

EXHIBIT 4

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

)	
)	
ELECTRONIC FRONTIER FOUNDATION)	
Plaintiff,)	Civil Action No. 08-1023 JSW
)	
v.)	
)	
OFFICE OF THE DIRECTOR OF NATIONAL)	
INTELLIGENCE and UNITED STATES)	
DEPARTMENT OF JUSTICE)	
Defendant.)	
_____)	

DECLARATION OF JOHN F. HACKETT

I, John F. Hackett, declare the following to be true and correct:

1. I am the Director of the Information Management Office (IMO) for the Office of the Director of National Intelligence ("ODNI" or "Agency"). In this capacity I am the final decision-making authority for the IMO, which receives, processes, and responds to requests for ODNI records under the Freedom of Information Act (FOIA), 5 U.S.C. 552.

2. I make the statements herein on the basis of personal knowledge, as well as on information acquired by me in the course of performing my official duties.

3. By facsimile dated December 21, 2007, plaintiff Electronic Frontier Foundation submitted a FOIA request to ODNI for records concerning briefings, discussions, or other exchanges that Director McConnell or other ODNI officials have had with 1) members of the Senate or House of Representatives and 2) representatives or agents of telecommunications companies concerning amendments to FISA, including any discussion of immunizing such companies or holding them otherwise unaccountable for their role in government surveillance and activities. This request included all email, appointment calendars, telephone message slips, or other records indicating that such briefings, discussions, or other exchanges took place. ODNI

received the request on December 26, 2007. (A copy of plaintiff's initial request letter is attached hereto as Exhibit A.)¹

4. In its initial FOIA request letter, plaintiff requested expedited processing based on assertions that there is "an urgency to inform the public about an actual or alleged Federal Government activity" and that the request is being "made by a person primarily engaged in disseminating information." By letter dated January 7, 2008, ODNI acknowledged receipt of plaintiff's FOIA request and granted expedited processing. (A copy of ODNI's January 7, 2008 letter is attached hereto as Exhibit B.)

Processing and Current Status of Plaintiff's Request

5. As soon as the decision was made to expedite plaintiff's request it was given priority status and moved to the front of the FOIA request queue. As such, this request is being processed ahead of the other 49 FOIA requests currently pending in ODNI.

6. Upon granting expedited processing, searches were initiated in the Offices of the General Counsel and Legislative Affairs, the Civil Liberties and Privacy Office, the Office of the Deputy Director of National Intelligence for Collection, the Office of the Director of the Intelligence Staff, the Office of the Deputy Director of National Intelligence for Policy, Plans, and Requirements, the Front Office for the Director of National Intelligence, as well as the ODNI Executive Secretariat, which serves as the official repository for Director and Principal Deputy Director records. Individuals in those Offices that were reasonably likely to have responsive materials were advised to search their electronic and paper files and forward any responsive records to the IMO.

¹ Plaintiff's request seeks information pertaining to, among other things, "any discussion of immunizing [telecommunication] companies or holding them otherwise unaccountable for their role in government surveillance activities." Nothing in this declaration should be construed to confirm or deny any role that telecommunications companies may or may not have in any government surveillance activities.

7. The individuals who were asked to search for responsive records work on some of the most significant mission-related matters relating to the national security of the United States and were required to stop this critical work in order to perform the necessary searches for this case. Despite this fact, as of today, all necessary searches for responsive material have been completed and the IMO is currently processing the records that were located. As records were located, the IMO conducted a continual analysis and review of the documents. This process included the identification of duplicative and non-responsive material, creation of "working" copies of the documents, document indexes as needed, and an assessment of necessary consultations and/or referrals with those entities maintaining equity in the documents, and the application of any FOIA exemptions to the material.

8. As a result of the IMO's comprehensive review of the documents located pursuant to its numerous records searches, approximately 185 pages of unclassified material and approximately 80 pages of classified material was determined to be responsive to plaintiff's request.

9. The ODNI is actively processing the responsive records that were located. Approximately 255 pages of both classified and unclassified records have been forwarded to other government agencies for consultation and response back to the ODNI regarding the applicability of any FOIA exemptions. These agencies have been advised of this litigation and have assured us that they will process our consultations as soon as practicable.

