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10 **IN THE UNITED STATES DISTRICT COURT**  
 11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
 12 **SAN FRANCISCO DIVISION**

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<p>13 ELECTRONIC FRONTIER FOUNDATION,</p> <p>14    Plaintiff,</p> <p>15    vs.</p> <p>16 DEPARTMENT OF JUSTICE,</p> <p>17    Defendant.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Case No. 10-CV-4892-RS</p> <p><b>DEFENDANT’S OPPOSITION TO</b></p> <p><b>PLAINTIFF’S MOTION FOR PARTIAL</b></p> <p><b>SUMMARY JUDGMENT</b></p> <p>Judge: Hon. Richard Seeborg</p> <p>Date: February, 17 2011</p> <p>Time: 2:00 p.m.</p> <p>Place: Courtroom 3, 17<sup>th</sup> Floor</p>
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13 ELECTRONIC FRONTIER FOUNDATION,

Case No. 10-CV-4892-RS

14 Plaintiff,

15 vs.

**DEFENDANT’S OPPOSITION TO  
 PLAINTIFF’S MOTION FOR PARTIAL  
 SUMMARY JUDGMENT**

16 DEPARTMENT OF JUSTICE,

17 Defendant.

Judge: Hon. Richard Seeborg

Date: February 17, 2011

Time: 2:00 p.m.

Place: Courtroom 3, 17<sup>th</sup> Floor

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## INTRODUCTION

1  
2 Plaintiff seeks an order from this Court requiring the Department of Justice's Criminal  
3 Division ("CRM"), Drug Enforcement Agency ("DEA"), and Federal Bureau of Investigation  
4 ("FBI") to complete the processing of its Freedom of Information Act ("FOIA") requests within 10  
5 days. Neither the FOIA nor any practical urgency supports this request.  
6

7 Plaintiff is mistaken that its September 28, 2010 FOIA request directed to CRM, DEA, and  
8 FBI is entitled to expedited processing. This request is extremely broad and seeks documents  
9 concerning, inter alia, any difficulties DOJ has experienced conducting surveillance of electronic  
10 communications systems, such as encrypted Blackberry devices, social networking sites, and peer-  
11 to-peer messaging services. Plaintiff argues that the requested documents will be relevant to  
12 legislation that might be introduced into Congress later this year, which would seek to amend  
13 current electronic surveillance law to ensure that communications providers are technically capable  
14 of complying with a wiretap order. The contemplated legislation, however, has not been  
15 introduced.  
16

17 As a result, Plaintiff is left to argue that there is an urgent need for documents that will  
18 allow it and the public to participate in a legislative debate that has not yet begun. This makes little  
19 sense and demonstrates that CRM and DEA reasonably denied Plaintiff's request for expedited  
20 processing. While the FBI granted expedited processing of Plaintiff's September 28, 2010 request,  
21 the Court must determine de novo whether expedited processing is required here. Defendant  
22 respectfully submits that the Court should not adopt an interpretation of the FOIA that would  
23 require expedited processing based on mere speculation about exigencies that may or may not  
24 occur in the future.  
25

26 Notwithstanding that the components were not required to do so, both CRM and DEA, like  
27 the FBI, have expedited Plaintiff's FOIA request. Rather than processing the request in accordance  
28

1 with the normal “first-in, first-out” handling of non-expedited FOIA requests, the components  
2 began processing Plaintiff’s request ahead of other earlier, pending requests. In CRM’s case, the  
3 search for responsive documents began almost immediately after receiving Plaintiff’s FOIA  
4 request, while DEA began a comprehensive search soon after receiving Plaintiff’s complaint.  
5 CRM has identified thousands of pages of potentially responsive information and its search will  
6 likely be substantially completed in the next two to three weeks. DEA has substantially completed  
7 its search and has identified almost 6,000 pages of potentially responsive information. The FBI’s  
8 search is ongoing, but it too estimates that the number of potentially responsive documents will  
9 number in the thousands. As the attached declarations from the components explain, the  
10 responsive material identified thus far contains sensitive law enforcement information as well as  
11 classified information that must be withheld under the FOIA. In addition, many of the documents  
12 involve communications with other portions of DOJ and the Federal Government. Because these  
13 offices have an equity interest in these communications, they must be consulted before the  
14 materials are released.

17 Given these realities, Plaintiff’s demand that the components complete processing of  
18 thousands of pages of potentially responsive information within ten days is not feasible. Nor is this  
19 processing schedule required by the FOIA. Rather than creating a specific deadline to process an  
20 expedited request, the FOIA provides that such requests must be processed “as soon as  
21 practicable.” 5 U.S.C. § 552(a)(6)(E)(iii). This standard requires a case-by-case determination of  
22 what is practicable based upon the particular size and complexity of the request at issue. Here, the  
23 components estimate that, consistent with processing the requests on an expedited basis, they will  
24 be able to process a minimum of between 350 to 500 pages per month and will be able to begin a  
25 monthly rolling production of documents commencing on April 1, 2011. In light of the detailed  
26 representations set forth in the attached declarations, the Court should reject Plaintiff’s request for  
27

1 an order requiring that processing be completed within 10 days, and instead adopt the processing  
2 schedule proposed by the components.

