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

16 ELECTRONIC FRONTIER FOUNDATION, )  
17 Plaintiff, )  
18 v. )  
19 OFFICE OF THE DIRECTOR OF NATIONAL )  
20 INTELLIGENCE )  
21 and )  
22 DEPARTMENT OF JUSTICE, )  
23 Defendants. )

NO. 08-1023 EDL  
**NOTICE OF MOTION AND MOTION  
FOR A PRELIMINARY INJUNCTION;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION FOR PRELIMINARY  
INJUNCTION**

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1 TO DEFENDANTS AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on March 25, 2008, or as soon thereafter as the matter may  
3 be heard, at the United States District Court for the Northern District of California, 450 Golden  
4 Gate Avenue, San Francisco, California, Plaintiff Electronic Frontier Foundation (“EFF”) will, and  
5 hereby does, move for an order granting preliminary injunctive relief.  
6

7 Pursuant to Federal Rule of Civil Procedure 65, EFF seeks to enjoin the Office of the  
8 Director of National Intelligence (“ODNI”) and the Department of Justice (“DOJ”) from impeding  
9 EFF’s efforts to expeditiously obtain agency records concerning a lobbying campaign to amend  
10 federal surveillance law, particularly to insulate telecommunications carriers from liability for their  
11 cooperation in widespread and illegal government surveillance. EFF respectfully asks that this  
12 Court issue an order requiring Defendants to expedite the processing of EFF’s Freedom of  
13 Information Act requests submitted to the agencies, and to complete their processing within 10  
14 days of the Court’s order. This motion is based on this notice of motion, the memorandum of  
15 points and authorities in support of this motion, the declaration of Marcia Hofmann and attached  
16 exhibits in support of this motion, and all papers and records on file with the Clerk or which may  
17 be submitted prior to or at the time of the hearing, and any further evidence which may be offered.  
18  
19

20 **MEMORANDUM OF POINTS AND AUTHORITIES**

21 **I. INTRODUCTION**

22 This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, seeking  
23 the expedited processing and release of records held by Defendants ODNI and DOJ concerning  
24 efforts of the agencies and telecommunications industry to push for changes to federal surveillance  
25 law, especially to ensure that telecommunications carriers are not held accountable for their  
26 participation in the government’s unlawful surveillance of millions of Americans.  
27

28 Defendants ODNI and DOJ acknowledge that the requested information qualifies for



1 expedited processing, and each agency has purported to grant EFF's requests for such treatment.  
2 Nonetheless, in violation of the FOIA and Defendants' own regulations, ODNI and DOJ have  
3 failed to process EFF's requests even within the statutory time frame (20 business days) for a  
4 standard request that is *not* entitled to expedited treatment. Defendants' failure to process the  
5 requests — or to even identify a date by which it expects to complete processing — violates the  
6 law.  
7

8 An order compelling the timely processing and production of these documents is critical  
9 because the information requested is directly relevant to understanding the Defendants' roles in  
10 lobbying on behalf of telecommunications providers for legislation designed to force the dismissal  
11 of lawsuits against the companies, more than 40 of which are currently pending before this Court.  
12 As Defendants forestall compliance with EFF's lawful FOIA requests, Congress continues to  
13 consider highly controversial legislation demanded by the President and the Director of National  
14 Intelligence. Because both EFF's rights and Defendants' obligations are highly time-sensitive, EFF  
15 respectfully requests entry of an order compelling Defendants ODNI and DOJ to process and  
16 disclose the requested records immediately.  
17

## 18 19 **II. STATEMENT OF FACTS**

### 20 **A. The Administration's Campaign to Shield Telecommunications Carriers** 21 **From Liability for Their Role in Unlawful Surveillance Activity**

22 The agency activities at the heart of this case concern ODNI and DOJ's lobbying efforts to  
23 ensure telecommunications providers are not held responsible for their participation in a massive,  
24 well-documented surveillance program through which the United States government has  
25 unlawfully gathered information about millions of Americans. The first news of this surveillance  
26 program reached the public on December 15, 2005, when the *New York Times* reported:

27  
28 Months after the Sept. 11 attacks, President Bush secretly authorized the National Security Agency to eavesdrop on Americans and others inside the United States to

1 search for evidence of terrorist activity without the court-approved warrants  
2 ordinarily required for domestic spying, according to government officials.

3 Under a presidential order signed in 2002, the intelligence agency has monitored  
4 the international telephone calls and international e-mail messages of hundreds,  
5 perhaps thousands, of people inside the United States without warrants over the  
6 past three years in an effort to track possible “dirty numbers” linked to Al Qaeda,  
7 the officials said.

8 James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec.

9 16, 2005, available at <http://www.nytimes.com/2005/12/16/politics/16program.html> (subscription

10 required) (attached to the Declaration of Marcia Hofmann (hereafter “Hofmann Decl.”) as Ex. A).<sup>1</sup>

11 The following day, President Bush confirmed in a radio address that he had authorized a

12 surveillance program to intercept international communications in which one participant was

13 suspected of having a connection to the terrorist organization al-Qaeda. President’s Radio Address,

14 Dec. 17, 2005, <http://www.whitehouse.gov/news/releases/2005/12/20051217.html> (Hofmann Decl.

15 Ex. B).

16 Shortly thereafter, the *New York Times* reported that the NSA’s surveillance activity was far  
17 more extensive than President Bush had admitted. According to the *Times*:

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18 <sup>1</sup> While newspaper accounts are hearsay, it is well established that this Court has the discretion to  
19 consider hearsay or otherwise inadmissible evidence for purposes of deciding whether to issue a  
20 preliminary injunction. *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1363 (9th Cir. 1988)  
21 (en banc) (allowing hearsay evidence); *accord Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1394  
22 (9th Cir. 1984) (“The urgency of obtaining a preliminary injunction necessitates a prompt  
23 determination and makes it difficult to obtain affidavits from persons who would be competent to  
24 testify at trial. The trial court may give even inadmissible evidence some weight, when to do so  
25 serves the purpose of preventing irreparable harm before trial.”); *Rosen Entm’t Sts. LP v. Eiger*  
26 *Vision*, 343 F. Supp. 2d 908, 912 (C.D. Cal. 2004) (“District courts have discretion to consider  
27 otherwise inadmissible evidence in ruling on the merits of an application for a preliminary  
28 injunction.”); *New.Net, Inc. v. Lavasoft*, 356 F Supp. 2d 1071, 1076 n.3 (C.D. Cal. 2003) (“[T]he  
Court may, in its discretion, accept hearsay for purposes of deciding whether to issue the  
preliminary injunction.”) “District courts must exercise their discretion in weighing all the  
attendant factors, including the need for expedition, to assess whether, and to what extent,  
affidavits or other hearsay materials are appropriate given the character and objectives of the  
injunctive proceeding.” *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 719 (3d Cir. 2004)  
(quoting *Asseo v. An Am. Grain Co.*, 805 F.2d 23, 26 (1st Cir. 1986) (quotation marks omitted))  
(emphasis added).

