

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

	)	
	)	
ELECTRONIC FRONTIER FOUNDATION	)	
	)	
Plaintiff,	)	Civil Action No. 09-3351
	)	
v.	)	
	)	
CENTRAL INTELLIGENCE AGENCY, et al.	)	
	)	
Defendants.	)	
_____	)	

**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 February 25, 2008, plaintiff Electronic Frontier Foundation submitted a FOIA request to ODNI for records of all reports submitted by the Office of the Director of National Intelligence to the Intelligence Oversight Board ("IOB") pursuant to Section 2.4 of Executive Order 12863 since April 2005. ODNI received the request on February 25, 2008. (A copy of plaintiff's February 25, 2008 request letter is attached hereto as Exhibit A.) Plaintiff did not request expedited processing.

4. Pursuant to ODNI regulation, all requests are processed on a "first-in, first-out" basis unless a request for expedited processing is received and granted. See 32 C.F.R. § 1700.12

(2008). Therefore, plaintiff's request was assigned number DF-2008-00029 and placed in our normal processing queue. ODNI does not have any record of providing the plaintiff with a written acknowledgement of plaintiff's FOIA request. When this inadvertent oversight was discovered ODNI provided a written status update to the plaintiff dated August 13, 2009. (A copy of ODNI's August 13, 2009 letter is attached hereto as Exhibit B.)

5. By facsimile dated June 19, 2009 plaintiff submitted a second FOIA request to ODNI. In this request, plaintiff requested reports submitted to the IOB pursuant to Executive Order 12863 through February 29, 2008, and also requested all records concerning the ODNI's activities under Executive Order 13462 from February 29, 2008 to the present. This includes reports, assessments, reviews, instructions, guidelines, and submissions to or communications between the ODNI and the IOB and/or the President's Intelligence Advisory Board ("PIAB"). (A copy of plaintiff's June 19, 2009 request letter is attached hereto as Exhibit C.) Plaintiff did not request expedited processing. Therefore, plaintiff's request was assigned number DF-2009-00083 and placed in our normal processing queue.

6. By letter dated June 29, 2009, ODNI acknowledged receipt of plaintiff's request. (A copy of ODNI's June 29, 2009 letter is attached hereto as Exhibit D.)

#### Processing and Current Status of Plaintiff's Requests

7. A search was conducted in the Offices of the General Counsel and Inspector General for records responsive to plaintiff's first request for ODNI IOB reports and 15 documents, totaling 18 pages, was located. ODNI is currently processing those records for release, which includes consulting with another government entity, and anticipates being able to provide a response to the plaintiff by December 15, 2009.

8. Searches for records responsive to plaintiff's second request are currently being performed in the Offices of the General Counsel and Inspector General. To date, all of the responsive IOB reports have been located, consisting of 10 documents, totaling 26 pages. The remainder of the plaintiff's request is very broad and requires much more time to locate responsive records. Plaintiff has requested all records concerning the DNI's activities pursuant to Executive Order 13462, including reports, assessments, reviews, and communications with the IOB. In order to process this portion of plaintiff's request, individuals that are reasonably likely to maintain responsive material are performing searches of their records. We anticipate having to review thousands of pages of documents to determine if they are responsive and process them for the application of FOIA exemptions.

9. We anticipate completing the processing of the ODNI IOB reports responsive to plaintiff's second request by December 15, 2009. However, it will require significantly more time to complete the processing of the remainder of plaintiff's second request. Individuals in the Office of General Counsel and the Office of the Inspector General are currently searching their records, including electronic records, for responsive documents. Given the breadth of plaintiff's request, these searches are extremely time-consuming. In addition, based on an initial assessment of some of the records located thus far, it is clear that many of them contain highly sensitive classified information that will require a classification review and inter-agency consultations and referrals.