3 Finally, regarding its second FOIA request, Plaintiff seeks an order that FBI complete the  
4 processing of materials responsive to its May 21, 2009 FOIA request within 10 days. This request  
5 was only submitted to the FBI and seeks documents related to the Bureau's "Going Dark" program.  
6 Plaintiff did not seek expedited processing of this request, and, as a result, the Court is without  
7 jurisdiction to order expedited processing. Nor does Plaintiff identify any persuasive reason why  
8 the Court should order a 10-day processing schedule for this non-expedited request. In any event,  
9 the FBI expects to shortly make its first interim release of materials located in response to the  
10 Going Dark request. It will then make a second final release once the remaining materials are fully  
11 processed and other offices in the Federal Government with equities in the documents complete  
12 their review of the material.  
13  
14

## 15 **BACKGROUND**

### 16 **I. Statutory and Regulatory Framework.**

17 Agencies ordinarily process FOIA requests for agency records on a first-in, first-out basis.  
18 When responding to a request made under the FOIA, an agency shall generally "determine within  
19 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such  
20 request whether to comply with such request and shall immediately notify the person making such  
21 request of such determination." 5 U.S.C. § 552(a)(6)(A)(i). If the agency notifies the requester of  
22 its determination to comply with a request, "the records shall be made promptly available." Id. §  
23 552(a)(6)(C)(i). If an agency is unable to respond within the 20-day period, the requester may,  
24 before a response has been made, file suit and be found to have constructively exhausted  
25 administrative remedies. Id.  
26

27 In 1996, Congress amended the FOIA to provide for "expedited processing" of certain  
28



1 categories of requests. See Electronic Freedom of Information Amendments of 1996 (“EFOIA”),  
2 Pub. L. No. 104-231, § 8, 110 Stat. 3048 (codified at 5 U.S.C. § 552(a)(6)(E)). Expedition, when  
3 granted, entitles requesters to move immediately to the front of an agency’s processing queue,  
4 ahead of earlier filed requests, and to have the request processed “as soon as practicable.” 5 U.S.C.  
5 § 552(a)(6)(E)(iii).  
6

7 As part of EFOIA, Congress directed agencies to promulgate regulations providing for  
8 expedited processing of requests for records (i) “in cases in which the person requesting the records  
9 demonstrates a compelling need,” 5 U.S.C. § 552(a)(6)(E)(i)(I), and (ii) “in other cases determined  
10 by the agency.” Id. § 552(a)(6)(E)(i)(II). As relevant here, FOIA defines “compelling need” to  
11 mean:

- 12
- 13 (II) with respect to a request made by a person primarily engaged in disseminating  
14 information, urgency to inform the public concerning actual or alleged Federal  
Government activity.

15 5 U.S.C. § 552(a)(6)(E)(v); see also 28 C.F.R. 16.5(d)(1)(ii).

16 DOJ implemented EFOIA by final rule effective July 1, 1998. See Revision of Freedom of  
17 Information Act and Privacy Act Regulations and Implementation of Electronic Freedom of  
18 Information Act Amendments of 1996, 63 Fed. Reg. 29591 (June 1, 1998), codified at 28 C.F.R.  
19 Part 16. This regulation, which governs FOIA requests to all DOJ components, 28 C.F.R.  
20 § 16.1(b), states that “[r]equests and appeals” will be “taken out of order and given expedited  
21 treatment whenever it is determined that they involve”:  
22

- 23 (i) Circumstances in which the lack of expedited treatment could reasonably be  
24 expected to pose an imminent threat to the life or physical safety of an individual;
- 25 (ii) An urgency to inform the public about an actual or alleged federal government  
26 activity, if made by a person primarily engaged in disseminating information;
- 27 (iii) The loss of substantial due process rights; or
- 28 (iv) A matter of widespread and exceptional media interest in which there exist

1 possible questions about the government's integrity which affect public  
2 confidence.

3 28 C.F.R. § 16.5(d)(1)(i)-(iv). Categories (i) and (ii) implement the FOIA's "compelling need"  
4 standard; categories (iii) and (iv) define additional categories for expedition. See 63 Fed. Reg. at  
5 29592.

6 As Congress recognized, agency expedition decisions depend on "factual and subjective  
7 judgments about the circumstances cited by requesters to qualify them for 'expedited processing.'"  
8 H.R. Rep. No. 104-795, at 26 (1996), reprinted at 1996 U.S.C.C.A.N. 3448, 3470. Accordingly,  
9 DOJ requires requesters to "explain[ ] in detail the basis for" their expedition requests. 28 C.F.R.  
10 § 16.5(d)(3); see also H.R. Rep. No. 104-795, at 26 ("the requesters will need to explain in detail  
11 their basis for seeking such treatment").  
12

13 Within ten calendar days of receiving a request for expedited processing, the component  
14 must "decide whether to grant it and . . . notify the requester of the decision." 28 C.F.R. §  
15 16.5(d)(4); see also 5 U.S.C. § 552(a)(6)(E)(ii)(I) (requiring notice of decision within ten days of  
16 request). If the request is denied, "any appeal of that decision shall be acted on expeditiously." 28  
17 C.F.R. § 16.5(d)(4); see also 5 U.S.C. § 552(a)(6)(E)(ii)(II). An agency decision denying  
18 expedited processing due to a lack of "urgency" is reviewed de novo based on the record before the  
19 agency at the time of its decision. See Al-Fayed v. Central Intelligence Agency, 254 F.3d 300, 308  
20 (D.C. Cir. 2001); see also 5 U.S.C. § 552(a)(6)(E)(iii). The requester bears the burden of showing  
21 that expedition is appropriate. See Al-Fayed, 254 F.3d at 305 n.4.  
22

## 23 **II. Plaintiff's FOIA Requests And The Components' Responses.**

### 24 **A. The May 21, 2009 Request to FBI for "Going Dark" Materials.**

25 Plaintiff's May 21, 2009 request was directed solely to the FBI and sought records  
26 concerning the Bureau's "Going Dark" program. See Ex. A to Declaration of David M. Hardy  
27 ("Hardy Decl.") (attached hereto as Ex. 1). Specifically, Plaintiff requested documents from 2007  
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1 to the present concerning: (1) “[A]ll records that describe the Going Dark Program”; (2) “[A]ll  
2 Privacy Impact Assessments prepared for the Going Dark Program”; and (3) “[A]ll System of  
3 Records Notices (‘SORNs’) that discuss or describe the Going Dark Program.” Id. at 2-3.