1 The National Security Agency has traced and analyzed large volumes of telephone  
2 and Internet communications flowing into and out of the United States as part of the  
3 eavesdropping program that President Bush approved after the Sept. 11, 2001,  
attacks to hunt for evidence of terrorist activity, according to current and former  
government officials.

4 The volume of information harvested from telecommunication data and voice  
5 networks, without court-approved warrants, is much larger than the White House  
6 has acknowledged, the officials said. It was collected by tapping directly into some  
of the American telecommunication system's main arteries, they said.

7 As part of the program approved by President Bush for domestic surveillance  
8 without warrants, the N.S.A. has gained the cooperation of American  
telecommunications companies to obtain backdoor access to streams of domestic  
and international communications, the officials said.

9 Eric Lichtblau, *Spy Agency Mined Vast Data Trove, Officials Report*, N.Y. TIMES, Dec. 24, 2005,  
10 available at <http://www.nytimes.com/2005/12/24/politics/24spy.html> (Hofmann Decl. Ex. C).

11 The press continued to reveal the broad scope of the government's surveillance operation.  
12 On February 6, 2006, for instance, *USA Today* reported, "[t]he National Security Agency has  
13 secured the cooperation of large telecommunications companies, including AT&T, MCI and  
14 Sprint, in its efforts to eavesdrop without warrants on international calls by suspected terrorists,  
15 according to seven telecommunications executives." Leslie Cauley and John Diamond, *Telecoms*  
16 *Let NSA Spy on Calls*, USA TODAY, Feb. 6, 2006, available at  
17 [http://www.usatoday.com/news/washington/2006-02-05-nsa-telecoms\\_x.htm](http://www.usatoday.com/news/washington/2006-02-05-nsa-telecoms_x.htm) (Hofmann Decl. Ex.  
18 D).

19  
20 Since the NSA's massive and illegal warrantless surveillance program was first revealed,  
21 approximately 41 lawsuits have been filed throughout the United States seeking to hold the  
22 government and cooperating telecommunications carriers responsible for violating the law and the  
23 privacy of countless citizens and customers. An additional seven suits have arisen from attempts by  
24 state public utility commissioners and attorneys general to seek information from  
25 telecommunications carriers about their involvement in warrantless surveillance activities. Nearly  
26 all of these lawsuits have been consolidated and are currently pending here in the United States  
27  
28

1 District Court for the Northern District of California. *In re NSA Telecommunications Records*  
2 *Litigation* (MDL Docket No. 06-1791 VRW).<sup>2</sup>

3 On August 5, 2007, President Bush signed into law the Protect America Act of 2007, which  
4 expanded the government's authority to intercept communications of Americans without warrants  
5 through the Foreign Intelligence Surveillance Act ("FISA"). Pub. L. No. 110-55, 121 Stat. 552.  
6 Among other things, the law contained provisions designed to protect telecommunications  
7 companies from *future* legal liability for their role in certain government surveillance activity.  
8

9 In an article published the same day the Protect America Act became law, the *New York*  
10 *Times* reported:

11 [The Protect American Act] gave the administration greater power to force  
12 telecommunications companies to cooperate with such spying operations. The  
13 companies can now be compelled to cooperate by orders from the attorney general  
and the director of national intelligence.

14 Democratic Congressional aides said Sunday that some telecommunications  
15 company officials had told Congressional leaders that they were unhappy with that  
16 provision in the bill and might challenge the new law in court. The aides said the  
telecommunications companies had told lawmakers that they would rather have a  
court-approved warrant ordering them to comply.

17 In fact, pressure from the telecommunications companies on the Bush  
18 administration has apparently played a major hidden role in the political battle over  
the surveillance issue over the past few months.

19 James Risen, *Bush Signs Law to Widen Reach for Wiretapping*, N.Y. TIMES, Aug. 5, 2007,  
20 *available at* <http://www.nytimes.com/2007/08/06/washington/06nsa.html> (Hofmann Decl. Ex. E).

21 The Protect America Act included a provision stating that the law would expire in February  
22 2008 without further congressional action. President Bush indicated that the Administration would  
23 push for more extensive, and likely retroactive, legal immunity for telecommunications companies:  
24

25 When Congress returns in September the Intelligence committees and leaders in  
26 both parties will need to complete work on the comprehensive reforms requested by  
27 Director [of National Intelligence Mike] McConnell, including the important issue  
of providing meaningful liability protection to those who are alleged to have  
assisted our Nation following the attacks of September 11, 2001.

28 <sup>2</sup> EFF is Co-Lead Coordinating Counsel in this litigation.

1  
2 Signing Statement, President Bush Commends Congress on Passage of Intelligence Legislation,  
3 Aug. 6, 2007, *available at* <http://www.whitehouse.gov/news/releases/2007/08/20070805.html>  
4 (Hofmann Decl. Ex. F). In an August 22, 2007 interview discussing the government's warrantless  
5 surveillance activities, Director McConnell stated:

6 [U]nder the president's program, the terrorist surveillance program, the private  
7 sector had assisted us. Because if you're going to get access you've got to have a  
8 partner and they were being sued. Now if you play out the suits at the value  
they're claimed, it would bankrupt these companies. So my position was that we  
have to provide liability protection to these private sector entities.

9 Chris Roberts, *Transcript: Debate on the Foreign Intelligence Surveillance Act*, EL PASO TIMES,  
10 Aug. 22, 2007, *available at* [http://www.elpasotimes.com/news/ci\\_6685679](http://www.elpasotimes.com/news/ci_6685679) (Hofmann Decl. Ex.  
11 G). Furthermore, according to an article published by *Newsweek*, "[t]he nation's biggest  
12 telecommunications companies, working closely with the White House, have mounted a secretive  
13 lobbying campaign to get Congress to quickly approve a measure wiping out all private lawsuits  
14 against them for assisting the U.S. intelligence community's warrantless surveillance programs."  
15 Mark Hosenball and Michael Isikoff, *Case Dismissed?: The Secret Lobbying Campaign Your  
16 Phone Company Doesn't Want You to Know About*, NEWSWEEK, updated Sept. 26, 2007, *available  
17 at* <http://www.newsweek.com/id/41142> (Hofmann Decl. Ex. H).  
18

19 Since passing the Protect America Act, Congress has continued to mull over additional  
20 changes to federal surveillance law. *See, i.e., Warrantless Surveillance and the Foreign  
21 Intelligence Surveillance Act: The Role of Checks and Balances in Protecting Americans' Privacy  
22 Rights (Part I): Hearing of the H. Comm. on the Judiciary*, 110th Cong. (Sept. 5, 2007); *The  
23 Foreign Intelligence Surveillance Act and the Protect America Act: Hearing of the H. Permanent  
24 Select Comm. on Intelligence*, 110th Cong. (Sept. 18, 2007); *Warrantless Surveillance and the  
25 Foreign Intelligence Surveillance Act: The Role of Checks and Balances in Protecting Americans'  
26 Privacy Rights (Part II): Hearing of the H. Comm. on the Judiciary*, 110th Cong. (Sept. 18, 2007);  
27  
28

