



August 4, 2009

BY EMAIL — FOIA@fcc.gov

Kris Anne Monteith  
Chief, Enforcement Bureau  
Federal Communications Commission  
445 12th Street, S.W., Room 1-A836  
Washington, D.C. 20554

**RE: *Freedom of Information Act Request***

Dear Ms. Monteith:

This letter constitutes a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and is submitted to the Federal Communications Commission (“FCC”) on behalf of the Electronic Frontier Foundation (“EFF”). We make this request as part of EFF’s FOIA Litigation for Accountable Government (“FLAG”) Project, which works to obtain government documents and make them widely available to the public.

We seek all agency records (including but not limited to electronic records) from 2005 to the present that concern warrantless searches or inspections of residential premises, with or without consent, in connection with the use of non-licensed radio equipment, including:<sup>1</sup>

1. any materials intended to instruct FCC agents on the circumstances under which to conduct warrantless searches;
2. any materials intended to instruct FCC agents how to conduct warrantless searches;
3. any materials intended to instruct FCC agents how to obtain consent to search a home or on what constitutes consent;
4. any records that describe the consequences of withholding consent from an FCC agent;

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<sup>1</sup> On June 3, 2009, EFF emailed a FOIA request to the FCC seeking all records concerning warrantless searches or inspections of residential premises in connection with the use of non-licensed radio equipment (FCC FOIA Control Number 2009-425) (see attached request). In your July 16, 2009 response (attached), you indicated that the FCC had interpreted our references to warrantless searches to mean searches without a warrant and without consent. That was not our intent, and we wish to clarify that we seek in this request records related to all searches of residential premises, with or without consent.

5. all records, communications or other materials regarding any completed warrantless search by the FCC of a residential premises;<sup>2</sup>
6. any memoranda, policies or other documents concerning the FCC's retention and/or sharing of any information acquired during a warrantless search of a residential premises;
7. any material regarding whether the agency has built in any operational safeguards to reduce the opportunities for abuse of warrantless searches;
8. any complaints from members of the public or from within the FCC regarding the conduct of any warrantless search; and
9. all records that discuss or describe the potential consequences that individuals might experience as a result of the FCC's use of warrantless searches.

### **Request for News Media Fee Status**

EFF asks that it not be charged search or review fees for this request because EFF qualifies as a "representative of the news media" pursuant to the FOIA and 47 C.F.R. § 0.466(7). In requesting this classification, we note that the Office of the Inspector General, Department of Homeland Security, National Security Agency, and Department of State have all recognized that EFF qualifies as a "news media" requester, based upon the publication activities set forth below (see DOJ OIG letter, DHS stipulation, NSA letter and State Department letter attached hereto). We further note that the U.S. Court of Appeals for the D.C. Circuit has stressed that "different agencies [must not] adopt inconsistent interpretations of the FOIA." *Al-Fayed v. CIA*, 254 F.3d 300, 307 (D.C. Cir. 2001), quoting *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1287 (D.C. Cir. 1983).

EFF is a non-profit public interest organization that works "to protect and enhance our core civil liberties in the digital age."<sup>3</sup> One of EFF's primary objectives is "to educate the press, policymakers and the general public about online civil liberties."<sup>4</sup> To accomplish this goal, EFF routinely and systematically disseminates information in several ways.

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<sup>2</sup> We understand that documents responsive to this request may contain information which, if released, would constitute an unwarranted invasion of personal privacy. We also understand that the FCC may redact portions of documents to the extent that they contain such information.

<sup>3</sup> Guidestar Basic Report, Electronic Frontier Foundation, <http://www.guidestar.org/pqShowGsReport.do?npId=561625> (last visited August 4, 2009).

<sup>4</sup> *Id.*

First, EFF maintains a frequently visited web site, <http://www.eff.org>, which reports the latest developments and contains in-depth information about a variety of civil liberties and intellectual property issues.

EFF has also regularly published an online newsletter, the EFFector, since 1990. The EFFector currently has more than 77,000 subscribers. A complete archive of past EFFectors is available at <http://www.eff.org/effector/>.

