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ELECTRONIC FRONTIER FOUNDATION

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

15 ELECTRONIC FRONTIER FOUNDATION,) NO. 08-1023 JSW
16)
16 Plaintiff,) **DECLARATION OF MARCIA**
17) **HOFMANN IN SUPPORT OF AMENDED**
17 v.) **APPLICATION FOR AN ORDER TO**
18) **SHORTEN TIME FOR A HEARING ON**
18 OFFICE OF THE DIRECTOR OF NATIONAL) **PALINTIFF’S MOTION FOR A**
19 INTELLIGENCE) **PRELIMINARY INJUNCTION**
20)
20 and)
21 DEPARTMENT OF JUSTICE,)
21)
22 Defendants.) Date: TBD
22) Time: TBD
23) Courtroom: 2, 17th Floor
23) Judge: Hon. Jeffrey S. White

24 1. I am an attorney of record for Plaintiff Electronic Frontier Foundation (“EFF”) in
25 this matter and a member in good standing of the California State Bar, and am admitted to practice
26 before this Court. I have personal knowledge of the matters stated in this declaration. If called
27 upon to do so, I am competent to testify to all matters set forth herein.

1 2. This declaration is submitted in support of EFF's Amended Application for an
2 Order to Shorten Time For a Hearing on Plaintiff's Motion for a Preliminary Injunction. EFF asks
3 respectfully requests that the Court shorten the time for a hearing on EFF's Motion for a
4 Preliminary Injunction to April 4, 2008 or the next available date. The motion is currently noticed
5 for a hearing on May 9, 2008.
6

7 3. The Court should hear the Motion for a Preliminary Injunction on shortened time
8 because the very nature of the right that EFF seeks to vindicate in this matter depends upon
9 timeliness. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552,
10 seeking the expedited processing and release of records held by the Office of the Director of
11 National Intelligence ("ODNI") and the Department of Justice ("DOJ") concerning a lobbying
12 campaign to amend federal surveillance law, particularly to insulate telecommunications carriers
13 from liability for their cooperation in widespread and illegal government surveillance. This lawsuit
14 seeks to compel Defendants to process the requested records expeditiously under the Freedom of
15 Information Act ("FOIA") because they involve a matter about which there is an "urgency to
16 inform the public about actual or alleged [f]ederal [g]overnment activity," and are sought by "a
17 person primarily engaged in disseminating information." 5 U.S.C. § 552(a)(6)(E)(v)(II), 32 C.F.R.
18 § 1700.12(c)(2), and 28 C.F.R. § 16.5(d)(1)(ii). Both agencies have conceded that EFF's FOIA
19 requests satisfy this statutory standard and the agencies' own implementing regulations, and are
20 therefore legally entitled to be processed in an expedited manner. Notwithstanding ODNI and
21 DOJ's purported decisions to expedite the processing of EFF's FOIA requests, however, the
22 agencies have to date neither completed the processing of EFF's requests, nor informed EFF of an
23 anticipated date for the completion of the processing of the requests. Furthermore, both ODNI and
24 DOJ have exceeded the generally applicable 20-day statutory deadline for processing a standard,
25 non-expedited FOIA request.
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1 4. This Court should also hear the matter on shortened time because the subject matter
2 of EFF's requests is directly relevant to Congress' ongoing debate about whether to immunize
3 telecommunications companies against legal liability for participating in unlawful government
4 surveillance. As of the filing of this lawsuit, the House of Representatives has passed legislation
5 that would amend the Foreign Intelligence Surveillance Act ("FISA"), but would not shield
6 telecommunications companies from civil liability for their role in the government's warrantless
7 surveillance program. H.R. 3773 (as passed by House). On February 12, 2008, however, the
8 Senate passed its own version of legislation to amend FISA, which purports to require dismissal of
9 any state or federal lawsuit against a carrier for facilitating government surveillance if the Attorney
10 General certifies to the court that the company was assisting in certain intelligence activity
11 authorized by the President. H.R. 3773, FISA Amendments Act of 2008 (engrossed amendment as
12 agreed to by Senate). The day before EFF filed its Motion for Preliminary Injunction, President
13 Bush told reporters that amending FISA is a "very urgent priority" for the Administration. Press
14 Conference of the President, Feb. 28, 2008, [http://www.whitehouse.gov/news/releases/2008/02/
15 20080228-2.html](http://www.whitehouse.gov/news/releases/2008/02/20080228-2.html) (attached to Declaration of Marcia Hofmann in Support of Plaintiff's Motion for
16 a Preliminary Injunction as Ex. J.)
17
18

