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13 Counsel for Plaintiffs

14 UNITED STATES DISTRICT COURT
15 FOR THE NORTHERN DISTRICT OF CALIFORNIA
16 SAN FRANCISCO DIVISION

17 INTERNET ARCHIVE; AMERICAN CIVIL
18 LIBERTIES UNION; AMERICAN CIVIL
LIBERTIES UNION FOUNDATION;
19 AMERICAN CIVIL LIBERTIES UNION OF
NORTHERN CALIFORNIA, INC.; AMERICAN
20 CIVIL LIBERTIES UNION FOUNDATION OF
NORTHERN CALIFORNIA, INC., and
21 ELECTRONIC FRONTIER FOUNDATION,

22 Plaintiffs,

23 v.

24 MICHAEL MUKASEY, in his official capacity as
25 Attorney General of the United States, *et al.*,

26 Defendants.

**JOINT ADMINISTRATIVE
MOTION TO UNSEAL CASE**

Case No. CV-07-6346-CW

**DOCUMENT FILED UNDER
SEAL**

1 Plaintiffs Internet Archive (“the Archive”), American Civil Liberties Union,
2 American Civil Liberties Union Foundation, American Civil Liberties Union of Northern
3 California, Inc., American Civil Liberties Union Foundation of Northern California, Inc.,
4 and Electronic Frontier Foundation and Defendants Michael Mukasey, *et al.*, hereby
5 move to unseal the above-captioned case.

6 On November 26, 2007, an agent of the Federal Bureau of Investigation (“FBI”)
7 served a National Security Letter (“November 2007 NSL”) on the Archive through the
8 Archive’s counsel at the Electronic Frontier Foundation. The November 2007 NSL
9 directed the Archive to disclose records pertaining to one of its patrons, and pursuant to
10 18 U.S.C. § 2709(c), expressly prohibited the Archive, its officers, employees, and
11 agents from disclosing that the FBI had sought information from it through the NSL.

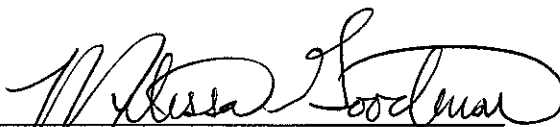
12 On December 14, 2007, plaintiffs filed a Complaint challenging the
13 constitutionality of 18 U.S.C. §§ 2709 and 3511 (collectively, “the NSL statute”).
14 Simultaneously, plaintiff Internet Archive filed a Petition to Set Aside the November
15 2007 NSL pursuant to 18 U.S.C. § 3511(a). Because the nondisclosure requirement
16 imposed by 18 U.S.C. § 2709(c) prohibited plaintiffs from disclosing the fact that the
17 FBI had served an NSL on the Archive, and because violating the nondisclosure
18 requirement could subject plaintiffs to penalties under that statute, plaintiffs sought leave
19 from the Court to file this case under seal. Plaintiffs’ motion was granted the same day.

20 On April 21, 2008, the parties entered into a settlement agreement
21 (“Agreement”), attached hereto as Exhibit A. As part of that Agreement, the FBI agreed
22 to withdraw the November 2007 NSL, including the non-disclosure requirement.
23 Plaintiffs agreed to keep confidential and not publicly disclose the content of certain
24 portions of the November 2007 NSL, the Attachment, as well as certain redacted portions
25 of court filings in this case. As part of the Agreement, the parties agreed to seek the
26 unsealing of the case, through a jointly filed administrative motion, within seven days of
27 plaintiffs’ receipt of the FBI’s letter withdrawing the NSL.

1 In accordance with the Agreement, on April 24, 2008, plaintiffs received a letter
2 from the FBI that withdrew the NSL and stated that the FBI would no longer seek to
3 enforce the NSL demand or the non-disclosure requirement. The letter is attached hereto
4 as Exhibit B. The letter also stated that the remaining non-disclosure obligation would
5 be governed exclusively by the Agreement.

6 Because the NSL and its non-disclosure obligations have now been withdrawn,
7 and thus the original rationale for sealing of this entire action has ceased, and pursuant to
8 the terms of the Agreement, the parties jointly move to unseal the case, but request that
9 the following, previously-filed documents and attachments thereto remain sealed: the
10 Complaint for Declaratory and Injunctive Relief; Memorandum of Points and Authorities
11 in Support of Petition of Plaintiff Internet Archive to Set Aside National Security Letter;
12 Declaration of Brewster Kahle; and Declaration of Kurt Opsahl. These documents
13 contain information that the parties agreed would remain sealed. The FBI has
14 determined that disclosure of the information in question would result in danger to the
15 national security of the United States, interference with a criminal, counterterrorism, or
16 counterintelligence investigation, interference with diplomatic relations, or danger to the
17 life or physical safety of a person. Should the Court grant this motion, within three
18 calendar days, plaintiffs will file on the public docket, copies of the documents listed
19 above that have been redacted in accordance with the Settlement Agreement between the
20 parties.

21 Dated May 1, 2008

22 
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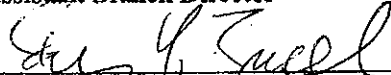
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EXHIBIT A

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9 Attorneys for Defendants Michael B. Mukasey, Attorney General of the United States, Robert S.
10 Mueller III, Director of the Federal Bureau of Investigation, and Arthur M. Cummings II, Deputy
Assistant Director of the Counterterrorism Division of the Federal Bureau of Investigation

11
12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA

14 INTERNET ARCHIVE and AMERICAN)
15 CIVIL LIBERTIES UNION, et al.,)

16 Plaintiffs,

17 v.