Furthermore, EFF publishes a blog that highlights the latest news from around the Internet. DeepLinks (<http://www.eff.org/deeplinks/>) reports and analyzes newsworthy developments in technology. It also provides miniLinks, which direct readers to other news articles and commentary on these issues.<sup>5</sup>

In addition to reporting high tech developments, EFF staff members have presented research and in-depth analysis on technology issues in no fewer than eighteen white papers published since 2002. These papers, available at <http://www.eff.org/wp/>, provide information and commentary on such diverse issues as electronic voting, free speech, privacy and intellectual property.

EFF has also published several books to educate the public about technology and civil liberties issues. *Everybody's Guide to the Internet* (MIT Press 1994), first published electronically as *The Big Dummy's Guide to the Internet* in 1993, was translated into several languages, and is still sold by Powell's Books (<http://www.powells.com>). EFF also produced *Protecting Yourself Online: The Definitive Resource on Safety, Freedom & Privacy in Cyberspace* (HarperEdge 1998), a "comprehensive guide to self-protection in the electronic frontier," which can be purchased via Amazon.com (<http://www.amazon.com>). Finally, *Cracking DES: Secrets of Encryption Research, Wiretap Politics & Chip Design* (O'Reilly 1998) revealed technical details on encryption security to the public. The book is available online at <http://cryptome.org/cracking-des.htm> and for sale at Amazon.com.

EFF also records and releases podcasts of interviews with EFF staff and outside experts. *Line Noise* is a five-minute audio broadcast on EFF's current work, pending legislation, and technology-related issues. A listing of *Line Noise* podcasts is available at <feed://www.eff.org/rss/linenoisemp3.xml> and <feed://www.eff.org/rss/linenoiseogg.xml>.

Due to these extensive publication activities, EFF is a "representative of the news media" under the FOIA and agency regulations.

### **Request for a Public Interest Fee Waiver**

EFF is entitled to a waiver of duplication fees because disclosure of the requested information is in the public interest within the meaning of 5 U.S.C. § 552(a)(4)(a)(iii) and

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<sup>5</sup> These figures include hits from RSS feeds through which subscribers can easily track updates to DeepLinks and miniLinks.

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47 C.F.R. § 0.470(e). To determine whether a request meets this standard, the FCC determines whether “[d]isclosure of the requested information is likely to contribute significantly to public understanding of the operations or activities of the government,” and whether such disclosure “is not primarily in the commercial interest of the requester.” 47 C.F.R. § 0.470(e)(1). This request clearly satisfies these criteria.

First, the government’s FCC’s operation of a program of warrantless administrative searches unquestionably concerns “the operations or activities of the government.” 47 C.F.R. § 0.470(e)(2)(i).


Second, disclosure of the requested information “is likely to contribute to an understanding of government operations or activities.” 47 C.F.R. § 0.470(e)(2)(ii). EFF has requested information that will shed light on the manner in which the FCC conducts warrantless administrative searches. Little information about these FCC activities is currently available to the public.

Third, the requested material will contribute not only to EFF’s understanding of the FCC’s warrantless administrative search activities, but to the understanding of a reasonably broad audience of persons interested in the subject. 47 C.F.R. § 0.470(e)(2)(iii). EFF will make the information it obtains under the FOIA available to the public and the media through its web site and newsletter, which highlight developments concerning privacy and civil liberties issues, and/or other channels discussed more fully above.

Furthermore, a fee waiver is appropriate here because EFF has no commercial interest in the disclosure of the requested records. 47 C.F.R. § 0.470(e)(3). EFF is a 501(c)(3) nonprofit organization, and will derive no commercial benefit from the information at issue here.

Thank you for your consideration of this request. If you have any questions or concerns, please do not hesitate to contact me at (415) 436-9333 x.136. As the FOIA and applicable Department regulations provide, we will anticipate your determination within twenty (20) working days.

Regards,



Nathan Cardozo  
Open Government Legal Fellow

Attachments.