4 Plaintiff did not seek expedited treatment of its request in May 2009. See Ex. A to Hardy  
5 Decl. Nor did it do so at any later point. Consequently, the FBI has processed the request on a  
6 first-in, first-out basis. See Hardy Decl. ¶ 35 n. 20. As the attached declaration from FBI FOIA  
7 Section Chief David M. Hardy explains, FBI has identified 1,039 pages of materials in response to  
8 this request, and the FBI expects to complete processing of the first portion of these materials  
9 shortly. Hardy Decl. ¶ 40.

11 **B. Plaintiff’s September 28, 2010 Request To The Criminal Division, DEA, And**  
12 **FBI For Records Relating To Agency Difficulties Conducting Electronic**  
13 **Surveillance.**

14 Plaintiff’s September 28, 2010 FOIA request to CRM, DEA and FBI seeks “all agency  
15 records created on or after January 1, 2006 (including, but not limited to, electronic records)  
16 discussing, concerning, or reflecting”:

- 17 1. any problems, obstacles or limitations that hamper the DOJ’s current ability to  
18 conduct surveillance on communications systems or networks including, but not  
19 limited to, encrypted services like Blackberry (RIM), social networking sites like  
20 Facebook, peer-to-peer messaging services like Skype, etc.;
- 21 2. any communications or discussions with the operators of communications systems  
22 or networks (including, but not limited to, those providing encrypted  
23 communications, social networking, and peer-to-peer messaging services), or with  
24 equipment manufacturers and vendors, concerning technical difficulties the DOJ  
25 has encountered in conducting authorized electronic surveillance;
- 26 3. any communications or discussions concerning technical difficulties the DOJ has  
27 encountered in obtaining assistance from non-U.S.-based operators of  
28 communications systems or networks, or with equipment manufacturers and  
vendors in the conduct of authorized electronic surveillance;
4. any communications or discussions with the operators of communications systems  
or networks, or with equipment manufacturers and vendors, concerning

1 development and needs related to electronic communications surveillance-enabling  
2 technology;

3 5. any communications or discussions with foreign government representatives or  
4 trade groups about trade restrictions or import or export controls related to  
5 electronic communications surveillance-enabling technology;

6 6. any briefings, discussions, or other exchanges between DOJ officials and members  
7 of the Senate or House of Representatives concerning implementing a  
8 requirement for electronic communications surveillance-enabling technology,  
9 including, but not limited to, proposed amendments to the Communications  
10 Assistance for Law Enforcement Act (CALEA).

11 See Ex. 1 to Declaration of Kristin L. Ellis (“Ellis Decl.”) (attached hereto as Ex 2); Ex. 9 to  
12 Declaration of Jennifer Lynch in Support of Plaintiff’s Motion for Partial Summary Judgment; Ex.  
13 K to Hardy Decl. Plaintiff sought expedited treatment of this request, contending that its “pertains  
14 to information about which there is an ‘urgency to inform the public about an actual or alleged  
15 federal government activity,’ and that it is ‘made by a person primarily engaged in disseminating  
16 information.’” Id. at 2-3 (quoting 28 C.F.R. § 16.5(d)(1)(ii)). In support of its claim of “urgency,”  
17 Plaintiff pointed to a September 27, 2010 *New York Times* article reporting that employees from  
18 DOJ and other federal agencies had been meeting with White House officials to develop proposed  
19 statutory language and regulations to “‘require all services that enable communications —  
20 including encrypted e-mail transmitters like BlackBerry, social networking Web sites like  
21 Facebook and software that allows direct ‘peer to peer’ messaging like Skype — to be technically  
22 capable of complying if served with a wiretap order.’” See, e.g., Ex. K to Hardy Decl. at 2  
23 (quoting Charlie Savage, *U.S. Tries to Make It Easier To Wiretap the Internet*, N.Y. Times, Sept.  
24 27, 2010 at A1). Plaintiff’s request noted that the *New York Times* article had reported that the  
25 Obama Administration planned to introduce legislation in 2011, and Plaintiff asserted that the  
26 possible introduction of this legislation created an urgency to process its request. Id. at 4.

27 In a letter dated October 4, 2010, CRM acknowledged receipt of Plaintiff’s September 28,

1 2010 request and informed Plaintiff that it had denied the request for expedited treatment. Ex. 3 to  
2 Ellis Decl. at 2; id. ¶ 9. CRM explained that it was denying the request because “we do not believe  
3 that your request for information about legislation that may or may not be proposed to Congress  
4 next year satisfies the criteria for expedited processing.” Ex. 3 to Ellis Decl. at 2. By letter dated  
5 October 26, 2010, DEA also denied expedited processing, finding that Plaintiff had not  
6 demonstrated a particular urgency to inform the public about an actual or alleged federal  
7 government activity. Ex. B to Declaration of Katherine L. Myrick, Drug Enforcement Agency  
8 (“Myrick Decl.”) (attached hereto as Ex. 3); id. ¶ 4.  
9

10 Unlike CRM and DEA, the FBI granted Plaintiff’s request for expedited treatment by letter  
11 dated October 20, 2010. See October 20, 2010 Letter (Ex. M to Hardy Decl.). Although Plaintiff  
12 sought expedited treatment based on the second category listed in DOJ’s regulation (where there is  
13 “[a]n urgency to inform the public about actual or alleged federal government activity, if made by a  
14 person primarily engaged in disseminating information,” 28 C.F.R. § 16.5(d)(1)(ii)), the FBI  
15 quoted different language in granting the request. The FBI’s response stated: “You have requested  
16 expedited processing under 28 C.F.R. § 16.5(d)(1)(ii) as the topic is a matter of ‘widespread and  
17 exceptional media interest,’ and 28 C.F.R. § 16.5(d)(1)(iv) as a matter ‘in which there exist  
18 possible questions about the government’s integrity which affect public confidence.’” Ex. M. to  
19 Hardy Decl. The referenced language in FBI’s response comes solely from the fourth category of  
20 DOJ’s regulation governing expedited processing, 28 C.F.R. § 16.5(d)(1)(iv). Plaintiff, however,  
21 did not contend in its request to FBI, nor does it do so in its motion for summary judgment, that  
22 expedited treatment is warranted under this latter category. Pl.’s Mem. at 7.  
23  
24