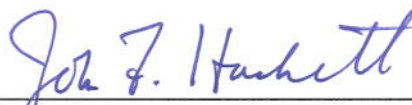
10. We anticipate our search for documents responsive to plaintiff's second request to be completed in approximately two weeks. Based on search results received thus far, we anticipate that thousands of pages of classified and unclassified documents will be provided to the IMO for review to determine if they are responsive to plaintiff's request and to process them for possible disclosure.

11. The potential volume of the responsive records and the sensitivity of the information in them will require adequate time for careful processing. We anticipate being able to complete processing of this portion of plaintiff's second request by March 31, 2010. However, we are willing to discuss this timeline with the plaintiff and to process first those records that are a priority for the plaintiff.

12. Many of the records located so far, including IOB reports and other records responsive to plaintiff's request, contain sensitive classified information. 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 currently and properly classified information is appropriately protected 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 and which information can be disclosed. 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. Such offices and agencies need sufficient time to perform a careful and thorough review of their information. It is vital to the national security that the review of classified information is done carefully and deliberately.

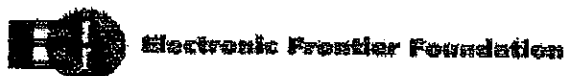
I certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 27<sup>th</sup> day of October, 2009



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John F. Hackett  
Director, Information Management Office



February 25, 2008

BY FACSIMILE — (703) 482-2144

John F. Hackett, Director, Information Management Office  
Director of National Intelligence  
Office of the Director of National Intelligence  
Washington, D.C. 20511

RE: Freedom of Information Act Request

Dear Mr. Hackett:

This letter constitutes a 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 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 are seeking copies of all reports submitted by the Office of the Director of National Intelligence to the Intelligence Oversight Board ("IOB") pursuant to Section 2.4 of Executive Order 12863. That section provides, in pertinent part, as follows:

Inspectors General and General Counsel of the Intelligence Community, to the extent permitted by law, shall report to the IOB at least on a quarterly basis and from time to time as necessary or appropriate, concerning intelligence activities that they have reason to believe may be unlawful or contrary to Executive order or Presidential directive.<sup>1</sup>

We seek such reports submitted to the IOB since April 2005.

#### **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, National Security Agency, 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, 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).

<sup>1</sup> The Office of the Director of National Intelligence is a member of the "Intelligence Community." See <http://www.intelligence.gov/1-members.shtml>.

Freedom of Information Act Request  
February 25, 2008  
Page 2

EFF is a non-profit public interest organization that works "to protect and enhance our core civil liberties in the digital age."<sup>2</sup> One of EFF's primary objectives is "to educate the press, policymakers and the general public about online civil liberties."<sup>3</sup> 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.

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.<sup>4</sup>

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,*

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<sup>2</sup> Guldestar Basic Report, Electronic Frontier Foundation, <http://www.guldestar.org/pqShowGsReport.do?npoid=561625> (last visited Feb. 1, 2008).

<sup>3</sup> *Id.*

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

Freedom of Information Act Request  
February 25, 2008  
Page 3

*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 web site in July 2007.

#### **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, the agency determines whether "[d]isclosure [of the requested information] is likely to contribute significantly to public understanding of the operations or activities of the United States government," and whether such disclosure "is not primarily in the commercial interest of the requester." 32 C.F.R. § 1700.6(b)(2). This request clearly satisfies these criteria.

First, the agency's submission of reports to the IOB clearly concerns "the operations or activities of the government." 32 C.F.R. § 1700.6(b)(2).

Second, disclosure of the requested information will contribute to a public understanding of government operations or activities. 32 C.F.R. § 1700.6(b)(2). EFF has requested information that will shed light on the agency's interpretation of laws governing intelligence activities, and how well it conforms to those laws. This information will contribute not only to EFF's understanding of the agency's interpretation and use of legal authority, 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.

