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ENDORSED
FILED
San Francisco County Superior Court

JUL - 9 2015

CLERK OF THE COURT
DENNIS TOYAMA

BY: _____
Deputy Clerk

Attorneys for Petitioners

SUPERIOR COURT OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN FRANCISCO

ELECTRONIC FRONTIER FOUNDATION,)

Petitioner,)

v.)

OFFICE OF THE ATTORNEY GENERAL,)

Respondent.)

Case No. CPF - 15 - 514385

**VERIFIED PETITION FOR
PEREMPTORY WRIT OF MANDATE
AND WRIT OF MANDATE ORDERING
COMPLIANCE WITH THE
CALIFORNIA PUBLIC RECORDS ACT**

[Gov. Code §§ 6250, *et seq.*;
Civ. Proc. Code §§ 1085, *et seq.*]

Department:

1 **INTRODUCTION**

2 1. By this petition and pursuant to Code of Civil Procedure §§ 1085, *et seq.* and
3 Government Code §§ 6250, *et seq.*, Petitioner Electronic Frontier Foundation (EFF) seeks a writ of
4 mandate to enforce the California Public Records Act (“PRA”). In May 2014, EFF submitted
5 requests for records concerning Respondent California Attorney General’s Los Angeles Regional
6 Criminal Information Clearinghouse (“LACLEAR”) use and coordination of the “Hemisphere”
7 program, a partnership between telecommunications provider AT&T and law enforcement officials
8 that allows law enforcement to obtain detailed records about phone calls. A copy of this request is
9 attached as Exhibit A. The Attorney General released heavily and improperly redacted records to
10 EFF. Moreover, the Attorney General refused to release several categories of requested records
11 without making any effort to segregate records that could be released with those that should be
12 withheld. By providing an incomplete response and refusing to release records, the Attorney
13 General violated her legal duty to comply with the CPRA, forcing EFF to ask this Court for a writ
14 of mandate to command the Attorney General to comply with the PRA.

15 **PARTIES**

16 2. Petitioner EFF is a not-for-profit corporation established under the laws of the
17 Commonwealth of Massachusetts, with offices in San Francisco, California and Washington, D.C.
18 As a donor-supported membership organization, EFF has worked for more than 25 years to inform
19 policymakers and the general public about civil liberties issues related to technology and to protect
20 civil liberties, privacy, consumer interests, and innovation in new technologies. In support of its
21 mission, EFF uses state and federal transparency laws to obtain and disseminate information to the
22 public concerning government activities. EFF reports on and publishes records it receives in
23 response to public records requests on its website, www.eff.org; in its online newsletter, the
24 *EFFector* (in publication since 1990, currently with more than 179,000 subscribers); and through
25 white papers, *amicus* briefs, books, and its staff members’ speaking engagements. As such, EFF is
26 interested in the outcome of these proceedings and in Respondents’ performance of their legal
27 duties.

1 “Hemisphere.” A copy of this article is attached as Exhibit B.² Included with the *New York Times*
2 article was a PowerPoint presentation, attached to this petition as Exhibit C, produced by the High
3 Intensity Drug Trafficking Areas (HIDTA) program, a division of the White House’s Office of
4 National Drug Control Policy (ONDCP), that explained the program.³ The existence of the
5 program had not been previously reported.

6 9. According to the *New York Times*, the Hemisphere program involves the placement
7 of AT&T employees within law enforcement agencies that are part of the HIDTA program in order
8 to facilitate law enforcement access to electronic call detail records. Exhibit B at p. 3. According
9 to the HIDTA PowerPoint presentation, the Hemisphere program has call detail records going back
10 to 1987 and contains over 4 billion call detail records on a daily basis. Exhibit C at p. 9-10.
11 According to the HIDTA PowerPoint, investigators submit an administrative or grand jury
12 subpoena or a court order to Hemisphere, who can then turn records back to law enforcement in as
13 little as one hour. Exhibit C at p. 10; Exhibit E at p. 104.