25 As Plaintiff notes in its brief, counsel for the parties attempted to negotiate a mutually  
26 acceptable production schedule. See December 20, 2010 Email from Nicholas Cartier, Defense  
27 Counsel, to Jennifer Lynch, Plaintiff Counsel (Ex. 16 to Lynch Decl.). However, before the  
28

1 components could substantially complete their searches and propose a schedule, Plaintiff filed the  
2 instant motion on January 6, 2011. After granting the Government's motion for an extension, the  
3 Court ordered the Government to file an opposition no later than January 25, 2011. Dkt No. 18.

## 4 ARGUMENT

### 5 **I. Standard of Review.**

6 Summary judgment is appropriate if there are no genuine issues of material fact and the  
7 moving party is entitled to judgment as a matter of law. G&C Auto Body Inc. v. Geico General  
8 Ins. Co., 552 F. Supp. 2d 1015, 1018 (N.D. Cal. 2008) (citing Anderson v. Liberty Lobby, Inc., 477  
9 U.S. 242, 247-48 (1986)).

### 10 **II. Plaintiff Never Sought Expedited Processing Of Its May 21, 2009 FOIA Request To** 11 **The FBI For "Going Dark" Materials, And Offers No Persuasive Grounds For This** 12 **Court To Enter An Order Requiring That All Responsive Materials Be Processed** 13 **Within 10 Days.**

14 As noted above, Plaintiff's May 21, 2009 request to the FBI for records concerning the  
15 agency's "Going Dark" program did not seek expedited treatment. Ex. A to Hardy Decl. For such  
16 non-expedited requests, an agency shall "determine within 20 days (excepting Saturdays, Sundays,  
17 and legal public holidays) after the receipt of any such request whether to comply with such  
18 request," 5 U.S.C. § 552(a)(6)(A)(i), and if the agency agrees to comply, "the records shall be  
19 made promptly available." Id. § 552(a)(6)(C)(i). After receiving Plaintiff's May 21, 2009 request,  
20 the FBI responded by letter dated May 29, 2009, stating that it was "searching the indices to our  
21 central records system at FBI Headquarters for the information you requested, and will inform you  
22 of the results as soon as possible." Ex. B. to Hardy Decl. The FBI has since provided periodic  
23 updates to Plaintiff about the status of its search. See Exs. C-E; G-J to Hardy Decl.

24 Because the request was not expedited, the FBI processed the request in the order in which  
25 it was received, on the first-in, first-out basis applicable to standard FOIA requests. Hardy Decl. ¶

1 35 n.20; see also 28 C.F.R. § 16.5(a) (DOJ FOIA regulations provide that “[c]omponents ordinarily  
2 shall respond to requests according to their order of receipt”). This meant that a number of  
3 requests took priority over Plaintiff’s. For instance, the FBI receives approximately 16,000 FOIA  
4 requests per year. Hardy Decl. ¶ 41. In Fiscal Year 2010 alone, the FBI released 2.2 million  
5 pages with a staff of 278 employees. Id. Currently, there are 1.85 million pages awaiting review in  
6 the FBI’s queues. Id. As a sophisticated FOIA requester, EFF is presumably well aware of these  
7 realities. Yet, it never sought expedited treatment of its request, even after the *New York Times*  
8 reported in September 2010 that legislation seeking to amend federal surveillance law might be  
9 introduced into Congress in 2011. See, e.g., Ex. K to Hardy Decl. at 2-3.  
10

11 It is unclear whether Plaintiff is asking this Court to expedite the treatment of this particular  
12 request. See Pl.’s Mem. at 1, 9. To the extent Plaintiff does seek this relief, the court is without  
13 jurisdiction to issue such an order. Because EFF never sought such treatment from the agency,  
14 there is no agency decision regarding expedited processing for the court to review. See 5 U.S.C.  
15 § 552(a)(6)(E)(iii) (“Agency action to deny or affirm denial of a request for expedited processing  
16 . . . shall be subject to judicial review under paragraph (4), except that the judicial review shall be  
17 based on the record before the agency at the time of the determination.”).  
18

19 Nor has Plaintiff set forth an adequate basis for the Court to invoke its equitable powers to  
20 issue an injunction requiring a 10-day processing schedule. As the Hardy declaration shows, the  
21 FBI has exercised due diligence in processing this request. After receiving the request on May 21,  
22 2009, the FBI conducted an index search of its Central Records System. Hardy Decl. ¶ 33. After  
23 this search was performed, the Bureau determined that a more individualized inquiry was necessary  
24 to identify potentially responsive records. Id. ¶ 34. Accordingly, on July 8, 2009, an Electronic  
25 Communication was sent to certain FBIHQ divisions thought most likely to possess potentially  
26 responsive records, which directed employees in these divisions to conduct a search for responsive  
27 records.  
28

1 materials. Id.

2 Following the completion of the search, the FBI located 1,039 potentially responsive  
3 documents. Id. ¶ 35. At this point, the FBI placed the request in its queue for assignment to a  
4 FOIA Disclosure Unit on December 1, 2009. Id. The case was assigned to an analyst on January  
5 7, 2010, who sent the material to the Classification Unit to determine whether the materials  
6 contained any classified information. Id. Upon completion of the classification review on January  
7 22, 2010, the potentially responsive material was returned to the FOIA analyst for processing. Id.  
8 Since then, the analyst has been processing the potentially responsive material, sending out  
9 referrals/consults, working with internal divisional reviews, and preparing responsive material to  
10 be released in two interim releases. Id. ¶ 36.

