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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO
12

<p>14 ELECTRONIC FRONTIER FOUNDATION, 15 Plaintiff, 16 v. 17 OFFICE OF THE DIRECTOR OF NATIONAL 18 INTELLIGENCE and UNITED STATES 19 DEPARTMENT OF JUSTICE 20 Defendants,</p>	<p>) No. 08-2997 JSW) DEFENDANTS' ANSWER TO) PLAINTIFFS' AMENDED) COMPLAINT FOR INJUNCTIVE) RELIEF</p>
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21 Defendants, the Office of the Director of National Intelligence and United States
22 Department of Justice, by and through undersigned counsel, hereby answer plaintiff's complaint
23 in the above-captioned matter as follows:

24 First Affirmative Defense

25 Plaintiff's complaint fails to state a claim upon which relief can be granted.
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28

1 Second Affirmative Defense

2 The Court lacks subject matter jurisdiction over plaintiff's complaint because defendants
3 have not improperly withheld information within the meaning of the Freedom of Information Act
4 ("FOIA"), 5 U.S.C. § 552.

5 Third Affirmative Defense

6 The FOIA request that is the subject of this lawsuit may implicate certain information that
7 is protected from disclosure by one or more statutory exemptions. Disclosure of such
8 information in response to this amended complaint is not required or permitted.

9 Fourth Affirmative Defense

10 Defendants deny each and every allegation contained in the amended complaint except as
11 hereinafter may be expressly admitted. No referral to a media report for a full and accurate
12 description of its contents should be construed as an adoption of the alleged facts in that media
13 report.

14 In response to the numbered paragraphs and sentences of the complaint, defendants
15 admit, deny, or otherwise respond as follows:

16 1. The allegations contained in the first two sentences of this paragraph consist of
17 plaintiff's characterization of its amended complaint, to which no response by defendants is
18 required. To the extent a response is deemed required, defendants admit that this action arises
19 under the FOIA and that the Office of the Director of National Intelligence and United States
20 Department of Justice are the named defendants, but deny plaintiff's characterization of the
21 records that they seek. The third and fourth sentences of this paragraph consist of plaintiff's
22 conclusions of law and characterization of the nature of plaintiff's action, to which no response is
23 required. To the extent a response is deemed required, defendants deny the allegations.

24 2. Defendants lack knowledge sufficient to form a belief as to the truth of the allegations
25 in this paragraph.

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1 3. Admit.

2 4. Admit.

3 5. The allegations contained in this paragraph consist of legal conclusions regarding the
4 scope and extent of the Court's jurisdiction, to which no response from defendants is required.

5 6. The allegations contained in this paragraph consist of legal conclusions regarding the
6 scope and extent of the venue of this action, to which no response from defendants is required.

7 7. The allegations contained in this paragraph consist of legal conclusions regarding the
8 scope and extent of the venue of this action, to which no response from defendants is required.

9 8. The allegations contained in this paragraph constitute plaintiff's characterization of the
10 contents of a published news reports, to which no response by defendants is required. To the
11 extent a response is deemed required, with respect to the allegations contained in the first
12 sentence, this sentence quotes a portion of a December 15, 2005 article in the NEW YORK
13 TIMES, to which the Court is respectfully referred for a full and accurate statement of its
14 contents. With respect to the allegations in the second sentence, defendants admit that, in a radio
15 address made on December 17, 2005, the President of the United States described certain
16 activities of the NSA which he authorized following the terrorist attacks of September 11, 2001,
17 but otherwise refer the Court to the transcript of that radio address, available at
18 <http://www.whitehouse.gov/news/releases/2005/12/20051217.html>, for a full and accurate
19 description of the President's statement.

20 9. The allegations contained in this paragraph constitute plaintiff's characterization of the
21 contents of a published news reports, to which no response by defendants is required. To the
22 extent a response is deemed required, this sentence quotes a portion of a December 24, 2005
23 article in the NEW YORK TIMES, to which the Court is respectfully referred for a full and
24 accurate statement of its contents.

25 10. The allegations contained in this paragraph constitute plaintiff's characterization of

1 the contents of a published news reports, to which no response by defendants is required. To the
2 extent a response is deemed required, this sentence quotes a portion of a February 6, 2006 article
3 in USA TODAY, to which the Court is respectfully referred for a full and accurate statement of
4 its contents.

5 11. The allegations contained in this paragraph constitute plaintiff's characterization
6 of various lawsuits related to certain activities of the NSA following the terrorist attacks of
7 September 11, 2001, to which no response by defendants is required. To the extent a response is
8 deemed required, defendants admit that various lawsuits have been filed challenging alleged
9 intelligence activities and have been consolidated in *In re NSA Telecommunications Records*
10 *Litigation* (MDL Docket No. 06-1791 VRW), but otherwise deny plaintiff's characterization of
11 these lawsuits.

12 12. The allegations contained in this paragraph constitute plaintiff's characterization
13 of the Protect America Act of 2007, to which no response by defendants is required. To the
14 extent a response is deemed required, defendants deny plaintiff's characterization of the Act
15 except to admit that the President of the United States signed the Protect America Act of 2007
16 into law on August 5, 2007. The Court is respectfully referred to the Act for a full and accurate
17 statement of its contents. *See* Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552.