14 10. The HIDTA PowerPoint presentation states that law enforcement must take steps to
15 “protect” the program and “keep the program under the radar.” Exhibit C at p. 15. As a result,
16 HIDTA informs officers making requests “to never refer to Hemisphere in any official document”
17 and in cases where “there is no alternative to referencing a Hemisphere request, then the results
18 should be referenced as information obtained from an AT&T subpoena.” *Id.* at p. 19. The HIDTA
19 PowerPoint stresses that Hemisphere should be used as a “pointer system” that allows law
20 enforcement to do complicated analysis of phone call records in order to determine alternative
21 phone numbers a suspect may be using, as well as other associates they may be communicating
22 with. *Id.* at p. 12-13, 17. Armed with this analysis, law enforcement can then issue a more
23 traditional subpoena or request for information to the phone provider directly in order to obtain this
24 information. According to the slides, this allows the information obtained via Hemisphere to be

25 _____
26 ² See Scott Shane and Colin Moynihan, *Drug Agents Use Vast Phone Trove, Eclipsing N.S.A.’s*,
27 *New York Times*, Sept. 1, 2013, at A1, available at [http://www.nytimes.com/2013/09/02/us/drug-](http://www.nytimes.com/2013/09/02/us/drug-agents-use-vast-phone-trove-eclipsing-nsas.html)
28 [agents-use-vast-phone-trove-eclipsing-nsas.html](http://www.nytimes.com/2013/09/02/us/drug-agents-use-vast-phone-trove-eclipsing-nsas.html).

³ See *Synopsis of the Hemisphere Project*, *New York Times*, September 1, 2013, available at
<https://s3.amazonaws.com/s3.documentcloud.org/documents/782287/database.pdf>.

1 “walled off” from public scrutiny. *Id.* at p. 17.

2 11. According to the HIDTA PowerPoint, the Hemisphere program is “coordinated
3 from the Los Angeles Clearinghouse” and funded by the ONDCP and the Drug Enforcement
4 Agency. *Id.* at p. 9. “Los Angeles Clearinghouse” refers to Respondent LACLEAR, which
5 explains on its website that it has received funding from the ONDCP to serve as an intelligence
6 support center for the Los Angeles Metropolitan HIDTA.⁴

7 *EFF’s Request to the Attorney General*

8 12. On May 5, 2014, Petitioner EFF sent a PRA request to Respondent Attorney
9 General. *See* Exhibit A. The request sought records about LACLEAR’s involvement in the
10 Hemisphere program, specifically:

- 11 a. Training and promotional records and materials, including
12 presentations, memorandums, policies and guidelines concerning
13 “Hemisphere” whether produced or created by LA CLEAR itself, or
14 produced, created or received from some other third party;
- 15 b. Contracts, service agreements or memorandums of understandings
16 concerning “Hemisphere” between LA CLEAR and
- 17 i. Any federal, state or local law enforcement agency;
18 ii. Any national, regional or local fusion center; or
19 iii. AT&T or any other telecommunications provider; and
- 20 c. Any and all reports, emails or other correspondence concerning LA
21 CLEAR’s use or knowledge of the “Hemisphere” program sent to or
22 received from

23
24 ⁴ *See* “About” on Los Angeles Regional Criminal Information Clearinghouse website, *available at*
25 <https://laclea.org/default.aspx/MenuItemID/975/MenuGroup/LA+Clear+Public.htm> (“By 1994 LA
26 CLEAR was awarded Office of National Drug Control Policy (ONDCP) High Intensity Drug
27 Trafficking Area (HIDTA) funding to expand its programs to support agencies throughout the
28 operational area of the Los Angeles Metropolitan HIDTA (LA-HIDTA), which encompasses Los
Angeles, Orange, Riverside and San Bernardino counties. Over the years LA CLEAR has grown in
size and scope and is now nationally recognized as a model HIDTA Intelligence Support Center
(ISC).”).