11  
12 If Plaintiff was dissatisfied with the speed at which its request was being processed, and  
13 believed there was a legal basis for the FBI to grant expedited processing, it was free to make such  
14 a request to the Bureau. Its failure to do so undermines its current claim that the request is urgent.  
15 Accordingly, the Court should deny Plaintiff's request to enter a 10-day processing schedule. As  
16 noted above, the FBI expects to complete its first release of responsive materials shortly. Id. ¶ 36.  
17 The second, and final interim release, continues to be processed by the FOIA analyst, and certain  
18 portions of the potentially responsive material are currently under review by Other Governmental  
19 Agencies who have an equity interest in the material. Id.

20  
21  
22 **III. Plaintiff's September 28, 2010 Request Is Not Entitled To Expedited Processing, But  
23 Nevertheless Has Been Expedited By All Three Components.**

24 **A. Plaintiff Is Not Entitled To Expedited Processing Of Its September 28, 2010  
25 Request Because It Has Not Demonstrated An "Urgency To Inform The  
26 Public."**

26 As explained above, CRM and DEA denied Plaintiff's request for expedition of its  
27 September 28, 2010 request. Ex. 3 to Ellis Decl. at 2; id. ¶ 9; Ex. B to Myrick Decl. at 1; id. ¶ 4.

28 This determination was reasonable because there is no "urgency" to Plaintiff's request. See 5  
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4892-RS DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT



1 U.S.C § 552(a)(6)(E)(v)(II) (“compelling need” authorizing expedited processing exists “with  
2 respect to a request made by a person primarily engaged in disseminating information,” where  
3 there is an “urgency to inform the public concerning actual or alleged Federal Government  
4 activity”); see also 28 C.F.R. § 16.5(d)(1)(ii) (same).

5  
6 Plaintiff supported its request for expedited processing based on a September 27, 2010 *New*  
7 *York Times* article reporting that the Obama Administration planned to introduce legislation to  
8 amend current surveillance law into Congress in 2011. See, e.g., Ex. K at 4 to Hardy Decl.  
9 Plaintiff contended that expedited treatment was warranted because the “federal government  
10 activity involved here — the proposed introduction of legislation that would impose new technical  
11 requirements on communications providers — raises significant issues concerning potential  
12 governmental intrusions into personal affairs, particularly those involving private communications  
13 and activities.” Id. According to Plaintiff, “[w]hen Congress begins the process of considering the  
14 administration’s request for new legislation, its deliberations will constitute the latest chapter in a  
15 public debate over anti-terrorism powers, which has been ongoing since late 2001.” Id. “The  
16 information we request will help the public and Congress fully participate in that ongoing debate  
17 over whether to increase — or restrict — the investigative authority of the federal government.”  
18 Id. According to Plaintiff, “[d]elay in processing this FOIA request could inhibit the public’s  
19 ability to fully analyze and debate the implications of the legislative changes the administration  
20 seeks.” Id. These arguments fail to establish a legal entitlement to expedited processing.  
21  
22

23 In keeping with the principle that the categories for “compelling need” warranting  
24 expedited processing are to be “narrowly applied,”<sup>1</sup> courts consider three factors in determining  
25

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26 <sup>1</sup> Both Congress and the Court of Appeals have recognized that the expedition categories  
27 are to be “narrowly applied” because, “[g]iven the finite resources generally available for fulfilling  
28 FOIA requests, unduly generous use of the expedited processing procedure would unfairly  
disadvantage other requesters who do not qualify for its treatment . . . . Indeed, an unduly generous  
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1 whether a requester has demonstrated an “urgency to inform”: “(1) whether the request concerns a  
2 matter of current exigency to the American public; (2) whether the consequences of delaying a  
3 response would compromise a significant recognized interest; and (3) whether the request concerns  
4 federal government activity.” ACLU v. Dep’t of Justice, 321 F. Supp. 2d 24, 29 (D.D.C. 2004);  
5 see also H.R. Rep. No. 104-795, at 26 (“The public’s right to know, although a significant and  
6 important value, would not by itself be sufficient to satisfy [the ‘urgency to inform’] standard.”).

7  
8 Plaintiff’s request for expedited treatment fails under the second prong because there can be no  
9 impairment of an interest in commenting on proposed legislation when that proposed legislation  
10 does not yet exist and where there is no clear indication when, or if, the legislation will be  
11 introduced.

12  
13 Plaintiff appears to believe that the FBI’s decision to grant expedited processing necessarily  
14 binds CRM and DEA. See Pl.’s Mem. at 8. While it is true that the components of a single agency  
15 should endeavor to interpret the agency’s regulations in a harmonious fashion, this does not mean  
16 that the decision of the FBI to grant expedited processing demonstrates that CRM and DEA were  
17 wrong to reach a different result. As noted above, the FBI did not inform EFF that it agreed with  
18 its claim that the request was “urgent.” Ex. M. to Hardy Decl. Instead, the FBI granted the request  
19 citing different language authorizing expedition for matters of “widespread and exceptional media  
20 interest,” where “there exist possible questions about the government’s integrity which affect  
21 public confidence.” Id. (quoting 28 C.F.R. § 16.5(d)(1)(iv)). Even if this was a clerical error, as  
22 Plaintiff believes, Pl.’s Mem. at 7 n.15, it certainly does not show that the FBI’s conclusion is  
23 unquestionably correct and must bind CRM and DEA. Instead, the Court must determine whether  
24 expedited processing is required in this case based on a de novo review, considering only the  
25  
26 approach would also disadvantage those requestors who do qualify for expedition, because  
27 prioritizing all requests would effectively prioritize none.” Al-Fayed v. Central Intelligence  
28 Agency, 254 F.3d 300, 310 (D.C. Cir. 2001) (quoting H.R. Rep. No. 104-795, at 26.)