1 *FISA: Hearing of the H. Permanent Select Comm. on Intelligence*, 110th Cong. (Sept. 20, 2007);  
2 *Strengthening FISA: Does the Protect America Act Protect Americans' Civil Liberties and*  
3 *Enhance Security?: Hearing of the S. Comm. on the Judiciary*, 110th Cong. (Sept. 25, 2007);  
4 *Preserving the Rule of Law in the Fight Against Terrorism: Hearing of the S. Comm. on the*  
5 *Judiciary*, 110th Cong. (Oct. 2, 2007); *FISA Amendments: How to Protect Americans' Security and*  
6 *Privacy and Preserve the Rule of Law and Government Accountability: Hearing of the S. Comm.*  
7 *on the Judiciary*, 110th Cong. (Oct. 31, 2007); *Nomination of Mark Flip to be Deputy Attorney*  
8 *General: Hearing of the S. Comm. on the Judiciary*, 110th Cong. (Dec. 19, 2007); *Oversight of the*  
9 *U.S. Department of Justice: Hearing of the S. Comm. on the Judiciary*, 110th Cong. (Jan. 30,  
10 2008); *Current and Projected National Security Threats: Hearing of the S. Select Comm. on*  
11 *Intelligence*, 110th Cong. (Feb. 5, 2008); *Justice Department Oversight: Hearing of the H. Comm.*  
12 *on the Judiciary*, 110th Cong. (Feb. 7, 2008); *Worldwide Threats: Hearing of the H. Permanent*  
13 *Select Comm. on Intelligence*, 110th Cong. (Feb. 7, 2008); *DNI Authorities and Personnel Issues:*  
14 *Hearing of the S. Select Comm. on Intelligence*, 110th Cong. (Feb. 14, 2008).

17 As of the filing of this motion, Congress is still considering whether to give  
18 telecommunications carriers legal immunity for their cooperation in the government's warrantless  
19 surveillance program. The House of Representatives has passed the RESTORE Act of 2007, which  
20 would not protect telecommunications companies from civil liability for their role in the  
21 surveillance operation. H.R. 3773 (as passed by House). On February 12, 2008, however, the  
22 Senate passed its own version of legislation to amend FISA, which purports to require dismissal of  
23 any state or federal lawsuit against a carrier for facilitating government surveillance if the Attorney  
24 General certifies to the court that the company was assisting in certain intelligence activity  
25 authorized by the President. H.R. 3773, FISA Amendments Act of 2008 (engrossed amendment as  
26 agreed to by Senate).



1 Congress allowed the Protect America Act to expire on February 16, 2008 without reaching  
2 an agreement to extend the controversial law. *See generally* Tim Starks, *House Allows FISA Law to*  
3 *Expire*, CONGRESSIONAL QUARTERLY, Feb. 17, 2008, available at  
4 <http://www.cqpolitics.com/wmspage.cfm?docID=weeklyreport-000002672840> (Hofmann Decl.  
5 Ex. I). However, the Administration continues to push aggressively for additional surveillance  
6 legislation. Just yesterday, President Bush told reporters that amending FISA is a “very urgent  
7 priority,” and that subjecting telecommunications companies to liability for their participation in  
8 past government surveillance would be “unfair.” Press Conference of the President, Feb. 28, 2008,  
9 <http://www.whitehouse.gov/news/releases/2008/02/20080228-2.html> (Hofmann Decl. Ex. J).

11  
12 **B. EFF’s Freedom of Information Act Requests For Records About the Telecom  
13 Lobbying Campaign and Requests for Expedited Processing**

14 In letters sent by facsimile on December 21, 2007, to ODNI and the DOJ Office of the  
15 Attorney General, Office of Legislative Affairs, Office of Legal Policy, Office of Legal Counsel,  
16 and National Security Division, EFF requested under the FOIA all records from September 1, 2007  
17 to December 21, 2007 concerning “briefings, discussions, or other exchanges” that agency officials

18 have had with 1) members of the Senate or House of Representatives and 2)  
19 representatives or agents of telecommunications companies concerning  
20 amendments to FISA, including any discussion of immunizing  
21 telecommunications companies or holding them otherwise unaccountable for their  
22 role in government surveillance activities. This request includes, but is not  
23 limited to, all email, appointment calendars, telephone message slips, or other  
24 records indicating that such briefings, discussions, or other exchanges took place.<sup>3</sup>

25 <sup>3</sup> Each request contained the following footnote:

26 The phrase “representatives or agents of telecommunications companies” is  
27 intended to include lobbyists and lawyers acting on behalf of such companies.  
28 According to *Newsweek*, these individuals may include, but are not limited to,  
“powerhouse Republican lobbyists Charlie Black and Wayne Berman (who  
represent AT&T and Verizon, respectively), former GOP senator and U.S.  
ambassador to Germany Dan Coats (a lawyer at King & Spaulding who is  
representing Sprint), former Democratic Party strategist and one-time assistant  
secretary of State Tom Donilon (who represents Verizon), former deputy attorney

1  
2 Letter from Marcia Hofmann, Staff Attorney, Electronic Frontier Foundation, to Freedom of  
3 Information Act/Privacy Office, Office of the Director of National Intelligence, December 21,  
4 2007 (Hofmann Decl. Ex. K); Letters from Marcia Hofmann, Staff Attorney, Electronic Frontier  
5 Foundation, to Carmen L. Mallon, Chief of Staff, Office of Information and Privacy, Department  
6 of Justice, Requesting Records from the Office of the Attorney General, Office of Legislative  
7 Affairs, and Office of Legal Policy, December 21, 2007 (Hofmann Decl. Ex. L); Letter from  
8 Marcia Hofmann, Staff Attorney, Electronic Frontier Foundation, to Bette Ferris, Supervisory  
9 Paralegal, Office of Legal Counsel, Department of Justice, December 21, 2007 (Hofmann Decl.  
10 Ex. M); Marcia Hofmann, Staff Attorney, Electronic Frontier Foundation, to GayLa Sessoms,  
11 FOIA Coordinator, National Security Division, Department of Justice, December 21, 2007  
12 (Hofmann Decl. Ex. N).

14 In each of its December 21 letters, EFF formally requested that the processing of these  
15 requests be expedited because they seek the disclosure of information about which there is “[a]n  
16 urgency to inform the public about an actual or alleged [f]ederal [g]overnment activity,” and were  
17 “made by a person primarily engaged in disseminating information,” as provided in 5 U.S.C. §  
18 552(a)(6)(E)(v)(II), 32 C.F.R. § 1700.12(c)(2), and 28 C.F.R. § 16.5(d)(1)(ii). (Hofmann Decl. Exs.  
19 K-N.)

21 In a letter dated December 28, 2007, the DOJ Office of Information and Privacy  
22 acknowledged that it had received EFF’s FOIA December 21 requests to the Office of the Attorney  
23 General, Office of Legislative Affairs, and Office of Legal Policy, and informed EFF that its  
24 requests for expedited processing had been granted. Letter from Melanie Ann Pustay, Director,  
25

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26 general Jamie Gorelick (whose law firm also represents Verizon) and Brad  
27 Berenson, a former assistant White House counsel under President George W.  
28 Bush who now represents AT&T.” Mark Hosenball and Michael Isikoff, *Case  
Dismissed?*, NEWSWEEK, updated Sept. 26, 2007.