19 5. A hearing on shortened time is also necessary because EFF's repeated efforts to
20 negotiate a processing schedule with Defendants have been unsuccessful. On February 20, 2008, I
21 phoned Andrew I. Warden, Trial Attorney at the Department of Justice, to inform him that EFF had
22 filed the complaint in the above-captioned matter. The following day, I told Mr. Warden that EFF
23 wanted to explore the possibility of negotiating a processing schedule for EFF's FOIA requests to
24 eliminate the need for further action in this case. Mr. Warden and I discussed surveillance reform
25 legislation currently pending in the House and Senate, and I told Mr. Warden that EFF would
26 consider seeking preliminary injunctive relief in the absence of an agreement to process EFF's
27
28

1 requests in a timely manner. On February 27, 2008, Mr. Warden and I spoke again regarding the
2 above-captioned case, but were unable to reach a mutually agreeable processing schedule for EFF's
3 FOIA requests. On February 28, 2008, I informed Mr. Warden of my intention to move for a
4 preliminary injunction if EFF and Defendants had not reached a firm agreement on the processing
5 of EFF's FOIA requests by February 29, 2008. As of this filing, the parties have reached no
6 processing agreement, no documents have been produced, and Mr. Warden has not indicated when
7 EFF's requests will be processed.
8

9 6. Under the statutory scheme Congress established in the FOIA, timing is a critical
10 component of expedited processing, and unless ODNI and DOJ are ordered to process EFF's
11 requests immediately, EFF's right to expedition under the FOIA will be irretrievably lost.
12 Moreover, any further delay in the processing of EFF's FOIA requests will irreparably harm EFF's
13 ability, and that of the public, to obtain timely information vital to the current and ongoing debate
14 surrounding whether Congress should amend FISA, particularly to render telecommunications
15 carriers immune from legal liability for their complicity in the government's warrantless
16 surveillance program.
17

18 7. Mr. Warden indicated that Defendants were not in a position as of the filing of this
19 amended application to stipulate to a hearing of EFF's Motion for a Preliminary Injunction on the
20 accelerated schedule proposed by EFF.
21

22 8. Attached is a proposed order granting this amended application. EFF respectfully
23 requests that the Court set the following expedited briefing and hearing schedule: Defendants'
24 opposition to EFF's Motion for a Preliminary Injunction will be filed no later than March 21, 2008;
25 EFF's reply to Defendants' opposition to EFF's Motion for a Preliminary Injunction will be filed
26 no later than March 26, 2008; and the Court's hearing on EFF's Motion for a Preliminary
27 Injunction will be held April 4, 2008, at 9:00 a.m.
28

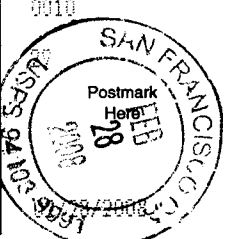
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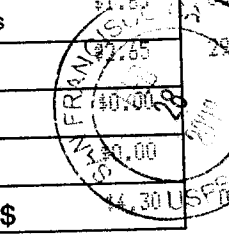
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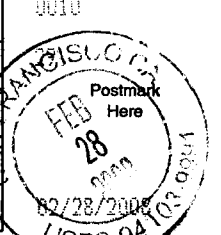
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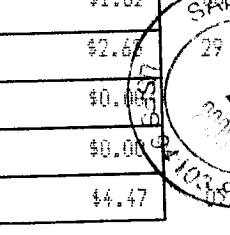
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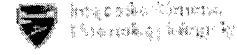
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