1 record that was before the components at the time of their decision. See Al-Fayed, 254 F.3d at 308  
2 and 311 n.11; see also 5 U.S.C. § 552(a)(6)(E)(iii).

3 Plaintiff's contention that there is an urgency here because legislation might be introduced  
4 at some point in the future should be rejected. Such a holding would grant expedited processing  
5 based on mere speculation and guesswork. If predictions about future events turn out to be wrong,  
6 the agency will have wasted resources to the detriment of other requesters. Such a watered-down  
7 interpretation of the FOIA's expedited processing requirements is also inconsistent with  
8 Congress's understanding that granting such requests would be rare. See supra.

9  
10 Should circumstances change, and legislation is introduced and debated later this year,  
11 Plaintiff could seek expedited treatment from the components at that point. Alternatively, the  
12 Court could revisit any previously entered processing schedule in light of these future  
13 developments. However, the Court should reject Plaintiff's argument that it is legally entitled to  
14 expediting processing now based on the information that was before the components in Fall 2010.  
15

16 **B. While Not Required To Do So, the Criminal Division and DEA, Like The FBI,  
17 Have Met The Requirements of Expedited Processing.**

18 As the attached declarations from CRM and DEA make clear, while these components  
19 denied Plaintiff's request for expedited processing, their treatment of the request has been  
20 consistent with the legal requirements applicable to expedited requests. Under the Department's  
21 regulation, a component's decision to grant expedited processing has two distinct consequences.  
22 First, the request is "taken out of order" and processed ahead of earlier non-expedited requests. 28  
23 C.F.R. § 16.5(d)(1). Second, the agency must process the request "as soon as practicable." 5  
24 U.S.C. § 552(a)(6)(E)(iii).  
25

26 As explained by the attached declaration of Kristin Ellis for the Criminal Division, "[e]ven  
27 though CRM did not grant plaintiff's request for expedited treatment of its FOIA request, CRM  
28

1 began treating the request as a priority in November 2010, and is processing the request ‘as soon as  
2 practicable.’” Ellis Decl. ¶ 12. For instance, on November 5, 2010, when defendants were served  
3 with Plaintiff’s complaint, “CRM had 134 FOIA/PA requests pending; 92 were older than  
4 plaintiff’s request.” Id.

5  
6 CRM initiated searches for responsive material to Plaintiff’s September 28, 2010 request  
7 beginning on October 6, 2010. Id. ¶ 10. CRM continues to systematically search for responsive  
8 information and to date has identified approximately 3,750 potentially responsive hard copy  
9 records, id. ¶ 14, and 3,000 potentially responsive emails, many of which have attachments. Id. ¶  
10 16. In accordance with processing the requests “as soon as practicable,” CRM currently anticipates  
11 being able to process a minimum of between 400-500 pages each month on a rolling basis, with the  
12 first group of materials to be processed by April 1, 2011. Id. ¶ 20. Consequently, while it was not  
13 required to do so, CRM has expedited the processing of Plaintiff’s request.

14  
15 So too with DEA. At the time DEA’s Office of Chief Counsel received notice of Plaintiff’s  
16 complaint on or about November 15, 2010, the component had a backlog in excess of 900  
17 administrative cases in a single processing track. Myrick Decl. ¶ 4. Nevertheless, “Plaintiff’s  
18 request was moved forward in the queue for processing,” and “DEA began processing Plaintiff’s  
19 request on November 18, 2010; ahead of hundreds of requesters who submitted FOIA requests to  
20 DEA before September 28, 2010.” Id. In addition to taking the request out of order, DEA has  
21 been working diligently to process the request. Consistent with processing the request on an  
22 expedited basis, DEA anticipates being able to process a minimum of 350 pages per month and  
23 expects to process its first group of documents by April 1, 2011. Myrick Decl. ¶ 8.

24  
25 In short, while CRM and DEA respectfully submit that they correctly determined that  
26 Plaintiff was not entitled to expedited processing, should this Court disagree, the components have  
27 already met all the legal requirements of expedited processing, leaving only the question of what  
28

1 constitutes an appropriate processing schedule.

2 **C. Expedited Processing Does Not Require Materials To Be Processed**  
 3 **Within 10 Days Or Any Other Specific Time Period.**

4 Plaintiff is wrong that an order granting expedited processing of its September 28, 2010  
 5 request requires that the components complete processing within 10 days. This 10-day period is  
 6 not a statutory requirement, nor is it feasible given the size and complexity of the request at issue.

7 While an agency is required to provide a “notice of the determination” of whether it intends  
 8 to comply with a request for expedited processing within 10 days after receiving a request, 5  
 9 U.S.C. § 552(a)(6)(E)(ii)(I), the FOIA creates no specific deadline for completing the processing of  
 10 expedited requests. Instead, as repeatedly noted above, the statute directs agencies to “process as  
 11 soon as practicable any request for records to which [they have] granted expedited processing.” 5  
 12 U.S.C. § 552(a)(6)(E)(iii); see also 28 C.F.R. §16.5(d)(4). As the Senate Report accompanying the  
 13 expedited processing amendments explains, the intent of these provisions was to give certain  
 14 requests priority, not to require that such requests be processed within ten days or any other  
 15 specific period of time:  
 16

17 [Once] . . . the request for expedited access is granted, the agency must then proceed to  
 18 process that request “as soon as practicable.” No specific number of days for compliance is  
 19 imposed by the bill since, depending on the complexity of the request, the time needed for  
 20 compliance may vary. The goal is not to get the request for expedited access processed  
 21 within a specific time period, but to give the request priority for processing more quickly  
 22 than otherwise would occur.