- i. Any federal, state or local law enforcement agency, or any national, regional or local fusion center; or
- ii. AT&T or any other telecommunications provider.

13. EFF stated that its request applied to all documents in LACLEAR’s possession, including electronic records. It also included documents that were created by a member of another government agency or a member of the public, including private companies, manufacturers, or vendors. EFF asked that if specific portions of any documents were exempt from disclosure, that LACLEAR provide the non-exempt portions. *See Exhibit A at p. 2.*

14. All of the records requested in Exhibit A fall within the definition of public records set forth in the PRA. *See Gov’t Code § 6252(e).*

15. After a lengthy delay, records were finally produced to EFF on February 11, 2015, accompanied with a letter, a copy of which is attached as Exhibit D.

16. Concerning EFF’s request for training and promotional materials, Respondent produced approximately 99 pages of records, mostly consisting of PowerPoint presentations. These records are attached as Exhibit E. A significant amount of the presentations slides were redacted in full. *See, e.g., Exhibit E at p. 40, 58, 60, 62, 64, 107, 118, 126-129.* According to the Attorney General, information was redacted under Government Code § 6255 “to protect[] against the disclosure of information germane to investigations and information gathered under assurances of confidentiality.” *Exhibit D at p. 36.* Redacted information includes partial titles of presentation slides, *Exhibit E at p. 52,* the names of police “squads” that queried the database, *Exhibit E at p. 82, 84, 86, 88, 90, 92,* and the names of other law enforcement agencies involved in the Hemisphere request process. *Exhibit E at p. 104.*

17. With respect to EFF’s request for contracts, service agreements or memorandums of understandings, Respondent claimed it had no records that were responsive to this request. *Exhibit D at p. 36.*

18. Finally, concerning EFF’s request for reports, emails or other correspondence, Respondent indicated it had identified responsive records in its possession but believed they were

1 exempt from disclosure. First, the Attorney General claimed the records were exempt under
2 Government Code § 6254(f) as investigative records and files compiled for a law enforcement
3 purpose. Exhibit D at p. 36. Second, it claimed they were exempt from disclosure as official
4 information under Government Code §§ 6154(k), 6255 and Evidence Code § 1040. Exhibit D at p.
5 37. Specifically, Respondent alleged that disclosing “unredacted copies of the documents you
6 requested would reveal important information about the current techniques and strategies being
7 utilized throughout the nation to combat illegal activities,” which “might prove beneficial to
8 criminal elements wishing to avoid interference by law enforcement officials in their unlawful
9 activities.” Exhibit D at p. 37.

10 19. As of the time this Petition was verified, Respondent has not provided Petitioner
11 with additional records responsive to EFF’s first request concerning training and promotional
12 materials.

13 20. As of the time this Petition was verified, Respondent has not provided Petitioner
14 with any records responsive to EFF’s second request concerning contracts, service agreements or
15 memorandums of understandings with other agencies or phone providers, or EFF’s third request
16 concerning reports, emails or other correspondence by LACLEAR about Hemisphere.

17 21. Upon information and belief, Respondent has at least some of the requested records
18 in its possession.

19 **THE CALIFORNIA PUBLIC RECORDS ACT**

20 22. Under the PRA, Government Code § 6250 *et seq.*, all records that are prepared,
21 owned, used, or retained by any public agency, and that are not subject to the PRA’s statutory
22 exemptions to disclosure must be made publicly available for inspection and copying upon request.
23 Gov’t Code § 6253.

24 23. In enacting the PRA the legislature recognized that
25 a requester, having no access to agency files, may be unable to precisely
26 identify the documents sought. Thus, writings may be described by their
27 content. The agency must then determine whether it has such writings under
28 its control and the applicability of any exemption. An agency is thus obliged
to search for records based on criteria set forth in the search request.

1 *Cal. First Amendment Coal. v. Super. Ct.*, 67 Cal. App. 4th 159, 165-66 (1998); *see* Gov't Code
2 § 6253(b).