1 Office of Information and Privacy, Department of Justice, to Marcia Hofmann, Staff Attorney,  
2 Electronic Frontier Foundation, Dec. 28, 2007. (Hofmann Decl. Ex. O.) In a letter dated January 7,  
3 2008, ODNI acknowledged that it had received EFF's December 21 FOIA request and informed  
4 EFF that its request for expedited processing had been granted. Letter from John F. Hackett, Chief,  
5 Information Management Office, Office of the Director of National Intelligence, to Marcia  
6 Hofmann, Staff Attorney, Electronic Frontier Foundation, Jan. 7, 2008. (Hofmann Decl. Ex. P.) In  
7 a letter dated January 9, 2008, the DOJ Office of Legal Counsel acknowledged that it had received  
8 EFF's December 21 FOIA request and informed EFF that its request for expedited processing had  
9 been granted. Letter from Bradley T. Smith, Attorney-Adviser, Office of Legal Counsel,  
10 Department of Justice, to Marcia Hofmann, Staff Attorney, Electronic Frontier Foundation, Jan. 9,  
11 2008. (Hofmann Decl, Ex. Q.) Finally, in a letter dated December 27, 2007, the DOJ National  
12 Security Division acknowledged receipt of EFF's December 21 FOIA request, and in a letter dated  
13 January 29, 2008 informed EFF that its request for expedited processing had been granted. Letters  
14 from Theresa Crosland, FOIA Public Liaison, National Security Division, Department of Justice, to  
15 Marcia Hofmann, Staff Attorney, Electronic Frontier Foundation, Dec. 27, 2007 and Jan. 29, 2008  
16 (Hofmann Decl. Exs. R & S.)

17  
18  
19 Notwithstanding ODNI and DOJ's purported decisions to process EFF's December 21  
20 FOIA requests in an expedited fashion, to date, neither agency has completed the processing of  
21 EFF's requests, nor informed EFF of an anticipated date for the completion of the processing of the  
22 requests. (Hofmann Decl. ¶ 19.) Furthermore, both ODNI and DOJ have exceeded the generally  
23 applicable 20-day statutory deadline for processing a standard, non-expedited FOIA request. See 5  
24 U.S.C. § 552(a)(6)(A).

25  
26 EFF initiated this lawsuit on February 20, 2008. On February 21, 27 and 28, 2008, EFF  
27 contacted counsel for Defendants to explore the possibility of negotiating a processing schedule for  
28

1 EFF's FOIA requests to eliminate the need for further action in this case. (Hofmann Decl. ¶ 23.)  
2 EFF explained that it planned to seek preliminary injunctive relief if the parties could not agree  
3 upon a mutually acceptable date by which to process EFF's requests. (*Id.*) However, Defendants  
4 have been unwilling to agree to process the requests by a specific date. (*Id.*)  
5

### 6 **III. ARGUMENT**

7 The issue raised in this motion is clear-cut and discrete. Although ODNI and DOJ have  
8 acknowledged EFF's legal entitlement to expedited processing of its December 21, 2007 FOIA  
9 requests, the agencies have failed to comply not only with the FOIA's provisions for expedited  
10 processing, but also the statute's mandated time frame of 20 working days for responding to  
11 standard FOIA requests. The agencies' failure to process the requests is a continuing impediment  
12 to EFF's — and the public's — ability to timely examine the scope of the lobbying campaign to  
13 secure legal immunity for telecommunications carriers for their cooperation with the government's  
14 warrantless surveillance operations. The agencies' actions are unlawful and must be enjoined.  
15

#### 16 **A. The Court has Jurisdiction to Grant the Requested Relief**

17 The Court's jurisdiction to consider this matter and grant appropriate relief is clear. The  
18 FOIA provides, in pertinent part:  
19

20 Agency action to deny or affirm denial of a request for expedited processing . . .  
21 shall be subject to judicial review under paragraph (4), except that the judicial  
22 review shall be based on the record before the agency at the time of the  
23 determination.

24 5 U.S.C. § 552(a)(6)(E)(iii). The referenced judicial review provision states, in pertinent part:

25 On complaint, the district court of the United States in the district in which the  
26 complainant resides, or has his principal place of business . . . has jurisdiction to  
27 enjoin the agency from withholding agency records and to order the production of  
28 any agency records improperly withheld from the complainant. In such a case the  
court shall determine the matter de novo . . . .

1 5 U.S.C. § 552(a)(4)(B).<sup>4</sup> See *Al-Fayed v. CIA*, 254 F.3d 300, 304 (D.C. Cir. 2001).

2 Here, notwithstanding ODNI and DOJ's decisions to "expedite" EFF's requests, the  
3 agencies have failed to respond within the generally applicable 20-working-day time limit  
4 established by 5 U.S.C. § 552(a)(6)(A). EFF's claim is ripe for adjudication because EFF has  
5 exhausted all applicable administrative remedies. The FOIA provides:

6 [a]ny person making a request to any agency for records . . . shall be deemed to  
7 have exhausted his administrative remedies with respect to such request if the  
8 agency fails to comply with the applicable time limit provisions of this paragraph.

9 5 U.S.C. § 552(a)(6)(C). See also *Oglesby v. Dep't of the Army*, 920 F.2d 57, 62 (D.C. Cir. 1990)  
10 ("If the agency has not responded within the statutory time limits, then . . . the requester may bring  
11 suit."). As the FOIA provides, in reviewing ODNI and DOJ's actions, "the court shall determine  
12 the matter de novo." 5 U.S.C. § 552(a)(4)(B); see also *Al-Fayed*, 254 F.3d at 308 ("[A] district  
13 court must review de novo an agency's denial of a request for expedition under FOIA.").

14  
15 **B. EFF is Entitled to Entry of an Order for Preliminary Injunction**

16 A preliminary injunction is a device for "preventing the irreparable loss of rights before  
17 judgment." *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984)  
18 (citation omitted). The Court may review this motion under one of two tests:

19 The "traditional" test requires the movant to: (1) establish a strong likelihood of  
20 success on the merits; (2) show the possibility of irreparable injury to the plaintiff  
21 if the preliminary relief is not granted; (3) show a balance of hardships favoring  
22 the movant; and (4) show that granting the injunction favors the public interest.  
23 The "alternative" test requires that the movant demonstrate either a combination  
24 of probable success on the merits and the possibility of irreparable injury, or that  
25 serious questions are raised and the balance of hardships tips sharply in his favor.  
26 Under either test, plaintiff must demonstrate that there exists a significant threat  
27 of irreparable injury.

28 *Elec. Frontier Foundation v. Office of the Director of National Intelligence*, No. 07-5278 SI, 2007

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26 <sup>4</sup> EFF's principal place of business is in San Francisco, California. (Hofmann Decl. ¶ 2.) This Court  
27 also has jurisdiction of this case under 28 U.S.C. § 1331 ("The district courts shall have original  
28 jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United  
States.").