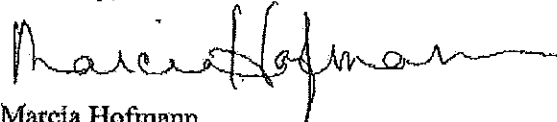
Finally, the disclosure will "contribute significantly" to the public's knowledge and understanding of how the agency seeks compliance with laws governing intelligence activities. 32 C.F.R. § 1700.6(b)(2) (internal quotation marks omitted). Disclosure of the requested information will help inform the public about the agency's actions, as well as contribute to the public debate about how intelligence activities should be conducted.

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February 25, 2008  
Page 4

Furthermore, a fee waiver is appropriate here because EFF has no commercial interest in the disclosure of the requested records. 32 C.F.R. § 1700.6(b)(2). 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. 116. As the FOIA provides, I will anticipate a determination on this request from your office within 20 working days.

Sincerely,

A handwritten signature in black ink that reads "Marcia Hofmann". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Marcia Hofmann  
Staff Attorney

Enclosures



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC FRONTIER FOUNDATION	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 06-1988 (ESH)
	)	
DEPARTMENT OF HOMELAND SECURITY,	)	
	)	
Defendant.	)	

**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*

PETER D. KEISLER  
Assistant Attorney General

JEFFREY A. TAYLOR  
United States Attorney

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 20755-8000

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

FOIA Case: 52276

(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 Stepan*  
for

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

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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.

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE  
WASHINGTON, DC 20511

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

AUG 13 2009

Reference: DF-2008-00029

Dear Ms. Hofmann:

This is to provide a status regarding your letter dated 25 February 2008 to the Office of the Director of National Intelligence (ODNI). You requested, under the Freedom of Information Act, **"copies of all reports submitted by the ODNI to the Intelligence Oversight Board (IOB) pursuant to Section 2.4 of Executive Order 12863."**

ODNI received your request and assigned it the reference number listed above. Your case is currently being processed in accordance with the FOIA.

Should you have any questions regarding this request, please call our Requester Service Center at (703) 275-2210.

Sincerely,



John F. Hackett  
Director, Information Management Office

EXHIBIT B





**ELECTRONIC FRONTIER FOUNDATION**  
Protecting Rights and Promoting Freedom on the Electronic Frontier

June 19, 2009

**BY FACSIMILE — (703) 275-1299**

John F. Hackett, Director, Information Management Office  
Director of National Intelligence  
Office of the Director of National Intelligence  
Washington, D.C. 20511

RE: Freedom of Information Act Request

Dear Mr. Hackett:

This letter constitutes a 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.

Executive Order 12863 determined the responsibilities of the Intelligence Oversight Board ("IOB") from September 13, 1993 through February 29, 2008. Section 2.4 of that Order provided, in pertinent part:

Inspectors General and General Counsel of the Intelligence Community, to the extent permitted by law, shall report to the IOB at least on a quarterly basis and from time to time as necessary or appropriate, concerning intelligence activities that they have reason to believe may be unlawful or contrary to Executive order or Presidential directive.<sup>1</sup>

We seek copies of all reports submitted by the ODNI to the IOB pursuant to Executive Order 12863 from February 25, 2008 through February 29, 2008.<sup>2</sup>

On February 29, 2008, Executive Order 13462 repealed Executive Order 12863 and greatly expanded the intelligence oversight role of the ODNI.

We also seek copies of all records, including but not limited to electronic records, concerning the DNI's activities under Executive Order 13462 from February 29, 2008 to the present. This request includes but is not limited to reports, assessments, reviews, instructions, guidelines, and submissions to or communications between the ODNI and

<sup>1</sup> The DNI is a member of the "Intelligence Community." See <http://www.intelligence.gov/1-members.shtml>.

<sup>2</sup> On February 25, 2008, EFF requested all reports submitted by the DNI to the IOB pursuant to Executive Order 12863 from January 1, 2001 through the date of the request. If convenient, please feel free to combine this request with our prior request, attached hereto for your reference.

