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9 *Attorneys for Defendants*

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

		No. C 08-1023 JSW
ELECTRONIC FRONTIER FOUNDATION,	)	<b>DEFENDANT’S OPPOSITION TO PLAINTIFF’S AMENDED APPLICATION FOR ORDER TO SHORTEN TIME FOR A HEARING ON PLAINTIFF’S MOTION FOR PRELIMINARY INJUNCTION</b>
Plaintiff,	)	
v.	)	
OFFICE OF THE DIRECTOR OF NATIONAL	)	
INTELLIGENCE and UNITED STATES	)	
DEPARTMENT OF JUSTICE	)	
	)	
Defendants,	)	
	)	

22 Defendants Office of the Director of National Intelligence (“ODNI”) and United States  
 23 Department of Justice (“DOJ”) hereby oppose plaintiff’s Amended Application For Order To  
 24 Shorten Time For A Hearing On Plaintiff’s Motion For Preliminary Injunction (dkt. no. 28).  
 25 Defendants respectfully request that the current hearing date (May 9, 2008) remain in place and  
 26 all briefing in this matter be conducted in accordance with the Court’s normal practice pursuant  
 27 to Local Civil Rule 7.

## BACKGROUND

1  
2 On February 20, 2008, plaintiff filed the above-captioned case under the Freedom of  
3 Information Act (“FOIA”) against ODNI and DOJ challenging the processing of a series of  
4 identical FOIA requests submitted to ODNI and five components within DoJ on December 21,  
5 2007. *See* Complaint ¶¶ 18-19. Plaintiff’s FOIA requests seek all records from September 1,  
6 2007 to the present “concerning briefings, discussions, or other exchanges” that DoJ and ODNI  
7 officials have had with: 1) members of the Senate or House of Representatives and 2)  
8 representatives of telecommunications companies concerning amendments to FISA [Foreign  
9 Intelligence Surveillance Act, 50 U.S.C. § 1801 *et seq.*, as amended], including any discussion of  
10 immunizing telecommunications companies or holding them otherwise unaccountable for their  
11 role in government surveillance activities.” Upon receipt of plaintiff’s FOIA requests,  
12 defendants agreed to process them on an expedited basis pursuant to the regulations governing  
13 such requests. *See* 32 C.F.R. § 1700.12 (ODNI regulation governing expedited FOIA requests);  
14 28 C.F.R. § 16.5(d) (DoJ regulations governing expedited processing of FOIA requests).  
15 Notwithstanding the approval of expedited processing, on February 29, 2008, plaintiff filed a  
16 motion for preliminary injunction seeking an order from this Court compelling defendants to  
17 produce or identify all responsive records within 10 days. *See* dkt no. 7. Plaintiff also filed an  
18 administrative motion to shorten time for briefing and hearing schedule that would have required  
19 defendants to file a response to the preliminary motion on March 7, 2008 (*i.e.*, five business days  
20 after the motion was filed) and to conduct a hearing on March 25, 2008. *See* dkt no. 11.  
21 Defendants opposed plaintiff’s motion. *See* dkt. no. 21. Following reassignment of this case  
22 from Magistrate Judge Laporte to this Court on March 6, 2008, and at the instruction of the  
23 Court’s courtroom deputy, plaintiff has filed an amended motion to shorten time for a hearing.  
24 Plaintiff’s motion requests a hearing date of April 4, 2008, as well as an order compelling  
25 defendants to file an opposition to plaintiff’s preliminary injunction motion by March 21, 2008.

## ARGUMENT

26  
27 Plaintiff’s amended motion for an expedited hearing and briefing schedule should be  
28 denied. Plaintiff’s purported basis for seeking expedited consideration of this recently-filed case

1 rests entirely on speculative claims of harm that are insufficient to support an expedited hearing  
2 schedule. The purported basis for the emergency briefing schedule in this case is based entirely  
3 on plaintiff's speculation that plaintiff will suffer irreparable injury if records responsive to  
4 plaintiff's FOIA request are not released before Congress votes on permanent amendments to the  
5 FISA. Plaintiff's argument is pure speculation, and it is not sufficient to support issuance of an  
6 expedited briefing schedule.

7 Further, the purported emergency in this case is largely of plaintiff's own making.  
8 Plaintiff's motion notably does not explain why plaintiff waited nearly two months to file the  
9 preliminary injunction motion. *See Lydo Enters. v. City of Las Vegas*, 745 F.2d 1211, 1213,  
10 1213-14 (9th Cir. 1984) ("By sleeping on its rights a plaintiff demonstrates the lack of need for  
11 speedy action."). According to plaintiff's legal theory, which defendants dispute, defendants  
12 should have finished processing the FOIA requests within 20 days of receiving the requests. *See*  
13 Plaintiff's Motion at 2. Consequently, plaintiff could have filed the preliminary injunction  
14 motion nearly two months ago in early January 2008.<sup>1</sup> Plaintiff should not be permitted to  
15 compensate for its own tardy conduct by imposing an expedited schedule on defendants.

16 Finally, plaintiff's contention that defendants "already proposed that this Court set an  
17 April 4, 2008 hearing date" is misleading. *See* Plaintiff's Motion at 4. Defendants have  
18 consistently maintained that this matter should be scheduled according to this Court's normal  
19 practice under the local civil rules. Plaintiff's motion for preliminary injunction was filed on  
20 February 29, 2008; thus, pursuant to Local Civil Rule 7-2(a), defendants argued in their  
21 opposition to plaintiff's first motion to shorten time that the earliest date a hearing could be  
22 noticed is April 4, 2008. Defendants' present understanding of the Court's calendar is that the  
23 first available civil motions date is May 9, 2009. Because plaintiff's motion for preliminary  
24 injunction does not warrant expedited consideration, plaintiff's motion should be heard and  
25 briefed according to the regular schedule of this Court.

26  
27  
28 <sup>1</sup> At that time the existence of the FISA debate was well known to the public and, most  
certainly, to plaintiff. *See* Complaint ¶¶ 8-17.

**CONCLUSION**

For the reasons stated above, the Court should maintain the current hearing date (May 9, 2008) and order that briefing on plaintiff’s motion for preliminary injunction be conducted in a manner consistent with the Court’s normal practice pursuant to Local Civil Rule 7.

Dated: March 13, 2008

Respectfully submitted,

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Acting Assistant Attorney General

CARL J. NICHOLS  
Deputy Assistant Attorney General

JOSEPH P. RUSSONIELLO  
United States Attorney

ELIZABETH J. SHAPIRO  
Assistant Director, Federal Programs Branch

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 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 JSW

**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 Amended Application For Order

1 To Shorten Time For A Hearing On Plaintiff's Motion For Preliminary Injunction (dkt. no. 28).

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

Dated: March 13, 2008



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 JSW

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

12  
13 Upon consideration of Plaintiff’s Amended Application For Order To Shorten Time For  
14 A Hearing On Plaintiff’s Motion For Preliminary Injunction, and defendants’ opposition thereto,  
15 it is hereby ORDERED as follows:

- 16 1) Plaintiff’s motion is DENIED;  
17 2) Plaintiff’s Motion For Preliminary Injunction shall be heard on May 9, 2008; and  
18 3) The timing of defendants’ response to plaintiff’s Motion For Preliminary  
19 Injunction, and plaintiff’s reply thereto, shall be governed by Local Civil Rule 7.

20  
21 IT IS SO ORDERED.

22 Dated: March \_\_\_\_, 2008.  
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24 \_\_\_\_\_  
25 UNITED STATES DISTRICT JUDGE  
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