

Civil Action No. 06-cv-1773 (RBW)

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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ELECTRONIC FRONTIER FOUNDATION,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 1:06-cv-01773-RBW
)	
DEPARTMENT OF JUSTICE;)	
)	
Defendant.)	
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SECOND 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 208 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 requests 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

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

² 5 U.S.C. § 552 (b)(1).

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 which describe "data expungement, restriction or 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) This second declaration supplements, and hereby incorporates, my previous declaration submitted in this case and dated March 28, 2007 ("First Hardy Declaration"), which provided the Court and plaintiff with an overview of the FBI's RIDS and the current backlog of FOIA/Privacy Act requests and pending FOIA/Privacy Act litigation, an explanation of the FBI's Central Records System ("CRS"), a chronology of plaintiff's FOIA requests, a description of the search for and voluminous number of records potentially responsive to plaintiff's FOIA requests, and an explanation for the delays associated with the FBI's processing of plaintiff's FOIA requests. In addition, the First

Hardy Declaration was also submitted to the Court 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) or no later than February 28, 2013, to allow the FBI to complete the processing and release of documents responsive to plaintiff's requests. This estimated length of time to complete the processing of plaintiff's FOIA requests was based on the volume of approximately 72,000 pages that the FBI had identified as potentially responsive as of March 28, 2007.

(5) However, since that date, the FBI has reviewed approximately 21,000 pages of potentially responsive records. Of those, 750 pages have been identified as responsive, and the remainder have been eliminated as being not responsive to plaintiff's FOIA requests.

(6) The purpose of this second declaration is to provide the Court and plaintiff with the current status of the review of records that are potentially responsive to plaintiff's FOIA requests, the current status of the classification review and FOIA processing of records which have been identified as responsive to plaintiff's FOIA requests, and an explanation of the delays associated with the FBI's processing of documents responsive to plaintiff's FOIA requests.

(7) There is no way of accurately predicting how many of the remaining 51,000 pages of documents are likely to be responsive. For the reasons which will be discussed below in greater detail, the FBI is also submitting this declaration in support of a continued stay of proceedings. As was anticipated earlier, (See First Hardy Declaration ¶ 4), based in part on the elimination of pages that have been identified as not responsive to plaintiff's request, the FBI anticipates that the time required to

complete processing will be significantly shorter than the initial estimate of 71 months. The FBI anticipates that an interim release of documents to plaintiff will be made by September 28, 2007.

**PLAINTIFF'S REQUEST FOR EXPEDITED TREATMENT
OF ITS FOIA REQUESTS**

(8) By letter dated April 6, 2007, addressed to the Department of Justice ("DOJ"), Office of Public Affairs ("OPA"), plaintiff requested that OPA grant expedited treatment for the processing of its FOIA requests concerning the IDW pursuant to 28 C.F.R. § 16.5(d)(1)(iv) inasmuch as the IDW is "[a] matter of widespread and exceptional media interest in which there exists possible questions about the government's integrity which affects public confidence." (**See Exhibit D.**)

(9) Pursuant to this letter, OPA considered the merits of plaintiff's request for expedited treatment of its FOIA requests concerning the IDW and concluded that the subject matter of its FOIA requests met the above-cited criteria, and therefore granted plaintiff's request for expedited processing.

(10) By letter dated August 3, 2007, addressed to plaintiff, the FBI advised plaintiff that OPA had granted expedited treatment for the processing of its FOIA requests concerning the IDW pursuant to the provisions of 28 C.F.R. § 16.5(d)(1)(iv). (**See Exhibit E.**)

(11) As a result of OPA's granting of expedited processing, the plaintiff's FOIA requests have been moved ahead of all earlier FOIA requests to the FBI that have not received expedited processing. Based on the dates of plaintiff's August 25, 2006 and September 1, 2006 FOIA requests, there are currently eight (8) FOIA requests that would have been processed before plaintiff's requests if plaintiff's requests had not

been granted expedited treatment. Plaintiff's requests are now being processed ahead of those earlier requests.