**Federal Communications Commission**  
Enforcement Bureau

July 16, 2009

Mr. Nathan Cardozo  
Electronic Frontier Foundation  
454 Shotwell Street  
San Francisco, CA 94110

Re: FOIA Control No. 2009-425

Dear Mr. Cardozo:

This is in response to your Freedom of Information Act (FOIA) request dated June 3, 2009.<sup>1</sup> In your FOIA request, you state that “[s]ince at least March 2005, the FCC has maintained that it has the authority to enter any premises, including private residences, without a search warrant to inspect any radio equipment operated there,” citing the Enforcement Bureau – Inspection Fact Sheet available at <http://www.fcc.gov/eb/otherinfo/inspect.html> (“the Fact Sheet”). You further state that the “FCC asserts that this inspection authority extends not only to licensed radio stations, but also to radio equipment which, under Part 15 of the FCC Rules . . . does not require a license to operate,” and then state that “[g]iven the ubiquitous nature of modern radio equipment, including devices such as baby monitors, garage door openers, cordless phones and WIFI routers, the FCC’s claimed authority to enter any home where any radio device is operating, at any time, with no notice and without a warrant, has raised concerns.” You then request seven different types of agency records, “from 2005 to the present, which concern warrantless searches or inspections of residential premises in connection with the use of non-licensed radio equipment.”

Your FOIA request refers to warrantless searches as those based on “authority to enter any premises, including private residences, without a search warrant to inspect any radio equipment operated there” and “FCC’s claimed authority to enter any home where any radio device is operating, at any time, with no notice and without a warrant.” We interpret your references to “warrantless searches” of residential premises to mean searches without a warrant and without consent. As we explain, the Commission does not conduct such searches. We thus have no documents responsive to your request.

The FCC has authority, pursuant to Section 303(n) of the Communications Act of 1934, as amended, “to inspect all radio installations associated with stations required to be licensed by any Act, or which the Commission by rule has authorized to operate without a license under section 307(e)(1) of this title, or which are subject to the provisions of any Act, treaty, or convention binding on the United States, to ascertain whether in construction, installation, and operation they conform to the requirements of the rules and regulations of the Commission . . . .”<sup>2</sup> Operation of “non-licensed radio equipment,” *i.e.*, equipment operated pursuant to Part 15 of

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<sup>1</sup> By letter dated June 30, 2009, the date for responding to your FOIA request was extended to July 16, 2009.

<sup>2</sup> 47 U.S.C. § 303(n).

the Commission's Rules ("Part 15 Device"),<sup>3</sup> does not require FCC authorization or license so long as the operation is consistent with the FCC's rules.<sup>4</sup> The operation of any Part 15 Device is subject to the condition that it not cause harmful interference to licensed users (including, but not limited to, public safety officers or air traffic control).<sup>5</sup> To enforce this condition, operators of Part 15 Devices must make that equipment or device "available for inspection by a Commission representative upon reasonable request."<sup>6</sup>

Typically, after the FCC has received a complaint of interference and located the source of the interference, an FCC agent will ask to inspect a Part 15 Device to determine if the device is causing interference to a licensed user. If inspection of the device can be accomplished from outside of a residence, no request for entry will be made. There are, however, instances where entry into a residence to inspect a Part 15 Device is necessary for FCC agents to determine accurately whether the device is causing interference. If the operation of the Part 15 Device is determined to be causing interference with the operations of a licensed user, the FCC agent will inform the operator and can request that operation of the Part 15 Device cease.<sup>7</sup> Operations may not be resumed until the harmful interference has been corrected.<sup>8</sup>

Investigations by the FCC in response to complaints by public safety entities have revealed that simple Part 15 Devices such as amplified antennas or wireless TV headsets can cause interference to air traffic systems and local public safety frequencies. Owners of these devices are often unaware that their Part 15 Device is causing interference to public safety or other licensed services and that such interference can occur, for example, if the device is malfunctioning. Quick resolution of the interference by FCC agents, with the assistance of the owners of the devices, helps to ensure that the safety services are not compromised. The FCC has issued citations to individuals where the operation of the Part 15 Device caused interference.<sup>9</sup> The citations are available on the FCC website.<sup>10</sup>

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<sup>3</sup> 47 C.F.R. §§ 15.1 *et seq.*

<sup>4</sup> 47 C.F.R. § 15.1.

