

1 JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
2 CARL J. NICHOLS
Deputy Assistant Attorney General
3 JOSEPH P. RUSSONIELLO
United States Attorney
4 ELIZABETH J. SHAPIRO
Assistant Director, Federal Programs Branch
5 ANDREW I. WARDEN (IN Bar No. 23840-49)
Trial Attorney, U.S. Department of Justice
6 Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W., Room 7332
7 Washington, D.C. 20530
Telephone: (202) 616-5084
8 Facsimile: (202) 616-8460
Andrew.Warden@usdoj.gov

9 *Attorneys for Defendants*

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

14 _____)
ELECTRONIC FRONTIER FOUNDATION,)
15 Plaintiff,)
16 v.)
17 OFFICE OF THE DIRECTOR OF NATIONAL)
18 INTELLIGENCE and UNITED STATES)
DEPARTMENT OF JUSTICE)
19)
20 Defendants,)
_____)

No. C 08-1023 EDL
**DEFENDANT’S OPPOSITION
TO APPLICATION FOR
ORDER TO SHORTEN TIME
FOR A HEARING ON
PLAINTIFF’S MOTION FOR
PRELIMINARY INJUNCTION**

22 Defendants Office of the Director of National Intelligence (“ODNI”) and United States
23 Department of Justice (“DoJ”) hereby oppose plaintiff’s Administrative Application For Order
24 To Shorten Time For A Hearing On Plaintiff’s Motion For Preliminary Injunction (dkt. no. 11).
25 Plaintiff’s motion unreasonably requests that the Court order defendants to respond to plaintiff’s
26 motion for preliminary injunction within five business days (*i.e.*, Friday, March 7, 2008).
27 Plaintiff’s proposed schedule will substantially prejudice defendants by not affording them
28

1 adequate time to respond to plaintiff's preliminary injunction motion. Further, plaintiff's
2 purported basis for seeking expedited consideration of this recently-filed case rests entirely on
3 speculative claims of harm that are insufficient to support an expedited hearing schedule.

4 For these reasons, the Court should deny plaintiff's administrative motion. In lieu of
5 plaintiff's unreasonable schedule, defendants respectfully request that the Court establish a
6 hearing date and briefing schedule in a manner consistent with the Court's normal practice
7 pursuant to Local Civil Rule 7.

8 **BACKGROUND**

9 On February 20, 2008, plaintiff filed the above-captioned case under the Freedom of
10 Information Act ("FOIA") against ODNI and DoJ challenging the processing of a series of
11 identical FOIA requests submitted to ODNI and five components within DoJ on December 21,
12 2007. *See* Complaint ¶¶ 18-19. Plaintiff's FOIA requests seek all records from September 1,
13 2007 to the present "concerning briefings, discussions, or other exchanges" that DoJ and ODNI
14 officials have had with: 1) members of the Senate or House of Representatives and 2)
15 representatives of telecommunications companies concerning amendments to FISA [Foreign
16 Intelligence Surveillance Act, 50 U.S.C. § 1801 *et seq.*, as amended], including any discussion of
17 immunizing telecommunications companies or holding them otherwise unaccountable for their
18 role in government surveillance activities." Upon receipt of plaintiff's FOIA requests,
19 defendants agreed to process them on an expedited basis pursuant to the regulations governing
20 such requests. *See* 32 C.F.R. § 1700.12 (ODNI regulation governing expedited FOIA requests);
21 28 C.F.R. § 16.5(d) (DoJ regulations governing expedited processing of FOIA requests).
22 Notwithstanding the approval of expedited processing, on February 29, 2008, plaintiff filed a
23 motion for preliminary injunction seeking an order from this Court compelling defendants to
24 complete processing of plaintiff's FOIA requests within 10 days, and produce or identify all
25 responsive records. *See* dkt no. 7. Additionally, plaintiff filed the instant motion for an
26 expedited briefing and hearing schedule that would require defendants to file a response to the
27 preliminary motion on March 7, 2008 (*i.e.*, five business days after the motion was filed) and to
28 conduct a hearing on March 25, 2008.

