards which allow a manual search for records prior to that date.

(33) The ACS consists of three integrated, yet separately functional, automated applications that support case management functions for all FBI investigative and administrative cases:

(a) Investigative Case Management ("ICM") – ICM provides the ability to open, assign, and close investigative and administrative cases as well as set, assign, and track leads. The Office of Origin ("OO"), which sets leads for itself and other field offices, as needed, opens a case. The field offices that receive leads from the OO are referred to as Lead Offices ("LOs"). When a case is opened, it is assigned a Universal Case File Number ("UCFN"), which is used by all FBIHQ, as well as all FBI field offices and Legats that are conducting or assisting in the investigation. Using the fictitious file number "44-HQ-12345," as an example, an explanation of the UCFN is as follows: "44" indicates the classification for the specific type of investigation, which in this example is "Civil Rights"; "HQ" is the abbreviated form used for the OO of the investigation, which in this example is FBIHQ; and "12345" denotes the individual case file number for the particular investigation.

(b) Electronic Case File ("ECF") – ECF serves as the central electronic repository for the FBI's official text-based documents. ECF supports the universal serial concept in that only the creator of a document serializes it into a file. This provides a single-source entry of serials into the computerized ECF system. All original serials are maintained in the OO case file.

(c) Universal Index ("UNI") – UNI continues the universal concepts of ACS by providing a complete subject/case index to all investigative and administrative cases. Only the OO is required to index; however, the LOs may index additional information as needed. UNI, an index of approximately 97.8 million records, functions to index names to cases, and to search names and cases for use in FBI investigations. Names of individuals or organizations are recorded with identifying applicable information such as date or place of birth, race, sex, locality, Social Security number, address, and/or date of event.

(34) The decision to index names other than subjects, suspects, and victims is a

discretionary decision made by the FBI Special Agent ("SA") – and on occasion, support employees – assigned to work on the investigation, the Supervisory SA ("SSA") in the field office conducting the investigation, and the SSA at FBIHQ. The FBI does not index every name in its files; rather, it indexes only that information considered to be pertinent, relevant, or essential for future retrieval. Without a "key" (index) to this enormous amount of data, information essential to ongoing investigations could not be readily retrieved. The FBI files would thus be merely archival in nature and could not be effectively used to serve the mandated mission of the FBI, which is to investigate violations of federal criminal and national security statutes. Therefore, the General Indices to the CRS files are the means by which the FBI can determine what retrievable information, if any, the FBI may have in its CRS files on a particular subject matter or individual, *i.e.*, the Investigative Data Warehouse.

SEARCH FOR RECORDS RESPONSIVE TO PLAINTIFF'S REQUEST

(35) In this case, the FBI has employed several mechanisms as part of its search efforts to identify documents responsive to plaintiff's request. As a threshold matter, it is important to note that the nature of plaintiff's FOIA request for specific records concerning the IDW does not lend itself readily or naturally to the searches that the FBI routinely conducts in response to FOIA requests seeking access to FBI investigative files. This is particularly the case where the subject matter of the request is relatively recent, and responsive records may not have yet been indexed to the FBI's CRS. As a result, the FBI initiated a standard search of records in the CRS, as well as an individualized inquiry of the most logical offices at FBIHQ which could have potentially responsive records concerning the IDW.

(36) On September 21, 2006, the RIDS staff initiated a search in the CRS for records responsive to plaintiff's request. The specific search inquiry in CRS included the following search terms: "Investigative Data Warehouse", "IDW", "Investigative Data Warehouse Account Password", "Investigative Data Warehouse", "Investigative Data Warehouse Regional Training", "Investigative Data Warehouse Version One Three Day Regional Training", "Investigative Data

Warehouse Version One", "Investigative Data Warehouse Version One Training", and "Investigative Data Warehouse Version 1.3." The date parameters for the search were for any responsive records created on or before September 21, 2006. The scope of the search included the Automated Data Base ("ADB"). The search sought main files and cross-references, whether security or criminal. As a result of this CRS search, FBIHQ identified no responsive FBIHQ main files for the above search terms concerning the IDW and only one FBIHQ cross-reference, which pertains to the search term "Investigative Data Warehouse Version One Three Day Regional Training."

(37) In addition, RIDS prepared and circulated an Electronic Communication ("EC") to those FBIHQ divisions and offices most likely to possess potentially responsive records requesting that all personnel to conduct a thorough search of any documents in their possession, including unserialized copies of documents; electronic records maintained on computers, audiotapes, or videotapes; e-mails; records maintained on portable media such as CD-ROMs or diskettes; and records maintained on any stand-alone databases created for the purpose of particular investigations, which may be responsive to the types of records concerning the IDW enumerated in plaintiff's request letter dated September 1, 2006. The date parameters for this search were for any responsive records created on or before September 21, 2006. This EC requested that these FBIHQ divisions and offices conduct the requested searches of their records and reply either positively or negatively to the appropriate RIDS personnel in WPU by October 23, 2006. FBIHQ divisions and offices with positive responses were also requested to forward copies of their potentially responsive records the appropriate RIDS personnel in WPU. This EC was circulated to the following FBIHQ divisions and offices, which were determined to most likely possess responsive documents concerning the IDW: the Director's Office; the Intelligence Directorate; the Office of the Chief Information Officer ("OCIO"); the Cyber Division; the Information Technology Operations Division ("ITOD"); the Office of Information Technology Policy and Planning; the Office of Information Technology Program Management;