<sup>5</sup> 47 C.F.R. § 15.5(b). Harmful interference is defined as interference which seriously degrades, obstructs, or repeatedly interrupts a licensed user, or endangers the functioning of a public safety service. 47 C.F.R. § 2.1.

<sup>6</sup> 47 C.F.R. § 15.29(a).

<sup>7</sup> 47 C.F.R. § 15.5(c).

<sup>8</sup> 47 C.F.R. § 15.5(c).

<sup>9</sup> A citation is a non-monetary warning issued by an FCC office to provide notice to parties who do not ordinarily conduct business with the FCC (*i.e.*, persons not holding or applying for Commission authorizations or licenses) that their actions violate the Communications Act and/or the FCC's rules. A citation also notifies the recipient that he or she could be subject to a monetary forfeiture if they continue those actions. Pursuant to Section 503(b)(5) of the Communications Act, no monetary forfeiture shall be determined against any person, if such person does not hold a license, permit, certificate, or other authorization issued by the Commission, and if such person is not an applicant for a license, permit, certification, or other authorization issued by the Commission, unless, . . . such person (A) is sent a citation of the violation charged; (B) is given a reasonable opportunity for a personal interview with an

Contrary to the premise of your FOIA request, FCC agents will only enter a residence with permission. The Fact Sheet specifically informs anyone that is the subject of such an FCC inspection request that “[o]nce you open the door, the agents should show their FCC identification card and badge, identify themselves by name and agency, and should state the purpose of the visit. They then should request permission to inspect the radio station. The agents may also ask to see records such as licenses for the station or operator. Agents, however, should never open private cabinets, drawers, or other private items in the search for license documents.” Thus, the agents are specifically directed to “request permission.” If permission is not granted, the agents will not proceed.

Failure to allow inspection of a Part 15 Device is a violation of FCC rules<sup>11</sup> and can result in issuance of a citation (which itself carries no monetary penalty, see n.9, *supra*). Such action is extremely rare, however. Indeed, only one such citation (copy enclosed for your information) has been issued for a failure to allow an inspection concerning the operation of a Part 15 Device. We also note that complaints concerning interference caused by the operation of Part 15 Device are generally resolved without formal enforcement action by the FCC other than the issuance of a citation.

In light of the concerns raised by your FOIA request and the article in Wired.Com, the Enforcement Bureau is reviewing the Inspection Fact Sheet to ensure it appropriately conveys the agency’s policies. At the same time, we encourage the operator of any Part 15 Device to work with any FCC agent who requests an inspection in order to quickly resolve any interference issues that are affecting other users of the spectrum.

As noted above, there are no records responsive to your FOIA request as we understand it. If you consider this to be a denial of your FOIA request, you may file an application for review with the Office of General Counsel within 30 days of the date of this letter, see 47 C.F.R. § 0.461(j).

Sincerely,



Kris Anne Monteith  
Chief, Enforcement Bureau

Enclosure  
cc: FOIA Officer

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official of the Commission, at the field office of the Commission which is nearest to such person’s place of residence; and (C) subsequently engages in conduct of the type described in such citation. 47 U.S.C. § 503(b)(5).

<sup>10</sup> See <http://www.fcc.gov/eb/FieldNotices/> (including citations issued since 2003).

<sup>11</sup> 47 C.F.R. § 15.29(a).



U.S. Department of Justice

Office of the Inspector General

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July 22, 2008

Marcia Hoffman  
Staff Attorney  
Electronic Frontier Foundation  
454 Shotwell Street  
San Francisco, California 94110

Subject: Freedom of Information/Privacy Act Request [08-OIG-164]

Dear Ms. Hoffman:

Your Freedom of Information Act (FOIA) request seeking records relating to the Federal Bureau of Investigation's use of National Security Letters was received in this office on July 21, 2008. We have assigned your request control number 08-OIG-164. Please cite this number in any future inquiry relating to your request.

You requested that we expedite your request pursuant to 28 C.F.R. § 16.5(d)(1)(ii), which provides that a request will be given expedited treatment if it is "made by a person primarily engaged in disseminating information" and the responding component determines that there is "[a]n urgency to inform the public about an actual or alleged federal government activity." The regulations further provide that in order to satisfy this provision a requestor must "establish a particular urgency beyond the public's right to know about government activity generally." Id. § 16.5(d)(3).