10. The existence of classified material contributes significantly to the complexities attendant to processing a FOIA request. Responsive documents that contain classified information must undergo an additional time-intensive review to ensure that all documents are appropriately classified in accordance with Executive Order 12958, as amended. Such review also includes a page-by-page and line-by-line review of the documents to determine which, if

any, FOIA exemptions may apply. In light of the sensitive nature of classified information, potentially responsive material must also be reviewed by offices and agencies with equities in the documents to ensure that no improper disclosures are made.

11. In addition, some of the responsive material is so highly classified that it is in a classification compartment that is extremely sensitive. Only a small number of ODNI officials are able to access this material and it must be handled under special security procedures. The ODNI is actively working through these issues but this also contributes to the complexity of processing this FOIA request.

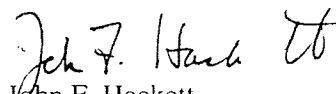
12. The agencies to which consultations have been sent have advised ODNI that they anticipate completing their review in approximately three weeks. The ODNI anticipates being able to complete the processing of all the responsive records in this case, and provide a final response to plaintiffs, within three weeks of receiving the other agencies responses to our consultations. ODNI is also willing to provide the Court with a status report in 30 days to update the Court on our progress.

13. Plaintiff's request that ODNI complete processing its FOIA request within 10 days is simply not practicable because ODNI has identified records, including classified records, that require consultations with other agencies and multiple layers of review. ODNI is devoting appropriate resources and effort to processing plaintiff's FOIA request as soon as practicable. Imposing a 10-day deadline would increase the chances of an inadvertent disclosure of classified

national security information as well as information otherwise protected from release under FOIA.

I certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 18th day of March, 2008.

A handwritten signature in black ink that reads "John F. Hackett". The signature is written in a cursive style with a large initial "J" and "H".

John F. Hackett
Director, Information Management Office

EXHIBIT A



December 21, 2007

VIA FACSIMILE — (703) 482-2144

Freedom of Information Act/Privacy Act Office
Office of the Director of National Intelligence
Washington, DC 20511

RE: Freedom of Information Act Request and Request for Expedited Processing

Dear Sir or Madam:

This letter constitutes an expedited request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and is submitted to the Office of the Director of National Intelligence ("ODNI") 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.

On August 5, 2007, President Bush signed into law the Protect America Act, legislation which amended the Foreign Intelligence Surveillance Act ("FISA") to expand the government's power to intercept communications without warrants, as well as shield telecommunications companies from future liability for their role in such activity.

Since the passage of this law, the Administration has tried to convince Congress to amend FISA to make it impossible for courts to impose liability on telecommunications companies for participating in a massive and illegal warrantless spying operation conducted by the National Security Agency. See Signing Statement, *President Bush Commends Congress on Passage of Intelligence Legislation*, Aug. 6, 2007; James Risen, *Bush Signs Law to Widen Reach for Wiretapping*, *NY Times*, Aug. 6, 2007; Mark Hosenball and Michael Isikoff, *Case Dismissed?: The Secret Lobbying Campaign Your Phone Company Doesn't Want You to Know About*, *Newsweek*, updated Sept. 26, 2007, available at <http://www.newsweek.com/id/41142>; Eric Lichtblau, James Risen and Scott Shane, *Wider Spying Fuels Aid Plan for Telecom Industry*, *NY Times*, Dec. 16, 2007.

National Intelligence Director Mike McConnell has actively campaigned for telecom immunity. In one interview, he said:

The issue that we did not address [in the Protect America Act], which has to be addressed is the liability protection for the private sector now is proscriptive, meaning going forward. We've got a retroactive problem. When I went through and briefed the various senators and congressmen, the issue was alright, look, we don't want to work that right now, it's too hard because we want to find out about some issues of the past. So what I recommended to the administration is, "Let's take that off the table for now and take it up when Congress reconvenes in September."

454 Shotwell Street, San Francisco, CA 94110 USA
+1 415 436 8333 (v) +1 415 436 8993 (f) www.eff.org

Freedom of Information Act Request and Request for Expedited Processing
 December 21, 2007
 Page 2

Chris Roberts, *Transcript: Debate on the Foreign Intelligence Surveillance Act*, El Paso Times, Aug. 22, 2007.