THE CURRENT STATUS OF THE REVIEW OF DOCUMENTS WHICH ARE POTENTIALLY RESPONSIVE TO PLAINTIFF'S FOIA REQUESTS

(12) As described in Paragraphs 35 through 38 of the First Hardy Declaration, the FBI conducted a wide-ranging search for FBIHQ records which could potentially contain information which is responsive to the specific categories of records sought by plaintiff. As a result of these search efforts, a total of approximately 72,000 pages of potentially responsive records were located and forwarded to RIDS personnel. As of the date of the First Hardy Declaration and continuing since that date, RIDS personnel in the Litigation Support Unit ("LSU") have been reviewing this enormous volume of potentially responsive records in order to determine whether or not the submitted records are within the scope of plaintiff's FOIA requests. (See First Hardy Declaration, ¶¶ 35-38.)

(13) Currently, RIDS has reviewed 21,000 out of the total of 72,000 pages of potentially responsive records to determine what records are within the scope of plaintiff's FOIA requests. This review has identified approximately 750 pages of documents which are responsive to plaintiff's FOIA requests, as well as eliminated approximately 20,250 pages of non-responsive documents.

(14) During this review process, RIDS personnel have been hampered by the complexity of some documents which are highly technical in nature. In addition, the review process has been delayed because of the inability of RIDS personnel to access some of the records on compact discs due to special encoding by the originator of

these records - the FBI's Security Division.³ These two unique elements of plaintiff's FOIA requests have required extensive consultation with personnel of the FBI's Security Division, the FBI's Office of the General Counsel, the FBI's Information Technology Operations Division, and the Office of the Program Manager of IDW. Nevertheless, the FBI anticipates that the scoping of the remaining potentially responsive documents will be completed within the next three months.

**THE CURRENT STATUS OF THE PROCESSING OF DOCUMENTS
WHICH ARE RESPONSIVE TO PLAINTIFF'S FOIA REQUESTS**

(15) As detailed in Paragraph 12 *supra*, this ongoing review of potentially responsive documents has to date resulted in the identification of approximately 750 pages of documents as containing information which is responsive to the specific categories of records sought by plaintiff. Approximately 550 pages of these responsive documents are currently being scanned into an electronic format and uploaded into the computerized FOIA/Privacy Act ("FOIPA") Document Processing System ("FDPS") for classification review and FOIA processing by RIDS personnel. In addition, the classification review and FOIA processing of approximately 200 pages of responsive records is nearing completion and it is anticipated that these processed records will be released to plaintiff on or before September 28, 2007.⁴

³ This inability of RIDS personnel to access these electronic records due to special encoding has recently been ameliorated by personnel of the Security Division, who have removed the encoding of most of these records, thus allowing RIDS personnel to print paper copies of these records.

⁴ It should be noted that the approximate page count of 200 pages represents the total number of pages reviewed and processed for the first interim release and not necessarily the number of pages which will actually be released to plaintiff.

(16) As detailed in Paragraphs 21 through 24, 38, and 39 of the First Hardy Declaration, there are several time-consuming steps that are necessary to complete the processing of plaintiff's FOIA requests. (See First Hardy Declaration, ¶¶ 21-24, 38 and 39.) The first step is to scan in the records which have been determined to be responsive into an electronic format and upload these records into FDPS. The next step is to forward these documents to the Classification Unit for classification/declassification review of these documents pursuant to Executive Order 12958, as amended. This classification and/or declassification review involves a page-by-page, line-by-line review of the responsive documents to determine which, if any, information is currently classified and/or should be declassified pursuant to Executive Order 12958, as amended, and to properly mark and stamp the classified information at the appropriate classification level.