As support for your expedition request you state that "there is an urgency to inform the public about the information [you] seek." However, you have not explained the nature of this urgency beyond the public's general right to know. Accordingly, we are denying your request for expedition.

You have also requested a fee waiver on the basis of §16.11(b)(6) (representative of the news media) and §16.11(k) (public interest). We are granting your request for news media status and accordingly, you will not incur search fees in connection with your request. We will make



a determination regarding your request under §16.11(k) once we have completed our search for responsive documents and are in a better position to determine whether disclosure of the requested information is likely to contribute significantly to public understanding of the operations or activities of the government. We will inform you regarding our decision on this aspect of your fee waiver prior to incurring any expense that could be attributed to you.

If you are dissatisfied with my action regarding your request for expedited processing, you may appeal by writing to the Director, Office of Information and Privacy, U.S. Department of Justice, 1425 New York Avenue, Suite 11050, Washington, D.C. 20530, within 60 days of the date of this letter. Both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal." In the event you are dissatisfied with the results of any such appeal, judicial review will thereafter be available to you in the United States District Court for the judicial district in which you reside or have your principal place of business, or in the District of Columbia.

Sincerely,

A handwritten signature in cursive script that reads "Deborah M. Waller". The signature is written in black ink and is positioned above the printed name and title.

Deborah M. Waller  
FOI/PA Specialist

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC FRONTIER )  
FOUNDATION )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
DEPARTMENT OF HOMELAND )  
SECURITY, )  
 )  
Defendant. )  
\_\_\_\_\_ )

Civil Action No. 06-1988 (ESH)

**STIPULATED DISMISSAL OF PLAINTIFF’S SECOND CAUSE OF ACTION**

Plaintiff Electronic Frontier Foundation (EFF) and Defendant Department of Homeland Security (DHS), by counsel, hereby stipulate and agree as follows:

1. Defendant DHS has granted news media status to Plaintiff EFF based on the representations contained in EFF’s FOIA requests, which demonstrate that EFF is an “entity that is organized and operated to publish or broadcast news to the public.” 6 C.F.R. § 5.11(b)(6). Defendant DHS will continue to regard Plaintiff EFF as a “representative of the news media” absent a change in circumstances that indicates that EFF is no longer an “entity that is organized and operated to publish or broadcast news to the public.” 6 C.F.R. § 5.11(b)(6).
2. Accordingly, the parties herewith agree to the dismissal of Plaintiff EFF’s Second Cause of Action, related to EFF’s status as a “representative of the news media.”
3. The parties further agree that each will pay its own fees and costs for work on the dismissed claim.

SO STIPULATED AND AGREED this 27<sup>th</sup> day of February, 2007.

/s/ David L. Sobel

DAVID L. SOBEL  
D.C. Bar 360418

MARCIA HOFMANN  
D.C. Bar 484136

ELECTRONIC FRONTIER FOUNDATION  
1875 Connecticut Avenue, N.W.  
Suite 650  
Washington, D.C. 20009  
(202) 797-9009

*Counsel for Plaintiff*

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JEFFREY A. TAYLOR  
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ELIZABETH J. SHAPIRO  
D.C. Bar 418925  
Assistant Branch Director  
U.S. Department of Justice  
Civil Division, Federal Programs Branch

/s/ John R. Coleman

JOHN R. COLEMAN  
Trial Attorney  
U.S. Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Avenue, NW, Room 6118  
Washington, D.C. 20530  
(202) 514-4505

*Counsel for Defendant*



NATIONAL SECURITY AGENCY  
CENTRAL SECURITY SERVICE  
FORT GEORGE G. MEADE, MARYLAND 20755-6000

FOIA Case: 52276  
6 February 2007

Ms. Marcia Hofmann  
Electronic Frontier Foundation  
1875 Connecticut Avenue, NW  
Suite 650  
Washington, DC 20009

Dear Ms. Hofmann:

This is an initial response to your Freedom of Information Act (FOIA) request submitted via facsimile on 23 January 2007, which was received by this office on 24 January 2007, for all agency records (including, but not limited to, electronic records) related to the NSA's review of and input on the configuration of the Microsoft Windows Vista operating system ("Vista"). Your request has been assigned Case Number 52276.