We are seeking all agency records from September 1, 2007 to the present concerning briefings, discussions, or other exchanges that Director McConnell or other ODNI officials have had with 1) members of the Senate or House of Representatives and 2) representatives or agents of telecommunications companies¹ concerning amendments to FISA, including any discussion of immunizing telecommunications companies or holding them otherwise unaccountable for their role in government surveillance activities. This request includes, but is not limited to, all email, appointment calendars, telephone message slips, or other records indicating that such briefings, discussions, or other exchanges took place.

Request for Expedited Processing

This request warrants expedited processing because it pertains to information about which there is “[a]n urgency to inform the public about an actual or alleged Federal Government activity,” and it is “made by a person primarily engaged in disseminating information.” 32 C.F.R. § 1700.12(c)(2). The information we request easily satisfies this standard.

As an initial matter, it is worth noting that ODNI and the Department of Justice recently granted expedited processing for four FOIA requests nearly identical to this one (see ODNI and Justice Department letters granting expedited processing attached hereto).

The federal government activity at issue here— ODNI efforts to secure immunity for telecoms engaged in illegal surveillance — raises serious questions about ODNI’s interests in revision of the FISA. Moreover, the Protect America Act includes a sunset provision requiring Congress to decide within weeks whether to reauthorize the legislation. This decisionmaking process has involved, and will continue to involve, congressional debate about whether to expand the law further, and if so, how much. Because Congress will imminently consider modifying FISA again, there is an urgency to inform the public about the lobbying forces pushing for reform of the law. The information we have requested will help the public and Congress fully participate in the

¹ The phrase “representatives or agents of telecommunications companies” is intended to include lobbyists and lawyers acting on behalf of such companies. According to *Newsweek*, these individuals may include, but are not limited to, “powerhouse Republican lobbyists Charlie Black and Wayne Berman (who represent AT&T and Verizon, respectively), former GOP senator and U.S. ambassador to Germany Dan Coats (a lawyer at King & Spaulding who is representing Sprint), former Democratic Party strategist and one-time assistant secretary of State Tom Donilon (who represents Verizon), former deputy attorney general Jamie Gorelick (whose law firm also represents Verizon) and Brad Berenson, a former assistant White House counsel under President George W. Bush who now represents AT&T.” Mark Hosenball and Michael Isikoff, *Case Dismissed?*, *Newsweek*, updated Sept. 26, 2007.

Freedom of Information Act Request and Request for Expedited Processing
 December 21, 2007
 Page 3

current and ongoing debate over whether the government's authority to conduct electronic surveillance should be further expanded and facilitated by telecommunications companies.

The purpose of this request is to obtain information directly relevant to ODNI's communications with members of Congress and telecommunications carriers about updating FISA to grant companies retroactive immunity for illegal conduct. There is an urgency to inform the public about the information we seek. Therefore, this request clearly meets the standard for expedited processing set forth in ODNI regulations.

Further, as I explain below in support of our request for "news media" treatment, EFF is "primarily engaged in disseminating information."

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 32 C.F.R. § 1700.2(h)(4). In requesting this classification, we note that the Department of Homeland Security and Department of State have recognized that EFF qualifies as a "news media" requester based upon the publication activities set forth below (see DHS stipulation and State Department letter attached hereto). In addition, the National Security Agency has previously determined that EFF is not only a "news media requester," but also "primarily engaged in disseminating information" for purposes of expedited processing (see attached EFF FOIA request and NSA response, in which EFF requested expedited processing because it sought information "urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity," and NSA granted the request). 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."² One of EFF's primary objectives is "to educate the press, policymakers and the general public about online civil liberties."³ To accomplish this goal, EFF routinely and systematically disseminates information in several ways.

First, EFF maintains a frequently visited web site, <http://www.eff.org>, which received 46,682,194 hits in July 2007 — an average of 62,744 per hour. The web site reports the latest developments and contains in-depth information about a variety of civil liberties and intellectual property issues.