18 13. The allegations contained in this paragraph constitute plaintiff's characterization
19 of the contents of a published news reports, to which no response by defendants is required. To
20 the extent a response is deemed required, this paragraph quotes a portion of an August 5, 2007
21 article in the NEW YORK TIMES, to which the Court is respectfully referred for a full and accurate
22 statement of its contents.

23 14. The allegations contained in this paragraph constitute plaintiff's characterization
24 of the Protect America Act of 2007 and a public statement by the President of the United States
25 concerning the Protect America Act of 2007, to which no response by defendants is required. To

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1 the extent a response is deemed required, the Court is respectfully referred to the President's
2 entire statement for a full and accurate statement of its contents. *See*
3 <http://www.whitehouse.gov/news/releases/2007/08/20070805.html>.

4 15. The allegations contained in this paragraph constitute plaintiff's characterization
5 of the contents of a published news reports, to which no response by defendants is required. To
6 the extent a response is deemed required, this paragraph quotes a portion of an August 22,
7 2007 article in the EL PASO TIMES, to which the Court is respectfully referred for a full and
8 accurate statement of its contents.

9 16. Defendants deny plaintiffs' characterization of the published report described in
10 Paragraph 15 and refer the Court to that report for a full and complete statement of its contents,
11 except to admit that the quoted excerpt is part of statements made by DNI McConnell.

12 17. The allegations contained in this paragraph constitute plaintiff's characterization
13 of the contents of a published news reports, to which no response by defendants is required. To
14 the extent a response is deemed required, this paragraph quotes a portion of a September 20,
15 2007 article in NEWSWEEK, to which the Court is respectfully referred for a full and accurate
16 statement of its contents.

17 18. Defendants deny plaintiff's characterization of the assertions contained in the
18 news article quoted in Paragraph 17.

19 19. Deny except to aver that representatives from telecommunications companies
20 communicated with representatives of DOJ with respect to legislation to amend FISA.

21 20. Deny except to aver that representatives from telecommunications companies
22 communicated with representatives of ODNI with respect to legislation to amend FISA.

23 21. The allegations contained in this paragraph constitute plaintiff's characterization
24 of matters contained in Congressional testimony and published news reports, to which no
25 response by defendants is required. To the extent a response is deemed required, the Court is

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1 respectfully referred to the various news articles and Congressional testimony cited in Paragraphs
2 22-30 for a full and accurate statement of their contents.

3 22. The allegations contained in this paragraph constitute plaintiff's characterization
4 of matters contained in Congressional testimony, to which no response by defendants is required.
5 To the extent a response is deemed required, the Court is respectfully referred to the February 14,
6 2008 testimony of Director of National Intelligence Mike McConnell before the Senate Select
7 Committee on Intelligence for a full and accurate statement of its contents.

8 23. The allegations contained in this paragraph constitute plaintiff's characterization
9 of matters contained in a news report, to which no response by defendants is required. To the
10 extent a response is deemed required, the Court is respectfully referred to the February 15, 2008
11 Fox News interview by Jim Angle of Director McConnell for a full and accurate statement of its
12 contents.

13 24. The allegations contained in this paragraph constitute plaintiff's characterization
14 of matters contained in a news report, to which no response by defendants is required. To the
15 extent a response is deemed required, the Court is respectfully referred to the February 17, 2008
16 Fox News interview of Director McConnell for a full and accurate statement of its contents.

17 25. The allegations contained in this paragraph constitute plaintiff's characterization
18 of matters contained in a press release, to which no response by defendants is required. To the
19 extent a response is deemed required, the Court is respectfully referred to the February 22, 2008
20 press release cited in this paragraph for a full and accurate statement of its contents. Defendants
21 aver that the quoted excerpt is part of a statement made by a Senior Administration Official on
22 the ODNI's website.

23 26. The allegations contained in this paragraph constitute plaintiff's characterization
24 of matters contained in a press release, to which no response by defendants is required. To the
25 extent a response is deemed required, the Court is respectfully referred to the February 23, 2008

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1 press release cited in this paragraph for a full and accurate statement of its contents. Defendants
2 aver that the quoted excerpt is part of a press release on the ODNI's website.

3 27. The allegations contained in this paragraph constitute plaintiff's characterization
4 of matters contained in a news report, to which no response by defendants is required. To the
5 extent a response is deemed required, the Court is respectfully referred to the February 26, 2008
6 WTOP Radio in Washington interview of Director McConnell for a full and accurate statement
7 of its contents.

8 28. The allegations contained in this paragraph constitute plaintiff's characterization
9 of matters contained in a press conference transcript, to which no response by defendants is
10 required. To the extent a response is deemed required, the Court is respectfully referred to the
11 February 26, 2008 press conference transcript cited in this paragraph for a full and accurate
12 statement of its contents. Defendants aver that the quoted excerpt is part of a statement made by
13 a Senior Administration Official on DOJ's www.lifeandliberty.gov website.