(17) After completion of the classification/declassification review, the documents will then be returned to the FOIPA Disclosure Unit at FBIHQ for processing of these documents pursuant to the FOIA. This FOIA processing involves a page-by-page, line-by-line review of the responsive documents to determine which, if any, FOIA exemptions may apply. This FOIA processing also includes the redaction of any exempt material and the notation of the applicable FOIA exemption(s) in the margin of each page and/or preparation of deleted page information sheets when pages are withheld in their entirety. During the course of their review, the FOIPA Disclosure Unit may need to consult with other United States Government agencies for their determination as to the releasability of the other agency's information contained within these FBI records, or refer non-FBI documents to those originating agencies for

processing and direct response to plaintiff. The FOIPA Disclosure Unit at FBIHQ will ensure that FOIA 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, and other United States Government agency information and/or entire documents originating with other United States Government agencies have been referred for either consultation and return to the FBI or direct response to plaintiff.

(18) The last step in the processing of these responsive documents will be to have the proposed release of documents reviewed by the appropriate FBI Divisions and offices at FBIHQ who have equities in the release and/or withholding of the information in these documents. In this matter, these FBIHQ Divisions and offices include the Security Division, the Office of General Counsel, the Information Technology Operations Division and the Office of the Program Manager of IDW. After the completion of these reviews by other FBI entities, the documents will then be printed and mailed to plaintiff.

(19) As stated in Paragraph 15, supra, the classification review and FOIA processing of approximately 200 pages of responsive documents is nearing completion and will soon be forwarded to the appropriate FBI entities for their review. The FBI anticipates that these processed records will be released to plaintiff on or before September 28, 2007. Concurrently, the FBI will process the remaining 550 pages of records already determined to be responsive to plaintiff's requests, scope the remaining 51,000 pages of potentially responsive records, and process from these 51,000 pages, all records that are determined to be responsive to plaintiff's FOIA requests.

Personnel Shortages and Other Pending FOIA Litigation

(20) As explained in Paragraphs 11 through 14 of the First Hardy Declaration, RIDS is currently undergoing a phased physical relocation of personnel and resources from FBIHQ to an interim facility in Frederick County, Virginia. An unfortunate side effect of this relocation has been the loss of experienced RIDS personnel due to retirement or separation from the FBI inasmuch as these employees have decided not to transfer to the new facility. The next scheduled relocation of RIDS personnel at FBIHQ will be in December of 2007, and the final relocation of the remaining RIDS personnel at FBIHQ is scheduled for the summer of 2008. Although the FBI is engaged in aggressive and intense recruitment and hiring efforts in the Frederick County, Virginia area, it is anticipated that the trend in loss of experienced personnel due to retirement and separation from the FBI will persist in the foreseeable future. (See First Hardy Declaration, ¶¶ 11-14.)

(21) As explained in Paragraphs 15 through 19 of the First Hardy Declaration, simultaneously with this personnel and resource drain, RIDS has experienced a significant increase in its FOIA litigation workload, including two district court cases brought by EFF. Each of the other two EFF litigations have resulted in strict court-imposed deadlines, as I will describe in further detail below. (See First Hardy Declaration, ¶¶ 15-19.)

(22) In Electronic Frontier Foundation v. Department of Justice, et al., Civ. A. No. 07-CV-00656 (D.D.C.), the FBI has been ordered by the Court to process 2,500 pages of documents every month for release to plaintiff pursuant to its FOIA request for

records concerning the FBI's use of National Security Letters. This litigation involves an estimated 100,000 pages of potentially responsive documents. The FBI has made two releases to date, with the next release due September 5, 2007. In Electronic Frontier Foundation v. Department of Justice, et al., Civ. A. No. 06-CV-1708 (D.D.C.), the FBI has been ordered by the Court to process 800 pages every month for release to plaintiff pursuant to its FOIA request for records concerning the DCS 3000 System.

Approximately 9,883 pages have been identified as potentially responsive and the FBI has made four releases to date, with the next release due September 24, 2007.

(23) Plaintiff is not alone in suing the FBI. The FBI is actively defending numerous other lawsuits in district courts and appellate courts across the country, each with its own set of deadlines. At this time, the FBI is defending 104 FOIA/Privacy Act lawsuits nationwide.

(24) In order to comply with all of these demands, RIDS has realigned and made a substantial commitment of its personnel resources to address these judicially-imposed deadlines. However, despite its attempts to realign and commit personnel and resources, RIDS continues to experience the effects of a drain in the number of its experienced personnel while it moves forward with its relocation to Frederick County, Virginia. Thus, despite these best efforts, there are only a limited number of RIDS personnel available to work on all of the other FOIA/PA requests and litigation, including this FOIA litigation.