ARGUMENT

1
2 Plaintiff's motion for an expedited briefing schedule should be denied because it unfairly
3 prejudices defendants ability to respond to plaintiff's motion for preliminary injunction.

4 Plaintiff's motion cites nearly one hundred separate legal authorities and attaches nearly two
5 hundred pages of exhibits. By all appearances plaintiff has spent considerable time and effort
6 preparing this motion, but plaintiff seeks to constrain defendants' ability to respond by
7 unreasonably compressing the briefing schedule in this matter. According to the typical practice
8 in this Court, defendants would have at least two weeks to respond to a motion for preliminary
9 injunction motion. *See* Local Civil Rule 65-2. Plaintiff's proposed schedule would cut
10 defendants' response time to five business days. Remarkably, plaintiff's schedule would have
11 the effect of shortening only defendants' response time. Plaintiff still seeks the full one-week to
12 file a reply memorandum. *See* Proposed Order (plaintiff's reply due March 12, 2008). Such an
13 unbalanced schedule unfairly prejudices defendants and it should be rejected by the Court.

14 In addition to requiring time to respond to the legal arguments raised in plaintiff's
15 motion, defendants require sufficient time to investigate the factual allegation raised in the
16 motion and to develop a response to those allegations. Because plaintiff's FOIA requests seek
17 documents from five separate DoJ components as well as ODNI, responding to plaintiff's motion
18 is likely to require coordination among multiple government components in order to prepare a
19 factual presentation for the Court. While defendants have begun these efforts, it would be
20 unreasonable to require defendants to complete these efforts and to file a response to plaintiff's
21 motion by this coming Friday.

22 Instead of the unreasonable schedule proposed by plaintiff, the Court should establish a
23 hearing date and briefing schedule in a manner consistent with the Court's normal practice
24 pursuant to Local Civil Rule 7. Specifically, the Court should establish a hearing date "not less
25 than 35 days after service of the motion," *see* Local Civil Rule 7-2(a) (*i.e.*, no sooner than April
26 4, 2008), and defendants should be permitted the full time under the Court's local rules to
27 respond to the motion. *See* Local Civil Rule 7-3 ("Any opposition to a motion [including a
28 preliminary injunction motion per Local Civil Rule 65-2] must be served and filed not less than

1 21 days before the hearing date.”).

2 This schedule will not impose undue harm or prejudice on plaintiff. As a threshold
3 matter, plaintiff’s motion notably does not explain why plaintiff waited nearly two months to file
4 the preliminary injunction motion. *See Lydo Enters. v. City of Las Vegas*, 745 F.2d 1211, 1213,
5 1213-14 (9th Cir. 1984) (“By sleeping on its rights a plaintiff demonstrates the lack of need for
6 speedy action.”). According to plaintiff’s legal theory, which defendants dispute, “the agencies
7 should have finished processing the [FOIA] requests within 20 working days of receipt.” *See*
8 Plaintiff’s Motion at 2. Consequently, plaintiff could have filed the preliminary injunction
9 motion in early January 2008.¹ For whatever reason, plaintiff made a strategic decision not to
10 pursue that course of action at that time. The Court should not reward plaintiff for this decision
11 by unreasonably accelerating the scheduling of this case in a manner that will prejudice
12 defendants. Moreover, plaintiff has not established that it will face certain and irreparable harm
13 absent the proposed briefing schedule. The purported basis for the emergency briefing schedule
14 in this case is based entirely on plaintiff’s speculation that any records responsive to plaintiff’s
15 FOIA request must be released before Congress votes on amendments to the FISA in order for
16 those documents to have value. *See* Plaintiff’s Motion at 2. Plaintiff’s argument is pure
17 speculation, and it is not sufficient to support issuance of an expedited briefing schedule.

18 CONCLUSION

19 For these reasons, the Court should deny plaintiff’s Administrative Application For Order
20 To Shorten Time For A Hearing on Plaintiff’s Motion For Preliminary Injunction. In the
21 alternative, the Court should adopt defendants’ proposed order that reflects a briefing and
22 hearing schedule consistent with this Court’s normal practice under Local Civil Rule 7.