² Guidestar Basic Report, Electronic Frontier Foundation, <http://www.guidestar.org/pqShowGsReport.do?npoid=561625> (last visited Dec. 18, 2007).

³ *Id.*

Freedom of Information Act Request and Request for Expedited Processing
 December 21, 2007
 Page 4

EFF has 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. DeepLinks had 510,633 hits in July 2007.⁴

In addition to reporting hi-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.

Most recently, EFF has begun broadcasting 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>. These podcasts were downloaded more than 2,600 times from EFF's in July 2007.

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 32 C.F.R. § 1700.6(b)(2). To determine whether a request meets this standard, ODNI considers whether "[i]t

⁴ These figures include hits from RSS feeds through which subscribers can easily track updates to DeepLinks and miniLinks.

Freedom of Information Act Request and Request for Expedited Processing
December 21, 2007
Page 5

is in the public interest to provide responsive records because the disclosure is likely to contribute significantly to the public understanding of the operations or activities of the United States Government and is not primarily in the commercial interest of the requester." *Id.* This request clearly satisfies these criteria.

First, ODNI's relationship with telecommunications companies and ODNI's push to amend FISA unquestionably constitutes government operations or activities.

Second, disclosure of the requested information will contribute to an understanding of government operations or activities. EFF has requested information that will shed light on how and why ODNI is lobbying to immunize telecommunications companies from liability for their role in conducting illegal surveillance.

Third, the requested material will contribute to public understanding of ODNI's efforts to modify FISA. This information will contribute not only to EFF's understanding of the reasons why and manner in which ODNI is lobbying for legal reform, but to the understanding of a reasonably broad audience of persons interested in the subject. 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.

Fourth, the disclosure will contribute significantly to the public's knowledge and understanding of ODNI's push to amend FISA to protect telecommunications companies. Disclosure of the requested information will help inform the public about the Justice Department's efforts to reform the law and the interests behind them, as well as contribute to the public debate about whether FISA should be further modified.

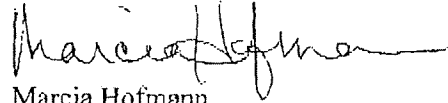
Furthermore, a fee waiver is appropriate here because EFF has no commercial interest in the disclosure of the requested records. EFF is a 501(c)(3) nonprofit organization, and will derive no commercial benefit from the information at issue here.

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

Thank you for your consideration of this request. As applicable ODNI regulations provide, we will anticipate your determination within ten (10) calendar days. 28 C.F.R. § 16.5(d)(1). Please be advised that, given the urgency of this matter, EFF intends to seek immediate judicial relief if a response to this request for expedition is not issued in a timely manner.

Freedom of Information Act Request and Request for Expedited Processing
December 21, 2007
Page 6

Sincerely,

A handwritten signature in black ink, appearing to read "Marcia Hofmann", with a long horizontal flourish extending to the right.

Marcia Hofmann
Staff Attorney

Enclosures

EXHIBIT B

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE
DIRECTOR OF THE INTELLIGENCE STAFF

Mr. John F. Hackett
Chief, Information Management Office
Office of the Director of National Intelligence
Washington, DC 20511

IAN 07 2008

Ms. Marcia Hofmann
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA 94110

Reference: DF-2008-00017

Dear Ms. Hofmann:

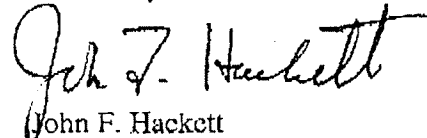
On 26 December 2007 the Office of the Director of National Intelligence received your facsimile dated 21 December 2007, wherein you requested under the Freedom of Information Act (FOIA):

“... records from September 1, 2007 to the present concerning exchanges that Director McConnell or other ODNI officials have had with 1) members of the Senate or House of Representatives and 2) representatives of telecommunications companies concerning amendments to FISA. . .”

We accept your request and have assigned it the reference number above. Please use this number when corresponding with us so that we can identify it easily. In addition, your request for expedited processing is granted and your request will be processed as soon as practicable.

If you have any questions you may contact the FOIA Requester Service Center at 571-204-4774.

Sincerely,



John F. Hackett
Director, Information Management Office