3 24. The PRA also requires the government to “assist the member of the public make a
4 focused and effective request that reasonably describes an identifiable record or records” by taking
5 steps to “[a]ssist the member of the public to identify records and information that are responsive to
6 the request or to the purpose of the request, if stated. Gov't Code § 6253.1(a). An agency that
7 receives a request must also “[p]rovide suggestions for overcoming any practical basis for denying
8 access to the records or information sought.” *Id.*

9 25. Whenever it is made to appear by verified petition to the superior court of the
10 county where the records or some part thereof are situated that certain public records are being
11 improperly withheld from a member of the public, the court shall order the officer or person
12 charged with withholding the records to disclose the public record or show cause why he or she
13 should not do so. The court shall decide the case after examining the record in camera (if
14 permitted by the Evidence Code), papers filed by the parties and any oral argument and additional
15 evidence as the court may allow. Gov't Code § 6259(a).

16 26. If the Court finds that the failure to disclose is not justified, it shall order the public
17 official to make the record public. Gov't Code § 6259(b).

18 27. To ensure that access to the public's information is not delayed or obstructed, the
19 PRA requires that “[t]he times for responsive pleadings and for hearings in these proceedings shall
20 be set by the judge of the court with the object of securing a decision as to these matters at the
21 earliest possible time.” Gov't Code § 6258.

22 28. The California Constitution provides an additional, independent right of access to
23 government records: “The people have the right of access to information concerning the conduct of
24 the people's business, and, therefore, the meetings of public bodies and the writings of public
25 officials and agencies shall be open to public scrutiny.” Cal. Const. art. 1, § 3(b)(1).

FIRST CAUSE OF ACTION
For Violation of the California Public Records Act &
Article I, § 3 of the California Constitution

29. Petitioners incorporate herein by reference the allegations of paragraphs 1 through 28 above, as if set forth in full.

30. Respondent's failure to release all records, including portions of records, responsive to Petitioner's first request for training materials and presentations, violates the PRA and Article I, § 3 of the California Constitution.

31. Respondent's failure to conduct an adequate search in response to Petitioner's second request concerning contracts, service agreements or memorandums of understandings with other agencies or phone providers, violate the PRA and Article I, § 3 of the California Constitution.

32. Respondent's failure to release records and failure to segregate responsive from non-responsive records in response to Petitioner's third request concerning correspondence, violate the PRA and Article I, § 3 of the California Constitution.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays as follows:

1. That this Court issue a peremptory writ of mandate directing Respondents to provide Petitioners with all requested records except those records that this Court determines may lawfully be withheld;
2. That Petitioner be awarded attorneys' fees and costs; and
3. For such other and further relief as the Court deems proper and just.

Dated: 7/9/15

Respectfully submitted,

ELECTRONIC FRONTIER FOUNDATION

By: 

HANNI M. FAKHOURY
hanni@eff.org
JENNIFER LYNCH
ELECTRONIC FRONTIER

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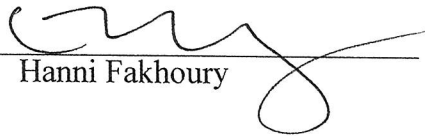
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Attorneys for Petitioner

VERIFICATION

1
2 I, Hanni Fakhoury, have read this VERIFIED PETITION FOR PEREMPTORY WRIT OF
3 MANDATE AND WRIT OF MANDATE in the matter of *EFF v. Office of the Attorney General*.
4 The facts alleged in paragraphs 2, 3, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20 and 21 are within
5 my own knowledge and I know these facts to be true. As to the remainder of the Petition, I am
6 informed, and do believe, that the matters herein are true. On that ground I allege that the matters
7 stated herein are true.

8 I declare under penalty of perjury under the laws of the State of California that the
9 foregoing is true and correct. Executed on 7/9/15 in San Francisco, California.

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12 _____
13 Hanni Fakhoury
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