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12
13 **UNITED STATES DISTRICT COURT**
14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
15 **SAN FRANCISCO DIVISION**

16 ELECTRONIC FRONTIER FOUNDATION,)

Case No.

17 Plaintiff,)

**COMPLAINT FOR INJUNCTIVE
RELIEF**

18 v.)

19 DEPARTMENT OF DEFENSE, CENTRAL)
INTELLIGENCE AGENCY, DEPARTMENT)
20 OF HOMELAND SECURITY, DEPARTMENT)
OF JUSTICE, DEPARTMENT OF TREASURY)
21 and OFFICE OF THE DIRECTOR OF)
NATIONAL INTELLIGENCE,)

22)
23 Defendants.)
24 _____)

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INTRODUCTION

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1. The Electronic Frontier Foundation (“EFF”) brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for injunctive and other appropriate relief to enforce its right to prompt disclosure of government agency records. Plaintiff seeks the release of records requested from the Department of Defense, Department of Homeland Security, Department of Justice, Department of Treasury, Central Intelligence Agency, and Office of the Director of National Intelligence (collectively “Defendants”) concerning the use of social-networking websites as investigative, surveillance, and data collection tools.

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PARTIES

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

3. Defendant Department of Defense (“DoD”) is a Department of the Executive Branch of the United States Government. DoD is an “agency” within the meaning of 5 U.S.C. § 552(f)(1). The Air Force, Navy, and Defense Intelligence Agency are components of Defendant DoD.

4. Defendant Central Intelligence Agency (“CIA”) is a Department of the Executive Branch of the United States Government. CIA is an “agency” within the meaning of 5 U.S.C. § 552(f)(1).

5. Defendant Department of Homeland Security (“DHS”) is a Department of the Executive Branch of the United States Government. DHS is an “agency” within the meaning of 5 U.S.C. §552(f)(1). The Secret Service is a component of DHS.

6. Defendant Department of Justice (“DOJ”) is a Department of the Executive Branch of the United States Government. DOJ is an “agency” within the meaning of 5 U.S.C. §552(f)(1).

1 The Federal Bureau of Investigation (“FBI”), Drug Enforcement Agency (“DEA”), Criminal
2 Division, Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”), and Executive Office of
3 U.S. Attorneys (“EOUSA”) are components of Defendant DOJ.

4 7. Defendant Department of the Treasury is a Department of the Executive Branch of
5 the United States Government. The Department of the Treasury is an “agency” within the meaning
6 of 5 U.S.C. §552(f)(1). The Internal Revenue Service (“IRS”) is a component of the Department of
7 the Treasury.

8 8. Defendant Office of the Director of National Intelligence (“ODNI”) is an
9 Independent Establishment of the Executive Branch of the United States Government. ODNI is an
10 “agency” within the meaning of 5 U.S.C. § 552(f)(1).

11 **JURISDICTION**

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

15 **VENUE AND INTRADISTRICT ASSIGNMENT**

16 10. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §
17 1391(e).

18 11. Assignment to the San Francisco division is proper pursuant to Local Rule 3-2(c)
19 and (d) because a substantial portion of the events giving rise to this action occurred in this district
20 and division, where Plaintiff is headquartered.

21 **FACTUAL ALLEGATIONS**

22 12. Through the FOIA, EFF has requested information concerning the government’s use
23 of social-networking websites for investigative and data gathering purposes to help inform
24 Congress and the public about the effect of such uses and purposes on citizens’ privacy rights and
25 associated legal protections.

26 **Public Interest in Federal Government Use of Social-Networks**

27 13. An Associated Press article recently described government use of social-networking
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1 websites as the “hold-nothing-back world of social networking, where police search Facebook
2 photos for evidence of underage drinking and watch YouTube videos to identify riot suspects[.]”
3 Gene Johnson, *Fraud Fugitive Busted After Unwise Friend Request*, Associated Press, Oct. 13,
4 2009.