23 S. Rep. 104-272, at \*17 (May 15, 1996), 1996 WL 262861; see also H. R. Rep. No. 104-795, at 23.

24 Thus, FOIA’s expedited processing provision is an ordering mechanism, allowing certain FOIA  
 25 requesters to jump to the head of the line and avoid the ordinary “first in, first out” processing  
 26 queue. See ACLU v. Dep’t of Justice, No. 04-4447, 2005 WL 588354, at \*1 (N.D. Cal. Mar. 11,  
 27 2005) (“If a request for expedited processing is granted, the request moves to the front of the  
 28 processing queue, ahead of previously filed requests.”). Once a request is at the front of the line,

1 however, “practicability” is the standard that governs how quickly any particular request can be  
2 processed. See 5 U.S.C. § 552(a)(6)(E)(iii); 28 C.F.R. § 16.5(d)(1)(4).

3 Although the FOIA does not create a specific deadline for expediting requests, and  
4 Congress was clear that it wished to avoid any specific deadline, see supra, some courts have held  
5 that the failure to complete processing of a request within 20 days creates a “presumption” that the  
6 request has not been expedited. Pl.’s Mem. at 13 (citing Elec. Frontier Found. v. Office of the Dir.  
7 Of Nat’l Intelligence, 542 F. Supp. 2d 1181, 1186 (N.D. Cal. 2008) (“Where an agency fails to  
8 comply with the twenty-day deadline applicable to a standard FOIA request, the agency  
9 ‘presumptively also fails to process an expedited request ‘as soon as practicable.’”)) (quoting  
10 Electronic Privacy Information Center v. Dep’t of Justice (“EPIC”), 416 F. Supp. 2d 30, 39  
11 (D.D.C. 2006)). For the reasons explained above, the government disagrees with these decisions.  
12 However, even these decisions find that the “presumption of agency delay raised by failing to  
13 respond to an expedited request within twenty days is certainly rebuttable if the agency presents  
14 credible evidence that disclosure within such time period is truly not practicable.” EPIC, 416 F.  
15 Supp. 2d at 39.

16 As the attached declarations from CRM, DEA and FBI demonstrate, Plaintiff’s demand that  
17 the request be processed within 10 days is clearly not practicable.

18  
19  
20  
21 ***1. The Criminal Division’s Efforts to Expedite Plaintiff’s September 28, 2010  
FOIA Request.***

22 As noted, in response to Plaintiff’s September 28, 2010 request, the Criminal Division  
23 began searching for responsive documents on October 6, 2010. Ellis Decl. ¶ 10. Agency personnel  
24 identified four offices at CRM as the most likely locations to have responsive information and the  
25 FOIA unit in each office was tasked with searching for responsive material. Id. Thereafter, on  
26 November 12, 2010, CRM determined that a wider segment of the CRM offices might have  
27

1 responsive information. Id. ¶ 13. Accordingly, on November 17, 2010, a larger group of CRM  
2 employees were tasked with searching for responsive documents. Id. Later, on November 30,  
3 2010, the search was expanded to include all CRM employees. Id. After conducting this wide-  
4 ranging search, CRM identified approximately 3,750 hard copy pages of potentially responsive  
5 information. Id. ¶ 14.

7 CRM's search has also included an effort to identify potentially responsive information in  
8 electronic format. By early January 2011, the searches of employees' e-mail accounts had yielded  
9 3,000 potentially responsive e-mails, many of which include one or more attachments. Id. ¶ 16.  
10 CRM is currently conducting a search of employee's personal drives as well as a shared network to  
11 locate any additional potentially responsive electronic information. Id. ¶ 17. In addition, CRM is  
12 working to restore the last full backup tape from three servers. Id. CRM estimates that once the  
13 restoration is completed, it will take two to three weeks to conduct searches and organize the  
14 results. Id.

16 The ongoing nature of CRM's search as well as the large number of potentially responsive  
17 documents identified thus far will require a significant investment of time before processing will be  
18 completed. As explained by CRM, this is due to several factors. First, the complexity and  
19 technical nature of the underlying material may require consultation with subject matter experts to  
20 assist in determining what information is responsive and whether the material is exempt under the  
21 FOIA. Id. ¶ 19a. Second, because much of the information concerns sensitive law enforcement  
22 information, "an exacting, thorough line-by-line review is necessary to achieve the greatest level of  
23 transparency possible, while also protecting the Government's legitimate law enforcement  
24 interests." Id. Third, multiple DOJ components, as well as other Federal agencies, have "equities  
25 in potentially responsive information located by CRM during its searches, which will necessitate  
26 many referrals and consultations." Id. ¶ 19b. Finally, CRM has located potentially responsive  
27  
28

1 information that is classified. Id. ¶ 19c. “The requirements for handling classified information in  
2 order to safeguard it necessitate special processing procedures and will increase the review time for  
3 this subset of information.” Id.

4 Consistent with an effort to process these materials “as soon as practicable,” CRM  
5 “anticipates processing a minimum of 400-500 pages of information per month and making interim  
6 responses to plaintiff concerning such processing on a monthly basis.” Id. ¶ 20. CRM’s current  
7 good faith estimate is that it will be able to process its first interim response no later than April 1,  
8 2011. Id.