1 U.S. Dist. LEXIS 89585, at \* 8 (N.D. Cal. Nov. 27, 2007) (citations omitted). Furthermore, in  
2 deciding whether to grant the injunction, “the court must balance the equities between the parties  
3 and give due regard to the public interest.” *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 833  
4 (9th Cir. 2002).

5  
6 In determining whether a preliminary injunction is proper, “[t]he district court is not  
7 required to make any binding findings of fact; it need only find probabilities that the necessary  
8 facts can be proved.” *Id.* at 1423. Moreover, “the greater the relative hardship to the moving  
9 party, the less probably of success must be shown.” *Sun Microsystems, Inc. v. Microsoft Corp.*,  
10 188 F.3d 1115, 1119 (9th Cir. 1999), quoting *Nat’l Ctr. For Immigrants Rights v. INS*, 743 F.2d  
11 1365, 1369 (9th Cir. 1984).

12  
13 Though preliminary injunction is not the norm in FOIA cases, this Court has concluded that  
14 such relief is appropriate where a plaintiff establishes that its requests are entitled to expedited  
15 processing under the statute, and the government fails to process them in a timely manner.<sup>5</sup> *Elec.*  
16 *Frontier Foundation*, 2007 U.S. Dist. LEXIS 89585, \*11; *Gerstein v. CIA*, No. C-06-4643 MMC,  
17 2006 U.S. Dist. LEXIS 89883, at \*\*12-13 (N.D. Cal. Nov. 29, 2006) (“*Gerstein I*”). The  
18 preliminary injunction factors in this case firmly establish EFF’s entitlement to injunctive relief.

19  
20 **1. EFF is Likely to Prevail on the Merits of Its Claim**

21 Given EFF’s uncontested entitlement to the expedited processing of its requests under the  
22 explicit terms of the FOIA, EFF’s likelihood of prevailing on the merits could not be stronger.  
23 Because ODNI and DOJ have already determined that EFF’s FOIA requests are entitled to  
24 expediting processing, the only question before the court is whether the Defendants are “actually  
25  
26  
27  
28

1 processing the requests ‘as soon as practicable.’” *Id.* at \*12. EFF is entitled to prevail on this issue,  
2 since the agencies have conceded that EFF’s requests are entitled to expedited processing, and yet  
3 have violated the terms of the FOIA and agency regulations by failing to satisfy the processing  
4 time for even a standard, non-expedited request. As this Court has found, “an agency’s failure to  
5 comply with the FOIA’s time limits is, by itself, a violation of the FOIA, and is an improper  
6 withholding of the requested documents.” *Gilmore v. Dep’t of Energy*, 33 F. Supp. 2d 1184, 1187  
7 (N.D. Cal. 1998).  
8

9 The FOIA clearly establishes the circumstances in which an agency must process a request  
10 in an expedited manner. According to the statute, “[e]ach agency shall promulgate regulations . . .  
11 providing for expedited processing of requests for records . . . in cases in which the person  
12 requesting the records demonstrates a compelling need and . . . in other cases determined by the  
13 agency.” 5 U.S.C. § 552(a)(6)(E)(i). “Compelling need” includes, “with respect to a request made  
14 by a person primarily engaged in disseminating information, urgency to inform the public  
15 concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v).  
16

17 Pursuant to this statutory directive, ODNI and DOJ have both issued regulations  
18 establishing grounds for expedited processing, only one of which is relevant here. Both agencies’  
19 regulations provide that requests “will be taken out of order and given expedited [processing]  
20 treatment whenever it is determined that they involve . . . [a]n urgency to inform the public about  
21 an actual or alleged [f]ederal [g]overnment activity, if made by a person primarily engaged in  
22 disseminating information.” 32 C.F.R. § 1700.12(c)(2) & 28 C.F.R. § 16.5(d)(1). If the agencies  
23 grant expedited treatment, they are obligated to process the request “as soon as practicable.” 5  
24

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25  
26 <sup>5</sup> As one judge has noted, “where a plaintiff contends in good faith that an agency has failed to  
27 expedite processing of a FOIA request in accordance with statute or regulation . . . the availability  
28 of an order that effectively is an injunction, preliminary or otherwise, should not be foreclosed.”  
*Elec. Frontier Foundation v. Dep’t of Justice*, No. 07-0656 (JDB), slip op. at 4 (D.D.C. June 15,  
2007) (Hofmann Decl. Ex. T).

1 U.S.C. § 552(a)(6)(E)(iii); 32 C.F.R. § 1700.12(b) & 28 C.F.R. §16.5(d)(4). As one court has  
2 noted, the statute’s “phrase ‘as soon as practicable,’ in the context of a provision of FOIA allowing  
3 for *expedited* processing, cannot be interpreted to impose a lower burden on the agency than would  
4 otherwise exist.” *Elec. Privacy Info. Ctr. v. Dep’t of Justice*, 416 F. Supp. 2d 24, 39 (D.D.C. 2006)  
5 (hereafter “*Elec. Privacy Info. Ctr. I*”) (emphasis in original).  
6

7 As such, an agency is presumed to have violated the “expedited processing” provisions of  
8 the FOIA when it fails to comply with the generally applicable 20-working-day deadline imposed  
9 by the FOIA for processing a non-expedited request. *Elec. Frontier Foundation*, 2007 U.S. Dist.  
10 LEXIS 89585 at \*13 (citing *id.*). Once the 20-working-day deadline has passed, the agency bears  
11 the burden of proving that it is in fact processing the expedited request “as soon as practicable.”  
12 *Elec. Privacy Info. Ctr. I*, 416 F. Supp. 2d 24, 39 at n.8. While the agency may rebut the  
13 presumption that it failed to process a request “as soon as practicable,” *Elec. Frontier Foundation*,  
14 2007 U.S. Dist. LEXIS 89585 at \*13, neither ODNI nor DOJ has even attempted to make that  
15 showing.  
16

17 Here, EFF requested expedited processing of its FOIA requests because they concern a  
18 lobbying campaign to amend federal surveillance law, which is a matter about which there is “an  
19 urgency to inform the public about actual or alleged federal government activity.” (Hofmann Decl.  
20 Exs. K-N.) Furthermore, the requests were made on behalf of EFF, which is a requester “primarily  
21 engaged in disseminating information.” (*Id.*) Defendants ODNI and DOJ determined that EFF’s  
22 requests were indeed entitled to expedited processing under this standard. (Hofmann Decl. Exs. O,  
23 P, Q & S). There is no indication in the record, however, that ODNI and DOJ have done anything  
24 other than pay lip service to EFF’s entitlement to expedition. As this Court has noted, “in the  
25 absence of relevant evidence as to the reasons for their delay in processing [a plaintiff’s FOIA]  
26 requests, [the government] ha[s] no likelihood of success on the merits.” *Gerstein I*, 2006 U.S.  
27  
28

1 Dist. LEXIS 89883 at \*14 (emphasis added). *See also Gilmore*, 33 F. Supp. 2d at 1188 (“unless an  
2 agency makes a timely determination that documents should or should not be disclosed . . . there is  
3 no compliance with the FOIA.”)