5 14. The Federal Government uses social-networking websites in investigations. For
6 example, as part of an investigation into the distribution of millions of pages of court documents
7 obtained from the Public Access to Court Electronic Records (“PACER”) system, FBI agents
8 researched the social-networking activities of Aaron Swartz, a computer programmer and activist,
9 including his Facebook and LinkedIn profiles. Ryan Singel, *FBI Investigated Coder for Liberating*
10 *Paywalled Court Records*, Wired, Oct. 5, 2009, [http://www.wired.com/threatlevel/2009/10/swartz-](http://www.wired.com/threatlevel/2009/10/swartz-fbi/)
11 [fbi/](http://www.wired.com/threatlevel/2009/10/swartz-fbi/); Wanted by the FBI, Raw Thought, <http://www.aaronsw.com/weblog/> (Oct. 5, 2009).

12 15. In another recent case, FBI searched the house of Elliot Madison, a social worker,
13 because of Twitter messages he sent during the G-20 summit notifying protesters of police
14 movements. Colin Moynihan, *Arrest Puts Focus on Protesters’ Texting*, N.Y. Times, Oct. 5, 2009,
15 at A19.

16 16. The Secret Service is using social-networking websites to conduct investigations, as
17 well. In a recent fraud investigation, “[i]nvestigators had spent months looking for [a fugitive] on
18 websites such as Facebook and MySpace, with no success. But when the fugitive finally opened [a
19 Facebook] account, it was immediately spotted by a Secret Service agent.” Chris Ayres, *US*
20 *Investigators Use Facebook to Track Down Wanted Man Maxi Sopo*, The Times (London), Oct.
21 15, 2009.

22 17. Although the Federal Government clearly uses social-networking websites to collect
23 information, often for laudable reasons, it has not clarified the scope of its use of social-networking
24 websites or disclosed what restrictions and oversight is in place to prevent abuse.

25 Plaintiff’s FOIA Requests and Requests for Expedited Processing

26 18. On October 7 and 8, 2009, EFF sent letters to various government agencies, as
27 detailed below, requesting records under FOIA.
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19. Specifically, EFF requested all records “about federal guidelines on the use of social-networking websites (including but not limited to Facebook, MySpace, Twitter, Flickr and other online social media) for investigative (criminal or otherwise) or data gathering purposes created since January 2003,” including but not limited to:

1) documents that contain information on the use of “fake identities” to “trick” site users “into accepting a [government] official as a friend” or otherwise provide information to the government as described in the Boston Globe article *Is This Lawman Your Facebook Friend?* By Julie Masis, published January 11, 2009;

2) guides, manuals, presentations, memoranda, or other materials explaining how government agents should collect information on social-networking websites;

3) guides, manuals, policy statements, memoranda, presentations, or other materials detailing how or when government agents may collect information through social-networking websites;

4) guides, manuals, policy statements, memoranda, presentations, or other materials detailing what procedures government agents must follow to collect information through social-networking websites;

5) guides, manuals, policy statements, memorandum, presentations, agreements (both formal and informal) with social-networking companies, or other materials relating to ‘privileged user’¹ access by the Bureau of Alcohol, Tobacco, Firearms, and Explosives to social-networking websites;

6) guides, manuals, memoranda, presentations or other materials for using any visualization programs, data analysis programs or tools used to analyze data gathered from social networks;

7) contracts, requests for proposals, or purchase orders for any visualization programs, data analysis programs or tools used to analyze data gathered from social networks; and

8) guides, manuals, policy statements, memoranda, presentations, or other materials describing how information collected from social-networking websites is retained in government databases or shared with other government agencies.

20. On October 7, 2009, EFF sent letters pursuant to the FOIA by facsimile to the CIA, Criminal Division, DEA, FBI, ODNI, IRS, and Department of Defense Inspector General. Each letter requested the records described in ¶ 19.

21. On October 8, 2009, EFF sent letters pursuant to the FOIA by facsimile to the Air

¹ Each request explained, “a privileged user is one who has powers within a computer system, which are greater than those available to regular users. Such persons usually include system administrators others responsible for maintaining the system. Adapted from Information Security Glossary, Privileged User, http://www.yourwindow.to/information-security/gl_privilegeduser.htm.”