the Office of Operational Technology; the Office of the General Counsel ("OGC"); the Office of Congressional Affairs ("OCA"); the Office of Public Affairs ("OPA"); the Critical Incident Response Group ("CIRG"); the Criminal Justice Information Services Division ("CJIS"); the Counterintelligence Division ("CD"); the Counterterrorism Division ("CTD"); the Criminal Investigative Division ("CID"), the Finance Division, the Inspection Division ("INSD"); the Security Division; and the Training and Development Division. Individuals in all of these FBIHQ divisions and offices have undertaken searches of their office records and files for potentially responsive records concerning the IDW. Given the nature of plaintiff's request, which seeks documents related to the IDW, the individuals who conducted these particular searches are those individuals most likely to possess potentially responsive records or who have knowledge as to where potentially responsive records could be located. Any suggestions or logical leads regarding potentially responsive documents have been followed up by RIDS personnel in WPU.

(38) As a result of these search efforts, which are now complete, a total of approximately 72,000 pages of records potentially responsive to plaintiff's request have been located and forwarded to RIDS personnel. This enormous volume of potentially responsive records is currently being reviewed by RIDS personnel in the Litigation Support Unit to determine whether or not the submitted records are within the scope of plaintiff's request, as defined in its FOIA request letters dated August 25, 2006, and September 1, 2006. This procedure is referred to as "scoping."¹²

(39) The responsive documents are being scanned into electronic format and will be

¹² Plaintiff's FOIA request dated August 25, 2006, which was sent to FBIHQ by plaintiff's attorney by facsimile dated November 29, 2006 was not specifically addressed by the EC. However, RIDS has been advised that the types of records concerning the IDW as listed in this request letter would have been included in the records already provided to RIDS personnel in WPU or records which were being located for forwarding to RIDS personnel in WPU. Therefore, it was decided that another EC requesting further searches for the types of records concerning the IDW listed in plaintiff's request letter dated August 25, 2006, would be an unnecessary redundancy.

forwarded to the "perfected" case backlog for assignment to a FOIPA LAS for processing. Based on the page count of approximately 72,000 pages, plaintiff's request will be placed in the large queue of the "perfected" case backlog. As explained earlier, in order to ensure fairness to all requesters and to administer equitably the deluge of FOIA/Privacy Act requests received by the FBI, a request is assigned based on the date of receipt on a "first in/first out" basis from within each of three queues according to sound administrative practices. Based on the date of this request - September 1, 2006 - there are approximately five requests, which total 35,801 pages, pending ahead of plaintiff's request in the large queue. The FBI anticipates that the earliest plaintiff's request will be assigned to a FOIPA Disclosure Unit for processing is in approximately three months, which is the estimated time for this request to rise to the top of the queue.¹³ The FBI will be able to review and process approximately 800 pages every four weeks, and anticipates that it will require a total of approximately 68 months to review and process the responsive documents. Due to the volume and complexity of the material, which consists of a number of highly technical documents, as well as lengthy e-mail trails, the FBI will release documents on a rolling basis. As the processing of a significant number of documents is completed, the FBI will make releases approximately every four weeks until the production is complete, rather than delay the release until the entire production is ready.

(40) The FBI takes its responsibilities with regard to the administration of the FOIA/Privacy Act program very seriously, and all reasonable efforts are being made to comply with the statutory deadlines. Regrettably, compliance with these deadlines is often not possible. However, as explained supra, the FBI has made tremendous strides in reducing its backlog over time. A reduction in pending requests has occurred even while the FBI continues to receive hundreds of new FOIA/Privacy Act requests. Nevertheless, the most equitable way to reduce the

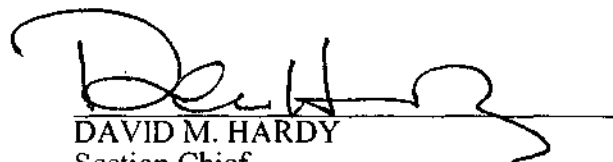
¹³ Once the FBI and/or DOJ grants a request for expedited processing, that request is moved to the head of the backlog queue. As a result, a request which has been granted expedition could conceivably jump ahead of plaintiff's request as would any perfected request with a date antecedent to that of plaintiff's request.

backlog and ensure that each request receives the attention it deserves is to process these requests based on the date of receipt according to sound administrative practices as explained above. It would be unfair to assign plaintiff's request for processing before other individuals whose requests were in the queue ahead of plaintiff. Each court order which requires that one request be given priority ahead of the others invariably works to the detriment of the other more patient requesters and encourages other requesters to seek relief in the courts, thereby undermining the FBI's attempt to manage the thousands of FOIA/Privacy Act requests it receives annually in a fair and consistent fashion.¹⁴

(41) For the above reasons, the FBI submits this declaration in support of its request in support of a stay of proceedings for approximately 71 months, no later than February 28, 2013, in order to allow the FBI to complete the processing and release of those documents responsive to plaintiff's request.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, and that Exhibits A through C attached hereto are true and correct copies.

Executed this 28th day of March, 2007.



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¹⁴ Due to the extraordinarily large number of potentially responsive pages in this case, some preliminary scanning and scoping has begun by a LAS from the LSU, but the process remains essentially as described, respecting the "first in-first out" principle.