4 Although it is undisputed that all of EFF’s requests are legally entitled to expedited  
5 treatment, ODNI and DOJ have failed to comply with the 20-day deadline set by the FOIA and  
6 their own regulations for issuing a determination on even a non-expedited FOIA request. The  
7 agencies have not (and cannot) offer adequate justification for the delay. For these reasons, EFF is  
8 entitled to the immediate processing and release of the requested records, and asks that the Court  
9 issue an order to secure this right.  
10

## 11 **2. EFF Will Suffer Irreparable Injury in the Absence of the Requested** 12 **Injunctive Relief**

13 Unless ODNI and DOJ’s unlawful failure to comply with their obligations to expedite the  
14 processing of EFF’s FOIA requests is immediately enjoined, EFF will suffer irreparable harm. The  
15 very nature of the right that EFF seeks to vindicate in this action — expedited processing —  
16 depends upon timeliness, because “stale information is of little value.” *Payne Enterprises, Inc. v.*  
17 *United States*, 837 F.2d 486, 494 (D.C. Cir. 1988); *Elec. Privacy Info. Ctr. I*, 416 F. Supp. 2d at 40-  
18 41; *See also August v. FBI*, 328 F.3d 697, 699 (D.C. Cir. 2003) (“[T]he statutory goals [of FOIA]  
19 — efficient, *prompt*, and full disclosure of information — can be frustrated by agency actions that  
20 operate to delay the ultimate resolution of the disclosure request.” (quoting *Senate of the*  
21 *Commonwealth of Puerto Rico v. Dep’t of Justice*, 823 F.2d 574, 580 (D.C. Cir. 1987) (internal  
22 quotation marks and citations omitted) (emphasis in original)). Courts have recognized that the  
23 requisite injury is present, and preliminary injunctive relief is appropriate, in cases where expedited  
24 FOIA processing is at issue and where time thus is of the essence, because delay “constitutes a  
25 cognizable harm.” *Gerstein I*, 2006 U.S. Dist. LEXIS 89983 at \* 15, quoting *Elec. Privacy Info.*  
26  
27  
28



1 *Ctr. I*, 416 F. Supp. 2d at 40; *see also, e.g., United States v. BNS, Inc.*, 858 F.2d 456, 465 (9th Cir.  
2 1988); *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982). Under the  
3 statutory scheme Congress established in the FOIA, it is clear that timing is a critical component of  
4 expedited processing, and unless ODNI and DOJ are ordered to process EFF's requests  
5 immediately, EFF's right to expedition under the FOIA will be irretrievably lost.  
6

7 In addition to the loss of its clearly established statutory right, any further delay in the  
8 processing of EFF's FOIA requests will irreparably harm EFF's ability, and that of the public, to  
9 obtain in a timely fashion information vital to the current and ongoing debate surrounding whether  
10 Congress should amend FISA, particularly to render telecommunications carriers immune from  
11 legal liability for their complicity in the government's warrantless surveillance program. (Hofmann  
12 Decl. ¶¶ 20-22.) The Supreme Court has long recognized our democracy's interest in "the  
13 uninhibited, robust, and wide-open debate about matters of public importance that secures an  
14 informed citizenry." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 815 (1985),  
15 quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (internal quotation marks  
16 omitted); *see also Board of Educ. v. Pico*, 457 U.S. 853, 876 (1982) ("[T]he Constitution  
17 presupposes the existence of an informed citizenry prepared to participate in governmental  
18 affairs.").

19  
20  
21 Furthermore, the courts have recognized that providing information for legislative debate is  
22 a compelling public interest. This recognized interest clearly would be compromised by further  
23 delay in the disclosure EFF seeks. First, the question of whether and how FISA should be  
24 modified, and whether telecommunications companies should receive some governmental  
25 protection from liability for their cooperation in unlawful government surveillance, has already  
26 garnered extraordinary media interest. (*See, e.g., Hofmann Decl. Exs. E, G, H & I.*) Second, since  
27 EFF submitted its FOIA requests to ODNI and DOJ on December 21, the issues about which EFF  
28



1 seeks information have become only more vital to the American public. While both the House and  
2 Senate have passed bills that would amend FISA, they have not agreed upon a final version of the  
3 law. Furthermore, the Protect America Act has lapsed, which only puts more pressure on the  
4 government to enact final legislation. In such circumstances, “the public interest is particularly  
5 well-served by the timely release of the requested documents.” *Elec. Privacy Info. Ctr. I*, 416 F.  
6 Supp. 2d at 42. Moreover, the bill that has been passed by the Senate would provide retroactive  
7 protection to telecommunications carriers involved in the government’s warrantless surveillance  
8 program, which has placed the decision of whether to extend immunity to the carriers squarely  
9 before the House. H.R. 3773, FISA Amendments Act of 2008 (engrossed amendment as agreed to  
10 by Senate). This Court and others have determined that the existence of pending legislation related  
11 to the subject of a FOIA request weighs in favor of a grant of expedited processing. *Elec. Frontier*  
12 *Foundation*, 2007 U.S. Dist. LEXIS 89585 at \* 19 (“irreparable harm can exist in FOIA cases such  
13 as this because ongoing public and congressional debates about issues of vital national importance  
14 cannot be restarted or wound back.”) (quoting *Gerstein I*, U.S. Dist. LEXIS 89883 at \*4 (quotation  
15 marks omitted)); *Gerstein v. CIA*, No. 06-4643 MMC, 2006 U.S. Dist. LEXIS 89847, at \*20 (N.D.  
16 Cal. Nov. 29, 2006) (“*Gerstein II*”) (granting expedited processing where this Court noted that  
17 “there is a significant recognized interest in enhancing public debate on potential legislative  
18 action”); see also *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260  
19 (D.D.C. 2005); *ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24, 31 (D.D.C. 2004). EFF and the  
20 public’s interest here is particularly compelling, as this Court has already recognized that delay in  
21 the context of the current congressional debate over amending FISA is a sufficient showing of  
22 likelihood of irreparable injury. *Elec. Frontier Foundation*, 2007 U.S. Dist. LEXIS 89585 at \*20  
23 (“Plaintiff seeks information from defendant specifically so that plaintiff, Congress, and the public  
24 many participate in the debate over the pending [FISA] legislation on an informed basis.  
25  
26  
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1 Accordingly, the Court finds that plaintiff has shown the likelihood of irreparable injury”).