(25) 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, the FBI has made tremendous strides in the allocation of limited personnel resources in order to comply with all of its court-ordered deadlines as well as the reduction of its backlog of pending FOIA/Privacy Act requests over time. With regard to plaintiff's FOIA requests for specific records concerning the IDW, the FBI has made substantial progress in the review and elimination of a significant number of documents as being not responsive to EFF's FOIA requests and has also nearly completed the processing of the first interim release of responsive documents.

(26) For the above reasons, the FBI submits this declaration in support of its request for a stay of proceedings.

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

Executed this 4th day of September, 2007.

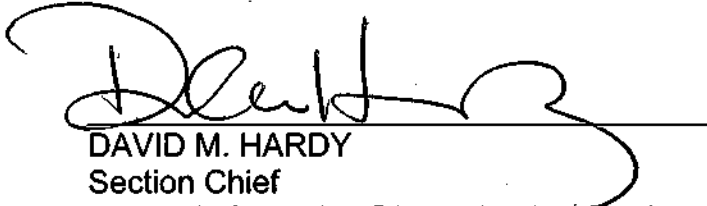

DAVID M. HARDY
Section Chief
Record/Information Dissemination Section
Records Management Division
Federal Bureau of Investigation
Washington, D.C.

Exhibit D



Electronic Frontier Foundation
Protecting Rights and Promoting Freedom on the Electronic Frontier

April 6, 2007

BY FACSIMILE – (202) 514-5331

Tasia Scolinos
Director of Public Affairs
Office of Public Affairs
U.S. Department of Justice
Room 1128
950 Pennsylvania Avenue, NW.
Washington DC 20530-0001

REQUEST FOR EXPEDITED FOIA PROCESSING

Dear Ms. Scolinos:

This is a request for expedited processing of a Freedom of Information Act ("FOIA") request, made pursuant to 28 CFR 16.5(d)(1). By letters dated August 25 and September 1, 2006 (attached hereto as Exhibits 1 & 2), the Electronic Frontier Foundation ("EFF") submitted FOIA requests to the Federal Bureau of Investigation ("FBI") seeking the disclosure of FBI records concerning the Investigative Data Warehouse ("IDW").

I believe these pending requests meet the criteria for expedited processing under 28 CFR 16.5(d)(1)(iv), as they concern "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." 28 CFR 16.5(d)(1)(iv). You recently concluded that another request EFF submitted to the FBI, concerning the Bureau's use of National Security Letters ("NSLs"), warranted expedited processing on this ground. See Exhibit 3, attached hereto. As I explain below, the factors EFF cited in support of the expedited processing of our NSL request in our letter to you dated March 12, 2007 (which I incorporate herein by reference) are equally applicable to our pending IDW requests.

In his report of March 9, 2007, the Department's Inspector General documented numerous instances of the FBI's "improper or illegal use" of NSL authority. Of particular relevance to this request, the Inspector General revealed that "NSL data is periodically downloaded . . . into the FBI's Investigative Data Warehouse (IDW), a centralized repository for intelligence and investigative data with advanced search capabilities." U.S. Department of Justice, Office of the Inspector General, "A Review of the Federal Bureau of Investigation's Use of National Security Letters" (March 2007), at 30. The Bureau's continuing retention in the IDW of the personal data improperly or illegally obtained through abuses of the NSL process is obviously central to the undisputed questions about "integrity which affect public confidence." Indeed, during the Senate Judiciary Committee's hearing on the issue on March 21, Sen. Feingold had the following exchange with the Inspector General:

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Sen. Feingold: In your October 2006 memo to the attorney general on the Justice Department's top management and performance challenges for fiscal year 2006, you caution that the Patriot Act granted the FBI broad new authorities to collect information, including the authority, quote, "To review and store information about American citizens and others in the United States about whom the FBI has no individualized suspicion of illegal activity," unquote.