454 Shotwell Street - San Francisco, CA 94110 USA

voice +1 415 436 9333 fax +1 415 436 9993 web [www.eff.org](http://www.eff.org) email [information@eff.org](mailto:information@eff.org)

EXHIBIT C

June 19, 2009

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the IOB and/or the President's Intelligence Advisory Board ("PIAB"). This request specifically includes:

1. reports of any assessments or reviews of intelligence activities by the PIAB to the DNI pursuant to Sec. 4(a)(ii) of Executive Order 13462;
2. recommendations concerning intelligence matters identified by the PIAB to the DNI pursuant to Sec. 4(b) of Executive Order 13462;
3. criteria on the thresholds for reporting matters to the IOB issued by the IOB to the DNI pursuant to Sec. 6(a) of Executive Order 13462;
4. reports and recommendations by the IOB to the DNI pursuant to Sec. 6(c) of Executive Order 13462 concerning the performance of the DNI under Executive Order 13462;
5. all records containing information and all recommendations for corrective action submitted by the DNI to the IOB pursuant to Sec. 6(d) of Executive Order 13462;
6. requests for investigations of intelligence activities by the IOB to the DNI and reports by the DNI to the IOB of the results of those investigations pursuant to Sec. 6(e) of Executive Order 13462;
7. guidelines concerning intelligence activities reviewed by the DNI pursuant to Sec. 7(a)(i) of Executive Order 13462;
8. instructions issued by the DNI pursuant to Sec. 7(a)(ii) of Executive Order 13462 to members of the intelligence community for incorporating intelligence oversight reporting into their intelligence guidelines;
9. reports of intelligence activity which "may be unlawful or contrary to Executive Order or Presidential directive" received by the DNI pursuant to Sec. 7(b)(i) of Executive Order 13462, which incorporates Section 1.7(d) of Executive Order 12333 by reference, or pursuant to Section 8(b)(i)(A) of Executive Order 13462;
10. all records containing information regarding intelligence activities forwarded by the DNI to the Attorney General pursuant to Sec. 7(b)(ii) of Executive Order 13462;
11. analyses by the DNI of reports received by it under Sec. 7(b)(i) of Executive Order 13462 and submitted to the IOB pursuant to Sec. 7(c)(i) of Executive Order 13462;
12. summaries and related recommendations by the DNI of the activities monitored by it under Sec. 7(b)(iii) of Executive Order 13462 and submitted to the IOB

June 19, 2009

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pursuant to Sec. 7(c)(ii) of Executive Order 13462;

13. assessments of the effectiveness of corrective action with respect to intelligence activities which "may be unlawful or contrary to Executive Order or Presidential directive" under Sec. 6(b)(1)(A) of Executive Order 13462 and submitted by the DNI to the IOB pursuant to Sec. 7(c)(iii) of Executive Order 13462;
14. any records concerning information and assistance provided by the DNI to the PIAB or IOB pursuant to Sec. 8(a) of Executive Order 13462;
15. any information received by the DNI from heads of departments pursuant to Sec. 8(b)(1)(B) of Executive Order 13462; and
16. reports made by heads of departments to the DNI or by the DNI to the IOB or PIAB pursuant to Sec. 8(c) of Executive Order 13462, concerning the reasons for not implementing a PIAB or IOB recommendation.

#### **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 National Security Agency, Department of Justice, 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 NSA letter, DOJ letter, DHS stipulation, 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).

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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.

<sup>3</sup> Guidestar Basic Report, Electronic Frontier Foundation, <http://www.guidestar.org/pqShowGsReport.do?npoid=561625> (last visited June 12, 2009).

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

June 19, 2009

Page 4 of 5

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/>.

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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.

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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>.

#### 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, the agency determines whether "[d]isclosure [of the requested information] is likely to contribute significantly to public understanding of the operations or activities of the United States government," and whether such disclosure "is not primarily in the commercial interest of the requester." 32 C.F.R. § 1700.6(b)(2). This request clearly satisfies these criteria.