9  
10 **2. *DEA’s Efforts to Expedite Plaintiff’s September 28, 2010 FOIA***  
11 ***Request.***

12 While DEA was not required to expedite the processing of Plaintiff’s request, as the  
13 attached declaration of Katherine L. Myrick, Chief of DEA’s FOIA Unit discusses, the  
14 component’s search has met the legal requirements for expedited requests. After consultations  
15 with agency personnel familiar with the issues raised in Plaintiff’s complaint, DEA offices and  
16 personnel likely to possess responsive information were identified. Myrick Decl. ¶ 5. “As a result,  
17 six DEA program offices/activities were identified and tasked to search for information in any  
18 format responsive to Plaintiff’s six-item request.” Id. ¶ 5. DEA personnel with subject matter  
19 expertise were also asked to search for responsive materials, “thus creating an overlapping search  
20 effort with six program offices/activities who also performed searches.” Id.

21  
22 DEA completed its initial search for records on or about January 7, 2011, which identified a  
23 voluminous amount of potentially responsive records. Id. ¶ 6. As a result, DEA personnel  
24 determined that it was necessary to divide the processing of these materials into two separate  
25 phases. Id. ¶ 7. The first phase was designed to eliminate clearly duplicative and non-responsive  
26 material and organize potentially responsive material in similar processing categories. Id. ¶ 7A.



1 Beginning on January 4, 2011, a four-person team began this first stage of the review. Id. Two  
2 senior FOIA Specialists were diverted from their normal duties to assist two other employees  
3 conducting the review. Id. Working on a full-time basis, “this first phase was completed on  
4 January 12, 2011, and identified approximately 5,800 pages of potentially responsive material.” Id.  
5

6 The second phase of this effort involves a “page-by-page review to determine which  
7 records are responsive, and if so, to determine whether such records may be released, referred,  
8 and/or withheld.” Id. ¶ 7B. This phase began on January 19, 2011, and two FOIA Specialists have  
9 been diverted from processing other requests as part of the joint processing team for Plaintiff’s  
10 request. Id. As DEA FOIA Chief Myrick explains, it is very difficult to accurately estimate how  
11 long it will take to process these materials. Id. ¶ 7.B. First, the number of potentially responsive  
12 documents is significant for DEA. Id. Second, given the technical or deliberative nature of many  
13 of the records, the material “will require additional consultation with program ‘experts’ and/or  
14 counsel to assist in determining responsiveness and what information should be released/withheld  
15 under applicable exemptions.” Id. In addition, “the need to avoid inadvertent disclosure of  
16 sensitive law enforcement information is paramount.” Id. ¶ 8.  
17

18 Given all these factors, it is impracticable to complete the processing of these materials  
19 within 10 days. Id. Instead, consistent with processing these requests as soon as practicable,  
20 DEA’s anticipates, based on its current good faith estimate, to be able to process “a minimum of  
21 350 pages per month and to provide Plaintiff a rolling update/determination/release on a monthly  
22 basis, with the first to occur on or about April 1, 2011, until the project is completed.” Id.  
23 (footnote omitted).  
24

25 **3. *FBI’s Efforts to Expedite Plaintiff’s September 28, 2010 FOIA***  
26 ***Request.***

27 The FBI has also met the requirements of expedited processing with respect to Plaintiff’s  
28

1 September 28, 2010 request. Given the breadth of Plaintiff's request, the FBI determined that a  
2 normal search of its indexed Central Records System would not be likely to produce a complete set  
3 of responsive documents. Hardy Decl. ¶ 37. Accordingly, on November 8, 2010, FBI FOIA  
4 personnel circulated an initial Electronic Communication ("EC") to FBIHQ divisions and offices  
5 most likely to possess responsive records. Id. ¶ 38. The EC requested that personnel in the  
6 designated divisions conduct a thorough search for potentially responsive documents. Id. During  
7 the course of this search, additional FBI offices were subsequently identified as having potentially  
8 responsive materials. Id. As a result, the FBI broadened its search and a second EC was circulated  
9 on January 10, 2011. Id.

11 As of January 24, 2011, the search for potentially responsive material continues. Id. ¶ 39.  
12 According to FBI FOIA Section Chief Hardy, "[t]he exact quantity of potentially responsive  
13 material has not yet been determined, but preliminary estimates place the number of pages in the  
14 thousands." Id. ¶ 40. Further complicating matters, the FBI is required to process thousands of  
15 pages in the next 30 days in response to multiple court-ordered deadlines in various FOIA  
16 litigations. Id. ¶ 42. Given all these factors, Plaintiff's demand that the processing of its request  
17 be completed within 10 days is not practicable.

19 According to Mr. Hardy, "[t]he FBI expects to be able to process 400-500 pages per month  
20 and will do so until production of all material responsive [to] the [September 28, 2010] request is  
21 complete." Id. ¶ 40. Consistent with the efforts of the other components, the FBI expects to be  
22 able to complete the processing of the first interim group of documents by April 1, 2011. Id.

24 In sum, the declarations from CRM, DEA, and FBI demonstrate that the components have  
25 met the FOIA's requirements for expedited requests and that Plaintiff's motion for a 10-day  
26 processing schedule is unworkable and inconsistent with the statute. Accordingly, the Court  
27 should reject Plaintiff's proposed processing schedule and instead enter the processing schedule set  
28

1 forth by the components above and embodied in the attached proposed order.

2 **CONCLUSION**

3 For the aforementioned reasons, this Court should find that CRM and DEA were not  
4 required to expedite Plaintiff's September 28, 2010 FOIA request, and deny Plaintiff's motion  
5 demanding that the processing of its May 21, 2009 and September 28, 2010 requests be completed  
6 within 10 days. With respect to the September 28, 2010 request, Defendant respectfully submits  
7 that the Court should enter Defendant's proposed processing schedule set forth in the attached  
8 proposed order.  
9

10  
11 Dated: January 25, 2011

Respectfully Submitted,

12  
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14  
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**CERTIFICATE OF SERVICE**

I hereby certify that on January 25, 2011, I caused a copy of the foregoing to be served on counsel for Plaintiff via the Court's ECF system.

*/s/ Nicholas Cartier*  
NICHOLAS CARTIER