

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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| <b>ELECTRONIC FRONTIER FOUNDATION,</b>     | ) |                       |
|  | ) |                       |
| Plaintiff,                                 | ) |                       |
|  | ) |                       |
| v.   | ) | C.A. No. 07-656 (JDB) |
|  | ) |                       |
| <b>DEPARTMENT OF JUSTICE,</b>              | ) |                       |
|  | ) |                       |
| Defendant.                                 | ) |                       |
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**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF  
PLAINTIFF’S PROPOSAL FOR A FREEDOM OF INFORMATION ACT  
PRODUCTION SCHEDULE**

Plaintiff Electronic Frontier Foundation (“EFF”) respectfully submits this supplemental memorandum in support of its proposal for a Freedom of Information Act (“FOIA”) production schedule, which EFF filed with the Court on May 29, 2007. In light of significant new developments, which are set forth below, EFF respectfully reiterates its request that the Court grant its motion for a preliminary injunction that has been pending since April 10, 2007, and enter an order compelling Defendant Department of Justice (“DOJ”) immediately to begin processing EFF’s FOIA request in conformance with EFF’s production proposal.

**BACKGROUND**

EFF initiated this action on April 10, 2007, seeking to compel the expedited processing of a March 12, 2007 FOIA request submitted to the Federal Bureau of Investigation (“FBI”) concerning the Bureau’s abuse of National Security Letter (“NSL”) investigative authority, which had been documented in a then-recent report by the DOJ Inspector General. The FBI had granted EFF’s request for expedited processing on March 30, 2007, agreeing that the request involved a “matter of widespread and

exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence" under 28 C.F.R. § 16.5(d)(1)(iv). However, the FBI not only failed to process the request in an expedited manner, but also to meet the statutory deadline for a standard, non-expedited FOIA request. Along with its complaint, EFF filed a motion to for preliminary injunction to compel expedited processing of its request, which Defendant DOJ opposed. EFF's motion is still pending before the Court. To date, the Bureau has failed to release a single page in response to EFF's request, and has been unwilling to provide EFF or the Court any estimate of when processing might be completed.

On May 21, 2006, this Court ordered the parties to confer and file either a joint proposal or competing proposals for a production schedule for EFF's FOIA request. The parties were unable to agree upon a mutually acceptable proposal, and so Defendant DOJ and EFF filed separate proposals for a production schedule on May 25, 2007 and May 29, 2007, respectively. EFF proposed the following:

- Defendant DOJ and its component the FBI shall, within 20 calendar days of this Court's Order, complete the processing of no fewer than 1500 pages of agency records potentially responsive to EFF's March 12, 2007 FOIA request, and provide to EFF copies of all non-exempt material contained therein;
- Defendant DOJ and its component the FBI shall thereafter complete the processing of 1500 pages every 15 calendar days, and provide to EFF all responsive non-exempt pages contained therein, until processing is complete.
- In an effort to minimize the number of exemption claims that must be litigated, Defendant DOJ shall produce a *Vaughn* index no later than 15 calendar days after processing is complete. EFF and Defendant DOJ shall then confer about the

possibility of removing any exemption claims from the scope of the litigation.

- No later than 45 calendar days after processing is complete, Defendant DOJ shall file its motion for summary judgment. No later than 15 calendar days thereafter, EFF shall file its cross motion for summary judgment, if any, and/or its opposition to Defendant DOJ's motion for summary judgment. No later than 15 calendar days thereafter, Defendant DOJ shall file its opposition to EFF's cross-motion for summary judgment, if any, and/or its reply to EFF's opposition. No later than 15 calendar days thereafter, EFF shall file its reply to Defendant DOJ's opposition to EFF's cross-motion for summary judgment, if any.

This morning, the *Washington Post* published an article on its front page reporting that a comprehensive internal FBI investigation has revealed far more NSL abuses than the Inspector General's report uncovered in March. John Solomon, *FBI Finds It Frequently Overstepped in Collecting Data*, *Washington Post*, June 14, 2007, at A1 (attached hereto as Exhibit 1). *Inter alia*, the *Post* reported:

An internal FBI audit has found that the bureau potentially violated the law or agency rules more than 1,000 times while collecting data about domestic phone calls, e-mails and financial transactions in recent years, far more than was documented in a Justice Department report in March that ignited bipartisan congressional criticism.

The new audit covers just 10 percent of the bureau's national security investigations since 2002, and so the mistakes in the FBI's domestic surveillance efforts probably number several thousand, bureau officials said in interviews. The earlier report found 22 violations in a much smaller sampling.

\* \* \*

"The FBI's comprehensive audit of National Security Letter use across all field offices has confirmed the inspector general's findings that we had inadequate internal controls for use of an invaluable investigative tool, FBI General Counsel Valerie E. Caproni said. "Our internal audit examined a much larger sample than the inspector general's report last March, but we found similar percentages of NSLs that had errors."

*Id.*

This morning's article shows unequivocally that there is still a great urgency for EFF to obtain the records it seeks in this action. The FBI's recent audit makes clear that the FBI's abuse of NSL authority is a far greater and more widespread problem than the DOJ Inspector General's report initially indicated. Indeed, had the records EFF seeks been released earlier, they might have helped to illuminate the scope of the FBI's unlawful conduct, which the FBI long ago conceded is a "matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." 28 C.F.R. § 16.5(d)(1)(iv). It is imperative that the requested information be made public as soon as possible to permit – for the first time – an *independent* assessment of the circumstances surrounding the Bureau's abuse of NSL authority.

Unfortunately, despite Defendant DOJ's acknowledgement that the processing of EFF's request should be expedited, it continues to languish more than three months after EFF first submitted it. The FBI's foot-dragging should not be entertained by the Court any longer. EFF reiterates that, in light of the demonstrated public interest in the material it seeks, the Court should compel Defendant DOJ and the FBI to begin processing and releasing material responsive to EFF's request in accordance with the schedule EFF has proposed.

## **CONCLUSION**

For the foregoing reasons, the Court should grant EFF's pending motion for a preliminary injunction, and order Defendant DOJ to immediately begin processing and releasing material in accordance with EFF's May 29, 2007 proposal for a FOIA production schedule.

Respectfully submitted,

*/s/ Marcia Hofmann*

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