First, the agency's submission of reports to the IOB clearly concerns "the operations or activities of the government." 32 C.F.R. § 1700.6(b)(2).

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EFF

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June 19, 2009  
Page 5 of 5

Second, disclosure of the requested information will contribute to a public understanding of government operations or activities. 32 C.F.R. § 1700.6(b)(2). EFF has requested information that will shed light on the agency's interpretation of laws governing intelligence activities, and how well it conforms to those laws. This information will contribute not only to EFF's understanding of the agency's interpretation and use of legal authority, 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.

Finally, the disclosure will "contribute significantly" to the public's knowledge and understanding of how the agency seeks compliance with laws governing intelligence activities. 32 C.F.R. § 1700.6(b)(2) (internal quotation marks omitted). Disclosure of the requested information will help inform the public about the agency's actions, as well as contribute to the public debate about how intelligence activities should be conducted.

Furthermore, a fee waiver is appropriate here because EFF has no commercial interest in the disclosure of the requested records. 32 C.F.R. § 1700.6(b)(2). 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 provides, I will anticipate a determination on this request from your office within 20 working days.

Sincerely,



Nathan Cardozo  
Open Government Legal Fellow

Enclosures



**Electronic Frontier Foundation**

February 25, 2008

**BY FACSIMILE — (703) 482-2144**

John F. Hackett, Director, Information Management Office  
 Director of National Intelligence  
 Office of the Director of National Intelligence  
 Washington, D.C. 20511

**RE: Freedom of Information Act Request**

Dear Mr. Hackett:

This letter constitutes a 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 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 are seeking copies of all reports submitted by the Office of the Director of National Intelligence to the Intelligence Oversight Board ("IOB") pursuant to Section 2.4 of Executive Order 12863. That section provides, in pertinent part, as follows:

Inspectors General and General Counsel of the Intelligence Community, to the extent permitted by law, shall report to the IOB at least on a quarterly basis and from time to time as necessary or appropriate, concerning intelligence activities that they have reason to believe may be unlawful or contrary to Executive order or Presidential directive.<sup>1</sup>

We seek such reports submitted to the IOB since April 2005.

**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, National Security Agency, 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, 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).

<sup>1</sup> The Office of the Director of National Intelligence is a member of the "Intelligence Community." See <http://www.intelligence.gov/1-members.shtml>.

## Freedom of Information Act Request

February 25, 2008

Page 2

EFF is a non-profit public interest organization that works "to protect and enhance our core civil liberties in the digital age."<sup>2</sup> One of EFF's primary objectives is "to educate the press, policymakers and the general public about online civil liberties."<sup>3</sup> 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.

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.<sup>4</sup>

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,*

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<sup>2</sup> GuideStar Basic Report, Electronic Frontier Foundation, <http://www.guidestar.org/pqShowGsReport.do?npofd=561625> (last visited Feb. 1, 2008).

<sup>3</sup> *Id.*

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

Freedom of Information Act Request  
February 25, 2008  
Page 3

*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 web site in July 2007.

#### 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, the agency determines whether "[d]isclosure [of the requested information] is likely to contribute significantly to public understanding of the operations or activities of the United States government," and whether such disclosure "is not primarily in the commercial interest of the requester," 32 C.F.R. § 1700.6(b)(2). This request clearly satisfies these criteria.

First, the agency's submission of reports to the IOB clearly concerns "the operations or activities of the government." 32 C.F.R. § 1700.6(b)(2).

Second, disclosure of the requested information will contribute to a public understanding of government operations or activities. 32 C.F.R. § 1700.6(b)(2). EFF has requested information that will shed light on the agency's interpretation of laws governing intelligence activities, and how well it conforms to those laws. This information will contribute not only to EFF's understanding of the agency's interpretation and use of legal authority, 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.