14 29. The allegations contained in this paragraph constitute plaintiff's characterization
15 of matters contained in a press conference transcript, to which no response by defendants is
16 required. To the extent a response is deemed required, the Court is respectfully referred to the
17 February 26, 2008 press conference transcript cited in this paragraph for a full and accurate
18 statement of its content. Defendants aver that the quoted excerpt is part of a statement made by a
19 Senior Administration Official on DOJ's www.lifeandliberty.gov website.

20 30. The allegations contained in this paragraph constitute plaintiff's characterization
21 of matters contained in Congressional testimony, to which no response by defendants is required.
22 To the extent a response is deemed required, the Court is respectfully referred to the February 27,
23 2008 testimony of Director of National Intelligence Mike McConnell before the Senate Armed
24 Services Committee for a full and accurate statement of its contents.

25 31. The allegations contained in this paragraph constitute plaintiff's characterization
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1 of the legislative debate to amend the Foreign Intelligence Surveillance Act (“FISA”), to which
2 no response by defendants is required. To the extent a response is deemed required, defendants
3 deny the first sentence of this paragraph. Defendants deny plaintiff’s characterization of the
4 RESTORE Act of 2007 in the second sentence of this paragraph, except to admit that the House
5 of Representatives passed that Act on November 15, 2007. The Court is respectfully referred to
6 the Act for a full and accurate statement of its contents. *See* H.R. 3773 (Nov. 15, 2007). In the
7 third sentence defendants deny plaintiff’s characterization of the United States Senate’s proposed
8 amendments to the FISA, except to admit that the Senate passed the FISA Amendments Act of
9 2007 on February 12, 2008. The Court is respectfully referred to the Act for a full and accurate
10 statement of its contents. *See* S. 2248. The allegations contained in the fourth sentence
11 constitute plaintiff’s characterization of matters contained in published news reports, to which no
12 response by defendants is required. To the extent a response is deemed required, this sentence
13 cites to a February 17, 2008 article in the CONGRESSIONAL QUARTERLY, to which the Court is
14 respectfully referred for a full and accurate statement of its contents.

15 32. The allegations contained in this paragraph constitute plaintiff’s characterization
16 of quotes from a press conference, to which no response by defendants is required. To the extent
17 a response is deemed required, the Court is respectfully referred to the transcript of President
18 Bush’s February 28, 2008 press conference, available at
19 <http://www.whitehouse.gov/news/releases/2008/02/20080228-2.html>, for a full accurate
20 statement of the contents of that press conference. Defendants aver that the quoted excerpts are
21 part of a transcript of President Bush’s February 28, 2008 press conference, available at
22 <http://www.whitehouse.gov/news/releases/2008/02/20080228-2.html>.

23 33. The allegations contained in this paragraph constitute plaintiff’s characterization
24 of matters contained in published news reports, to which no response by defendants is required.
25 To the extent a response is deemed required, this paragraph quotes a portion of a June 9, 2008
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1 article in THE HILL, to which the Court is respectfully referred for a full and accurate statement
2 of its contents.

3 34. Admit.

4 35. Admit.

5 36. Admit.

6 37. Admit

7 38. Admit.

8 39. Admit.

9 40. Admit.

10 41. Admit the first three sentences. With regard to the fourth sentence, Defendants
11 are without sufficient knowledge to admit or deny plaintiff's allegations of what it received.
12 Defendants further aver that ODNI sent a letter to plaintiff dated July 30, 2008 that informed
13 plaintiff that, because the information being sought is now part of pending litigation, ODNI has
14 administratively closed plaintiff's appeal pursuant to ODNI's regulations.

15 42. Defendants deny the allegations in this paragraph, except to aver that defendants
16 are continuing to process plaintiff's FOIA requests.

17 43. The allegations contained in this paragraph constitute conclusions of law to which
18 no response by defendants is required. To the extent a response is deemed required, the
19 allegations are denied.

20 44. The allegations contained in this paragraph constitute conclusions of law to which
21 no response by defendants is required. To the extent a response is deemed required, the
22 allegations are denied.

23 45. The allegations contained in this paragraph constitute conclusions of law to which
24 no response by defendants is required. To the extent a response is deemed required, the
25 allegations are denied.

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1 46. Defendants repeat and reallege the responses made in paragraphs 1-45.

2 47. The allegations contained in this paragraph constitute conclusions of law to which
3 no response by defendants is required. To the extent a response is deemed required, the
4 allegations are denied.

5 48. The allegations contained in this paragraph constitute conclusions of law to which
6 no response by defendants is required. To the extent a response is deemed required, the
7 allegations are denied.

8 49. The allegations contained in this paragraph constitute conclusions of law to which
9 no response by defendants is required. To the extent a response is deemed required, the
10 allegations are denied.

11 WHEREFORE, having fully answered plaintiff's complaint, defendants pray for a
12 judgment dismissing the complaint with prejudice and for such further relief as the Court may
13 deem just.

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16 Dated: August 15, 2008

Respectfully submitted,

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19 Assistant Director, Federal Programs Branch

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