2 If there is to be a meaningful public debate on the issue of retroactive protection for  
3 telecommunications companies the examination “cannot be based solely upon information that the  
4 Administration voluntarily chooses to disseminate.” *Elec. Privacy Info. Ctr. I*, 416 F. Supp. 2d at  
5 41 n.9. Indeed, the public oversight mechanism provided by the FOIA is central to open and  
6 democratic debate on critical policy issues such as telecommunications industry’s lobbying  
7 campaign and government agencies’ role in it. As the Supreme Court has observed, the Act is “a  
8 means for citizens to know what the Government is up to. This phrase should not be dismissed as a  
9 convenient formalism. *It defines a structural necessity in a real democracy.*” *Nat’l Archives &*  
10 *Records Admin. v. Favish*, 541 U.S. 157, 171-172 (2004) (emphasis added; citation and internal  
11 quotation marks omitted). Moreover, “[n]ot only is public awareness a necessity, but so too is  
12 *timely* public awareness.” *Elec. Privacy Info. Ctr. I*, 416 F. Supp. 2d at 40 (emphasis in original).

13  
14  
15 It is clear that the information EFF seeks must be disclosed expeditiously if it is to  
16 contribute to the public debate on amending foreign intelligence surveillance law, particularly on  
17 the issue of telecommunications carrier immunity. Because time is of the essence in this matter,  
18 EFF will be irreparably harmed unless the Court acts now, “when it [is] still possible to grant  
19 effective relief,” and before “all opportunity to grant the requested relief [is] foreclosed.” *Local*  
20 *Lodge No. 1266, Int’l Ass’n of Machinists and Aerospace Workers v. Panoramic Corp.*, 668 F.2d  
21 276, 290 (7th Cir. 1981).<sup>6</sup>

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26 <sup>6</sup> As one court has recognized, delay in the processing of FOIA requests “may well result in  
27 disclosing the relevant documents after the need for them in the formulation of national . . . policy  
28 has been overtaken by events.” *Natural Resources Defense Council v. Dep’t of Energy*, 191 F.  
Supp. 2d 41, 43 (D.D.C. 2002) (“NRDC”) (granting motion for release of documents).

### 3. Injunctive Relief Will Not Burden Others' Interests

Defendants ODNI and DOJ cannot be “burdened” by a requirement that they merely comply with the law.<sup>7</sup> The immediate relief EFF seeks will require nothing more of the government than what federal law already mandates: the expedited processing of EFF’s FOIA requests, which ODNI and DOJ do not dispute are entitled to such treatment. Furthermore, the relief EFF seeks will not burden the interests of other parties who have submitted FOIA requests to ODNI or DOJ in any manner beyond that foreseen by Congress. In providing for expedited processing of qualifying requests, Congress intended that such requests would take precedence over those that do not qualify for such treatment. As such, expedited processing here should not be unduly burdensome for any party. ODNI and the relevant offices within DOJ carry a relatively small FOIA caseload, and handle few, if any, requests that require expedited processing. In fact, the most recently published ODNI statistics on FOIA processing shows that the agency processed 103 requests in fiscal year 2007, only two of which were afforded expedited processing. U.S. Office of the Director of National Intelligence, Freedom of Information Act Report for Fiscal Year 2007, Initial FOIA/PA Access Requests, Compliance with Time Limits/Status of Pending Requests, [http://www.odni.gov/Annual\\_Report\\_Final.pdf](http://www.odni.gov/Annual_Report_Final.pdf) (Hofmann Decl. Ex. U). Similarly, at the time the most recent DOJ statistics on FOIA processing were published, the Office of the Attorney General had 134 requests pending, twelve of which had been granted expedited processing; the Office of

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<sup>7</sup> As this Court has pointed out, “any complaints about the burdens of complying with the [FOIA] are best addressed to Congress, not the courts.” *Elec. Frontier Foundation*, 2007 U.S. Dist. LEXIS 89585 at \* 20. It is worth noting that Congress appears unimpressed by the government’s FOIA performance. In recent amendments to the FOIA, Congress opted to impose penalties upon agencies that fail to observe the law’s deadlines and are unable to show that exceptional circumstances justify the non-compliance. OPEN Government Act of 2007, Pub. L. 110-175, § 6(b), 121 Stat. 2524 (2007). This provision of the law shall take effect on December 31, 2008. *Id.*

1 Legislative Affairs had 42 requests pending, seven of which had been granted expedited  
2 processing; the Office of Legal Policy had 32 requests pending, two of which had been granted  
3 expedited processing; the Office of Legal Counsel had 11 requests pending, one of which had been  
4 granted expedited processing; and the National Security Division had 20 requests pending, none of  
5 which had been granted expedited processing. U.S. Department of Justice, Freedom of Information  
6 Act Report for Fiscal Year 2007, Compliance With Time Limits/Status of Pending Requests,  
7 [http://www.usdoj.gov/oip/annual\\_report/2007/07foiapg7.pdf](http://www.usdoj.gov/oip/annual_report/2007/07foiapg7.pdf) (Hofmann Decl. Ex. V). None of  
8 these statistics suggest that these offices should be unable to do what the law and agency  
9 regulations require: process EFF's requests in an expedited manner.  
10

#### 11 **4. The Public Interest Favors the Requested Relief**

12 The final factor in the preliminary injunction analysis also weighs in favor of the issuance  
13 of the order EFF seeks in this case. The courts have long recognized that "there is an overriding  
14 public interest . . . in the general importance of an agency's faithful adherence to its statutory  
15 mandate." *Jacksonville Port Authr .v. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977); *Elec. Privacy Info.*  
16 *Ctr. I*, 416 F. Supp. 2d at 42. Similarly, it is "axiomatic that an agency is required to follow its  
17 own regulations." *Edmonds v. FBI*, No. 02-1294, 2002 U.S. Dist. LEXIS 26578, at \*9 n.3 (D.D.C.  
18 Dec. 3, 2002) (quoting *Cherokee National of Okla. v. Babbitt*, 117 F.3d 1489, 1499 (D.C. Cir.  
19 1997) (internal quotation marks omitted)). Such adherence is all that EFF seeks here.  
20

21 The public interest will also be served by the expedited release of the requested records,  
22 which will further the FOIA's core purpose of "shedding light on an agency's performance of its  
23 statutory duties." *Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749,  
24 773 (1989); *Sammis v. Barnhardt*, No. C01-3973 BZ, 2002 U.S. Dist. LEXIS 10321, at \*\*3-4  
25 (N.D. Cal. June 6, 2002); *Los Angeles Times Communications LLC v. Dep't of Labor*, 483 F. Supp.  
26 2d 975, 981 (C.D. Cal. 2007). The public interest weighs in favor of a preliminary injunction  
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1 because “[t]here is public benefit in the release of information that adds to citizens’ knowledge” of  
2 government activities. *Ctr. to Prevent Handgun Violence v. Dep’t of the Treasury*, 49 F. Supp. 2d  
3 3, 5 (D.D.C. 1999). For these reasons, the public interest favors the issuance of an order directing  
4 ODNI and DOJ to immediately process and release the requested information.  
5

6 **C. The Court Should Order Defendants to Process EFF’s FOIA Requests**  
7 **Immediately**