You cautioned nearly six months ago that the department and the FBI need to be particularly mindful about the potential for abuse of these types of powers.

First, I want to establish some basic facts alluded to in your memo. Under the existing NSL statutes, it is possible to obtain information, including full credit reports, about people who are entirely innocent of any wrongdoing. Isn't that correct?

Mr. Fine: Well, it is possible, yes, as a result of the investigation there's no finding of anything and that they are innocent. Yes.

Sen. Feingold: And the FBI's policy is that it will retain all information obtained via NSLs indefinitely, often in databases like the Investigative Data Warehouse that are available to thousands of investigators. Is that correct?

Mr. Fine: Yes.

Sen. Feingold: Now, with regard to your caution about the potential for abuse of these powers, DOJ responded in November 2006 that the FBI agrees and that it is, quote, "aggressively vigilant in guarding against any abuse," unquote.

Would you agree with that statement, that the FBI has been aggressively vigilant in guarding against abuses?

Mr. Fine: I would agree that the FBI was not aggressively vigilant in terms of guarding against the problems we found, yes.

Indeed, the Department has recognized that the questions surrounding the retention of NSL data in the IDW are serious and require further examination. In a "Fact Sheet" issued on March 20, the Department announced "new oversight of the use and retention

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of NSL-derived information" and the creation of a "working group" to "examine how NSL-derived information is used and retained by the FBI." Fact Sheet: Department Of Justice Corrective Actions on the FBI's Use of National Security Letters (March 20, 2007) (attached hereto as Exhibit 4).

In summary, it is clear that recent events warrant the expedited processing of EFF's requests for information concerning the policies and procedures governing the inclusion and use of information in the Investigative Data Warehouse. As such, we hereby request such expedited treatment.

Thank you for your consideration of this request. As applicable Department regulations provide, I will anticipate your determination within ten (10) calendar days. 28 CFR 16.5(d)(1).

Under penalty of perjury, I hereby affirm that the foregoing is true and correct to the best of my knowledge and belief.



David L. Sobel
Senior Counsel

attachments

cc: (w/o attachments)

James C. Luh
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch

Exhibit E



U.S. Department of Justice

Federal Bureau of Investigation

Washington, D. C. 20535-0001

August 3, 2007

David L. Sobel, Esq.
Senior Counsel
Electronic Frontier Foundation
Suite 650
1875 Connecticut Avenue, NW
Washington, DC 20009

Re: FOIPA Request No. 1058805

Dear Mr. Sobel:

This letter is in response to your request to the U.S. Department of Justice ("DOJ"), Office of Public Affairs ("OPA"), for expedition of your Freedom of Information Act ("FOIA") request to FBI Headquarters ("FBIHQ") for specific records concerning the FBI's Investigative Data Warehouse ("IDW"). In your initial FOIA request letter dated August 25, 2006, and your supplemental FOIA request letter dated September 1, 2006, the Electronic Frontier Foundation ("EFF") sought access to specific records concerning the categories of individuals and records included in the IDW; the criteria for inclusion of information in the IDW; records concerning any FBI determinations that the IDW is, or is not, subject to the requirements of the Privacy Act of 1974 and federal records retention requirements; records concerning data expungement, restriction or 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.

The EFF requested that OPA grant expedited treatment for the processing of this FOIA request concerning the IDW pursuant to 28 C.F.R. §16.5(d)(1)(iv) inasmuch as the IDW is "[a] matter of widespread and exceptional media interest in which there exists possible questions about the government's integrity which affects public confidence." We have been advised that the Director of OPA has concluded that the subject matter of your FOIA request meets this criteria and therefore your request for expedited processing should be granted.

Please be advised that we have located and are currently processing FBIHQ records which are responsive to your FOIA request for release to you. In addition, we are continuing our review of the large number of FBIHQ records identified as potentially responsive to your request. As we process those records determined to be responsive, we will release them to you as soon as practicable.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Hardy', with a stylized flourish at the end.

David M. Hardy
Section Chief
Record/Information Dissemination
Section
Records Management Division