27
28 ¹ At that time the existence of the FISA debate was well known to the public and, most
certainly, to plaintiff. *See* Complaint ¶¶ 8-17.
No. C. 08-1023 EDL – Defendants’ Opposition To Administrative Application For Order To Shorten Time For A
Hearing on Plaintiff’s Motion For Preliminary Injunction

1 Dated: March 5, 2008

Respectfully submitted,

2 JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

3
4 CARL J. NICHOLS
Deputy Assistant Attorney General

5 JOSEPH P. RUSSONIELLO
United States Attorney

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7 ELIZABETH J. SHAPIRO
Assistant Director, Federal Programs Branch

8 /s/ Andrew I. Warden
9 ANDREW I. WARDEN (IN Bar No. 23840-49)
10 Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W., Room 7332
11 Washington, D.C. 20530
Telephone: (202) 616-5084
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13 *Attorneys for Defendants*

1 JEFFREY S. BUCHOLTZ
 Acting Assistant Attorney General
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 11 **UNITED STATES DISTRICT COURT**
 12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
 13 **SAN FRANCISCO DIVISION**

14
 15 ELECTRONIC FRONTIER FOUNDATION,

16 Plaintiff,

17 v.

18 OFFICE OF THE DIRECTOR OF NATIONAL
 INTELLIGENCE and UNITED STATES
 19 DEPARTMENT OF JUSTICE

20 Defendants,
 21

No. C 08-1023 EDL

**DECLARATION OF
 ANDREW I. WARDEN**

22 Pursuant to 28 U.S.C. § 1746, I, Andrew I. Warden, hereby declare:
 23

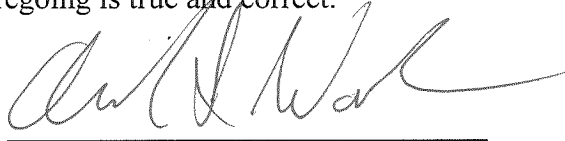
24 1. I serve as a Trial Attorney in the United States Department of Justice, Civil
 25 Division, Federal Programs Branch. I serve as counsel for defendants in the above-captioned
 26 case.

27 2. Consistent with Local Civil Rule 6-3(c), today defendants have filed an opposition
 28 memorandum that sets forth the basis for opposing plaintiff's Administrative Application For

1 Order To Shorten Time For A Hearing On Plaintiff's Motion For Preliminary Injunction (dkt. no.
2 11).

3 I declare under penalty of perjury that the foregoing is true and correct.

4
5 Dated: March 5, 2008

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ANDREW I. WARDEN

1 UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA
3 SAN FRANCISCO DIVISION

4 _____)
5 ELECTRONIC FRONTIER FOUNDATION,)
6 Plaintiff,)
7 v.)
8 OFFICE OF THE DIRECTOR OF NATIONAL)
9 INTELLIGENCE and UNITED STATES)
10 DEPARTMENT OF JUSTICE)
11 Defendants,)
_____)

No. C 08-1023 EDL

**ORDER ESTABLISHING
HEARING SCHEDULE FOR
PLAINTIFF’S MOTION FOR
PRELIMINARY INJUNCTION**

12
13 Upon consideration of Plaintiff's Administrative Motion To Consider Whether Cases
14 Should Be Related (dkt. no. 40), and defendant’s opposition thereto, it is hereby ORDERED as
15 follows:

- 16 1) Plaintiff’s Administrative Application For Order To Shorten Time For A Hearing
17 on Plaintiff’s Motion For Preliminary Injunction is DENIED;
18 2) The Court shall establish a hearing date for plaintiff’s Motion For Preliminary
19 Injunction no sooner than April 4, 2008, consistent with Local Civil Rule 7; and
20 3) The timing of Defendants’ response to plaintiff’s Motion For Preliminary
21 Injunction, and plaintiff’s reply thereto, shall be governed by Local Civil Rule 7.
22

23 IT IS SO ORDERED.

24 Dated: March ____, 2008.
25

26 _____
UNITED STATES DISTRICT JUDGE
27
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