8 It is well established that preliminary injunctive relief is appropriate when, as in this case,  
9 an agency has failed to act upon a well-founded request for expedited processing. *Elec. Privacy*  
10 *Info. Ctr. I*, 416 F. Supp. at 35 n.4 (“the court may use its equitable power to prevent agency delay,  
11 even when exercise of such authority is preliminary in nature.”) Congress expressly required  
12 agencies to make determinations on requests for expedited processing within 10 calendar days, 5  
13 U.S.C. § 552(a)(6)(E)(ii)(I), and provided for immediate judicial review of adverse determinations,  
14 5 U.S.C. § 552(a)(6)(E)(iii), demonstrating an intent that the courts should act quickly to vindicate  
15 the right to expedition. *See, e.g., ACLU v. Dep’t of Justice*, 321 F. Supp. 2d at 28-29 (complete  
16 exhaustion of administrative remedies not a prerequisite to judicial review of agency expedition  
17 decisions). Congress’s mandate that disputes concerning expedited processing should be quickly  
18 resolved would be frustrated if aggrieved requesters were required to remain idle for 20 days after  
19 initiating suit before moving for partial summary judgment. Fed. R. Civ. P. 56(a). As such, claims  
20 involving entitlement to expedited processing are appropriately addressed through motions for  
21 preliminary relief. *Elec. Privacy Info. Ctr. I*, 416 F. Supp. at 35. *See also Aguilera v. FBI*, 941 F.  
22 Supp. 144, 152-153 (D.D.C. 1996) (granting preliminary injunction FOIA lawsuit for expedited  
23 processing); *Cleaver v. Kelley*, 427 F. Supp. 80, 81-82 (D.D.C. 1976) (same); *ACLU v. Dep’t of*  
24 *Defense*, 339 F. Supp. 2d 501, 503 (S.D.N.Y. 2004) (same).  
25  
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27 The appropriate form of relief is no more than ordering the agencies to follow the  
28

1 applicable ODNI and DOJ regulations that dictate the manner in which expedited FOIA requests  
2 must be processed. The regulations provide that ODNI and DOJ generally processes requests in the  
3 order received. 32 C.F.R. § 1700.12(a) (ODNI), 28 C.F.R. §16.5(a) (DOJ), but that requests “will  
4 be taken out of order and given expedited processing treatment whenever it is determined that they  
5 [meet the criteria for expedited processing].” 32 C.F.R. § 1700.12(c); 28 C.F.R. §16.5(d). “If a  
6 request for expedited treatment is granted, the request shall be given priority and shall be processed  
7 as soon as practicable.” 32 C.F.R. § 1700.12(b); 28 C.F.R. §16.5(d). ODNI and DOJ concede that  
8 EFF’s requests qualify for expedited treatment, and so there is no dispute that EFF’s requests must  
9 be processed as soon as practicable. Therefore, the Court should order ODNI and DOJ to complete  
10 the processing of EFF’s FOIA requests immediately.  
11

12 In several recent cases, courts have imposed specific processing deadlines on agencies,  
13 requiring the prompt delivery of non-exempt records to FOIA requesters. This Court, for example,  
14 recently ordered ODNI to process and produce all non-exempt records responsive to two EFF  
15 FOIA requests within 13 days of the Court’s order. *Elec. Frontier Foundation*, 2007 U.S. Dist.  
16 LEXIS 8958, at \* 23. Likewise, in both *Gerstein I & II*, the Court ordered the defendant federal  
17 agencies to process and produce all non-exempt records responsive to the plaintiff’s FOIA requests  
18 within 30 days of the Court’s orders. 2006 U.S. Dist. LEXIS 89883, at \* 16; 2006 U.S. Dist.  
19 LEXIS 89847, at \* 27.  
20

21 Other courts have imposed similar schedules. In *Judicial Watch, Inc. v. Dep’t of Energy*,  
22 191 F. Supp. 2d 138 (D.D.C. 2002), the District Court for the District of Columbia ordered the  
23 Commerce Department and the Transportation Department to process, respectively, 9000 and 6000  
24 pages of material and to complete the processing within 60 days; and to provide the requester with  
25 an index detailing withholdings pursuant to *Vaughn v. Rosen*, 484 F.2d 820, 826-8 (D.C. Cir. 1973)  
26 within 72 days. *Id.* at 141. It is worth noting that the FOIA requests at issue in that case were not  
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28

1 claimed to be entitled to expedited processing. Similarly, in *NRDC*, the same court ordered the  
2 Energy Department to process 7500 pages of material; to complete the processing of the “vast  
3 majority” of the material within 32 days; to complete all processing within 48 days; and to provide  
4 the requester with a *Vaughn* index within 63 days. 191 F. Supp. 2d at 43-44. Again, the FOIA  
5 request in *NRDC*, unlike the requests at issue here, had not been granted expedited treatment.  
6

7 In *ACLU v. Dep’t of Defense*, a case involving an expedited request, the District Court for  
8 the Southern District of New York ordered a variety of agencies to “produce or identify all  
9 responsive documents,” and to provide the requesters with a *Vaughn* index, within 30 days. 339 F.  
10 Supp. 2d at 505. Furthermore, in *Elec. Privacy Info. Ctr. v. Dep’t of Justice*, the court ordered the  
11 FBI to “complete the processing of 1500 pages every 15 calendar days, and provide the plaintiff all  
12 responsive non-exempt pages contained therein, until processing is complete,” after the agency had  
13 granted a request for expedited processing but failed to produce any responsive records. Civ. No.  
14 05-845, 2005 U.S. Dist. LEXIS 40318, at \*\*5-6 (D.D.C. Nov. 16, 2005) (“*Elec. Privacy Info. Ctr.*  
15 *v. Dep’t of Justice II*”). Most recently, in a case involving a request submitted by EFF, the court  
16 ordered the FBI to process 2500 pages every 30 days where the Bureau conceded that EFF was  
17 entitled to expedited processing of a request, but failed to process the responsive documents  
18 quickly. *Elec. Frontier Foundation v. Dep’t of Justice*, No. 07-0656 (JDB) (Hofmann Decl. Ex. T  
19 at 5).  
20  
21

22 Recognizing the extraordinary public interest in the records at issue here, and in order to  
23 facilitate the informed participation of EFF, and the American people, in the current and ongoing  
24 debate over whether FISA should be amended and telecommunications companies should be held  
25 unaccountable for their role in the government’s unlawful surveillance operations, EFF respectfully  
26 requests the Court to direct Defendants ODNI and DOJ to complete the processing of EFF’s  
27  
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1 requests and produce or identify all responsive records within 10 days of the issuance of its order.<sup>8</sup>

2  
3 **IV. CONCLUSION**

4 For the foregoing reasons, EFF's motion for a preliminary injunction should be granted.

5 DATED: February 29, 2008

6 /s/ Marcia Hofmann

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26 \_\_\_\_\_  
27 <sup>8</sup> Judicial resolution of the expedited processing issue would not resolve all issues raised in the  
28 complaint. Once the question of processing time is resolved, the Court would retain jurisdiction to  
review the completeness and propriety of ODNI's substantive determination of EFF's FOIA  
requests. *See Open America v. Watergate Special Prosecution Force*, 547 F. 2d 605 (D.C. Cir.  
1976).