Finally, the disclosure will "contribute significantly" to the public's knowledge and understanding of how the agency seeks compliance with laws governing intelligence activities. 32 C.F.R. § 1700.6(b)(2) (internal quotation marks omitted). Disclosure of the requested information will help inform the public about the agency's actions, as well as contribute to the public debate about how intelligence activities should be conducted.



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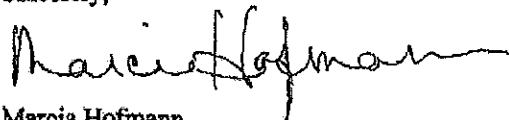
PAGE 10

Freedom of Information Act Request  
February 25, 2008  
Page 4

Furthermore, a fee waiver is appropriate here because EFF has no commercial interest in the disclosure of the requested records. 32 C.F.R. § 1700.6(b)(2). 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. 116. As the FOIA provides, I will anticipate a determination on this request from your office within 20 working days.

Sincerely,



Marcia Hofmann  
Staff Attorney

Enclosures

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EFF

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NATIONAL SECURITY AGENCY  
CENTRAL SECURITY SERVICE  
PORT GEORGE S. HEADS, MARYLAND 20725-6000

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

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EFF

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FOIA Case: 52276

(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 Stinson*  
for

PAMELA N. PHILLIPS  
Chief  
FOIA/PA Office

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4359993

EFF

PAGE 13



U.S. Department of Justice

Office of the Inspector General

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

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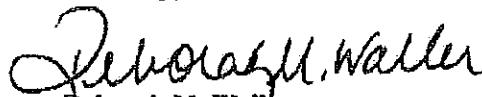
EFF

PAGE 14

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,



Deborah M. Waller  
FOI/PA Specialist

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4369993

EFF

DOCUMENT TO FILE 02/27/2007 Page 1 of 2

PAGE 15

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.

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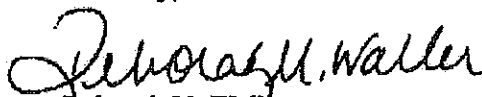
EFF

PAGE 14

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,

  
Deborah M. Waller  
FOI/PA Specialist

06/19/2009 11:23 4369993

EFF  
Page 1 of 2

PAGE 15

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

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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*

PETER D. KEISLER  
Assistant Attorney General

JEFFREY A. TAYLOR  
United States Attorney

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*

**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

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

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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

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

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

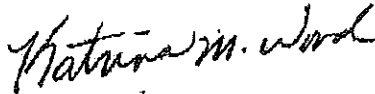
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may arise for extending the time limit (see enclosure). We appreciate your patience in this matter.

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.

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

JUN 29 2009

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

Reference: DF-2009-00083

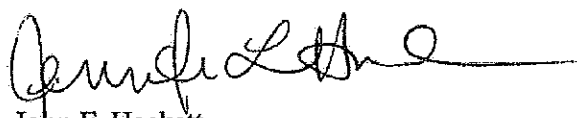
Dear Mr. Cardozo:

Your facsimile dated 19 June 2009, addressed to the Director, Information Management Office, Office of the Director of National Intelligence, was received in our office on 19 June 2009. You requested, under the Freedom of Information Act (FOIA), **"a copy of all reports submitted by the ODNI to the IOB pursuant to Executive Order 12863 from February 25, 2008 through February 29, 2008, and copies of all records concerning the DNP's activities under Executive Order 13462 from February 29, 2008 to the present."**

We accept your request and it will be processed in accordance with the FOIA, 5 U.S.C. § 552, as amended. We assigned your request the reference number above.

Please be advised that should we be unable to respond to your request within the 20 working days the FOIA requires, you have the right to consider the delay a denial of this request and may file an appeal with the undersigned. A more practical approach, however, would permit us to continue processing your request and respond to you as soon as we can. You will retain your appeal rights and, once you receive the results of our search, can appeal at that time if you wish. We will proceed on that basis unless you object.

Sincerely,



John F. Hackett  
Director, Information Management Office

EXHIBIT D