1 Force, ATF, Defense Intelligence Agency, DoD, EOUSA, Navy and Secret Service. The letter
2 requested the records described in ¶ 19.

3 22. Because the Navy did not receive the first attempted facsimile, a second identical
4 request was sent via facsimile and received on October 16, 2009.

5 23. By letter dated October 9, 2009, the Defense Intelligence Agency acknowledged
6 receipt of EFF's FOIA request.

7 24. By letter dated October 16, 2009, the CIA acknowledged receipt of EFF's FOIA
8 request.

9 25. By letter dated October 16, 2009, the EOUSA acknowledged receipt of EFF's FOIA
10 request.

11 26. By letter dated October 19, 2009, the Navy acknowledged receipt of EFF's FOIA
12 request.

13 27. By letter dated October 20, 2009, the DoD acknowledged receipt of EFF's FOIA
14 request.

15 28. By letter dated October 21, 2009, the Secret Service acknowledged receipt of EFF's
16 FOIA request.

17 29. By letter dated October 22, 2009, the ODNI acknowledged receipt of EFF's FOIA
18 request.

19 30. By letter dated October 27, 2009, the Criminal Division acknowledged receipt of
20 EFF's FOIA request.

21 31. By letter dated October 29, 2009, the Air Force acknowledged receipt of EFF's
22 FOIA request.

23 32. By letter dated October 29, 2009, the IRS acknowledged receipt of EFF's FOIA
24 request.

25 33. By letter dated November 5, 2009, the DEA acknowledged receipt of EFF's FOIA
26 request.

27 34. By letter dated November 10, 2009, the FBI acknowledged receipt of EFF's FOIA
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1 request.

2 35. To date, EFF has not received any written response from ATF, but the agency
3 component acknowledged receipt of EFF's request letter in a phone conversation on November 7,
4 2009.

5 36. On information and belief, each agency component named herein received EFF's
6 FOIA request described in ¶ 19 on the date EFF transmitted the request to the agency by fax.

7 37. To date, no agency component named herein has completed the processing of EFF's
8 request.

9 38. All agency components named herein have exceeded the generally applicable
10 twenty-day deadline for the processing of FOIA request. 5 U.S.C. § 552(a)(6)(A)(i).

11 39. Only the IRS has invoked the ten-day extension provided by the FOIA for "unusual
12 circumstances." 5 U.S.C. § 552(a)(6)(B). However, the IRS has neither provided a firm date by
13 which it will complete the processing of the request, nor given EFF the opportunity to limit the
14 scope of its request or arrange an alternative time frame for processing.

15 40. No agency component named herein, with the exception of the IRS, has invoked the
16 statutorily permitted ten-day extension for "unusual circumstances." 5 U.S.C. § 552(a)(6)(B).

17 41. EFF has exhausted all applicable administrative remedies with respect to the
18 defendants' wrongful withholding of the requested records. 5 U.S.C. § 552(a)(6)(C)(i).

19 **CAUSE OF ACTION**

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

22 42. Plaintiff repeats and re-alleges the allegations in paragraphs 1 through 41 above,
23 inclusive.

24 43. Defendants have wrongfully withheld agency records requested by Plaintiff by
25 failing to comply with the statutory time limit for the processing of FOIA requests. 5 U.S.C. §
26 552(a)(6)(A)(i).

27 44. Plaintiff is entitled to an order requiring the immediate processing and release of the
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1 requested documents. 5 U.S.C. § 552(a)(4)(B).

2 **REQUESTED RELIEF**

3 WHEREFORE, Plaintiff prays that this Court:

- 4 A. order Defendants to process immediately the requested records in their
5 entirety and make copies available to Plaintiff;
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7 B. provide for expeditious proceedings in this action pursuant to 28 U.S.C. §
8 1657(a);
9
10 C. award Plaintiff its costs and reasonable attorneys fees incurred in this action
11 pursuant to 5 U.S.C. § 552(a)(4)(E); and
12
13 D. grant such other relief as the Court may deem just and proper.

14 DATED: December 1, 2009

15 By _____
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