As we began to process your request, we realized that the first page of the actual request was missing from your 18-page facsimile package. On 1 February 2007, a member of my staff contacted you to advise you of this fact. As a result, you submitted another facsimile of your original five-page request, which we received and have begun to process. There is certain information relating to this processing about which the FOIA and applicable Department of Defense (DoD) and NSA/CSS regulations require we inform you.

For purposes of this request and based on the information you provided in your letter, you are considered a representative of the media. Unless you qualify for a fee waiver or reduction, you must pay for duplication in excess of the first 100 pages. Your request for a fee waiver has been granted. In addition, please be advised your request for expedited treatment has been accepted. We are currently in the process of searching for responsive documents and will notify you of the status of your request as soon as that search has been completed.

Correspondence related to your request should include the case number assigned to your request, which is included in the first paragraph of this letter. Your letter should be addressed to National Security Agency, FOIA Office

(DC34), 9800 Savage Road STE 6248, Ft. George G. Meade, MD 20755-6248  
or may be sent by facsimile to 443-479-3612. If sent by fax, it should be  
marked for the attention of the FOIA office. The telephone number of the FOIA  
office is 301-688-6527.

Sincerely,

*Marianne Stupar*  
joc

PAMELA N. PHILLIPS  
Chief  
FOIA/PA Office



United States Department of State

Washington, D.C. 20520

May 1, 2007

Case Number: 200701765

Ms. Marcia Hofmann  
Electronic Frontier Foundation  
1875 Connecticut Avenue, N.W., Suite 650  
Washington, DC 20009

Dear Ms. Hofmann:

This is in response to your Freedom of Information Act (FOIA) request, dated March 19, 2007 for copies of documents concerning copyright matters between the U.S. and Canada.

We will begin the processing of your request based upon the information provided in your communication. We will notify you as soon as responsive material has been retrieved and reviewed.

We wish to advise you that the cut-off date for retrieving records is either the date you have given the Department by specifying a particular time frame or the date the search is initiated.

**Fees:** The Freedom of Information Act requires agencies to assess fees to recover the direct costs of processing requests, unless a fee waiver has been granted.

By making a FOIA request, you have agreed to pay all applicable fees up to \$25.00 unless a fee waiver has been granted. You may

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Office of Information Programs and Services  
U.S. Department of State SA-2  
Washington, DC 20522-8100  
Web site: [foia.state.gov](http://foia.state.gov)

Inquiries:  
Phone: 1-202-261-8484  
FAX: 1-202-261-8579  
email: [FOIAStatus@state.gov](mailto:FOIAStatus@state.gov)

specify a willingness to pay a greater or lesser amount. If the estimated fees exceed this limit, you will be notified.

Based upon the information that you have provided, we have placed you in the "news media" requester category. This category requires us to assess:

- duplication costs after first 100 pages.(see 22 CFR 171, enclosed)

Therefore, without an agreement to pay fees please be advised that your request will be processed without cost up to the required duplication of the first 100 pages.

Please let us know if you are willing to pay the fees that will incurred in the processing of your request. You may set a limit of the maximum amount that you wish to pay.

Based upon the information provided in your letter, your request for a fee waiver has been denied. If you wish to appeal this decision, you may write to the Chief, Requester Liaison Division, at the address given on the bottom of this page. Your appeal should address the points listed in the enclosed sheet entitled "Requests for Fee Waivers." Your appeal must be sent to us within 30 days from the date that you receive this letter.

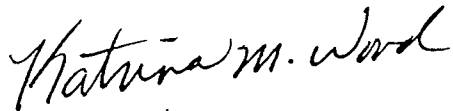
While we will make every effort to meet the time limits cited in the Freedom of Information Act (5 USC § 552), unusual circumstances

may arise for extending the time limit (see enclosure). We appreciate your patience in this matter.

If you have any questions, please do not hesitate to contact us. We can provide faster service if you include the case number of your request in your communications with us.

We are pleased to be of service to you.

Sincerely,



Katrina M. Wood  
Requester Communications Branch

Enclosure: As stated.