18 MICHAEL B. MUKASEY, Attorney)
19 General of the United States, et al.,)

20 Defendants.
21

No. C 4:07-06346 CW

SETTLEMENT AGREEMENT

DOCUMENT FILED UNDER SEAL
PURSUANT TO COURT ORDER DATED
DECEMBER 14, 2007

22 This Settlement Agreement (hereinafter "the Agreement") is made between plaintiffs
23 Internet Archive, American Civil Liberties Union, American Civil Liberties Union Foundation,
24 American Civil Liberties Union of Northern California, Inc., American Civil Liberties Union
25 Foundation of Northern California, Inc., and Electronic Frontier Foundation (hereinafter
26 "plaintiffs") and defendants Michael B. Mukasey, Attorney General of the United States, Robert
27 S. Mueller III, Director of the Federal Bureau of Investigation (hereinafter "FBI"), and Arthur M.
28 Cummings II, Deputy Assistant Director of the Counterterrorism Division of the FBI (hereinafter

1 “defendants”), by and through their undersigned counsel.

2 WHEREAS plaintiffs and defendants desire to settle and compromise certain claims
3 between them, avoid further proceedings and expense, and resolve this matter under the terms set
4 forth below.

5 WHEREAS the plaintiffs have brought suit in the Northern District of California (No. C
6 4:07-06346 CW) against defendants.

7 AGREEMENTS

8 The parties, by and through their undersigned counsel, hereby agree to the following:

- 9 1. Within three (3) calendar days of the execution of this Agreement, a duly
10 authorized employee of the FBI shall contact Internet Archive in an appropriate
11 writing to withdraw the National Security Letter served on Internet Archive that is
12 the subject of plaintiffs’ suit in the Northern District of California, No. C 4:07-
13 06346 CW, against defendants (hereinafter “NSL”). The letter shall state that the
14 NSL is withdrawn; that the FBI will not seek to enforce the NSL, including its
15 non-disclosure requirement; and that the remaining nondisclosure obligations are
16 governed exclusively by the terms of this Agreement.
- 17 2. Notwithstanding withdrawal of the NSL, plaintiffs, their employees and
18 representatives shall keep confidential and not publicly disclose the content of
19 those portions of the NSL and the Attachment that was sent to Internet Archive
20 with the NSL that are redacted in the copy of the NSL and Attachment that is
21 Exhibit A hereto. The individual employees of plaintiffs who have seen the
22 content of those redacted portions of the NSL also shall not disclose them to any
23 other employees of plaintiffs, except to (a) counsel of record in Northern District
24 of California Case No. C 4:07-06346 CW and other attorneys, secretaries,
25 assistants, and employees of plaintiffs who work with counsel of record to the
26 extent reasonably necessary to render professional services in that case or with
27 respect to this Agreement, or (b) those to whom such disclosure is necessary to
28 comply with the terms of this Agreement or an attorney to obtain legal advice or

1 legal assistance with respect to this Agreement. Such a disclosure may be made to
2 someone not a party to this Agreement only after that individual is informed of,
3 and agrees to, the nondisclosure obligations imposed by this Agreement by
4 endorsing a complete copy of this Agreement with his or her signature and the
5 statement "I agree to be bound by the nondisclosure obligations imposed by this
6 Settlement Agreement and consent to the personal jurisdiction of the U.S. District
7 Court for the Northern District of California for purposes of enforcing the
8 nondisclosure terms of the Agreement." Counsel for the respective parties shall
9 retain copies of the Agreement so endorsed until such time as the FBI has
10 permitted to expire the certification described in Paragraph 13 or the Court has set
11 the certification aside as provided under Paragraphs 13 and/or 14.

12 3. Within seven calendar days of plaintiffs' receipt of the writing described in
13 paragraph 1 signifying withdrawal of the NSL, the parties shall file a joint
14 administrative motion to unseal Northern District of California Case No. C 4:07-
15 06346 CW, except that the following, previously-filed documents and attachments
16 thereto shall remain sealed: the Complaint for Declaratory and Injunctive Relief;
17 Memorandum of Points and Authorities in Support of Petition of Plaintiff Internet
18 Archive to Set Aside National Security Letter; Declaration of Brewster Kahle; and
19 Declaration of Kurt Opsahl. Upon entry of an order unsealing the case, within
20 three calendar days the plaintiffs may file the public, redacted versions of those
21 documents that are Exhibit B hereto.

22 4. The parties, their employees and representatives shall keep confidential and not
23 publicly disclose the content of those portions of the parties' filings in Northern
24 District of California Case No. C 4:07-06346 CW that remain redacted in Exhibit
25 B hereto. The individual employees of plaintiffs who have seen the content of
26 those redacted portions of the filings also shall not disclose them to any other
27 employees of plaintiffs, except to (a) counsel of record in Northern District of
28 California Case No. C 4:07-06346 CW and other attorneys, secretaries, assistants,

1 and employees of plaintiffs who work with counsel of record to the extent
2 reasonably necessary to render professional services in that case or with respect to
3 this Agreement, or (b) those to whom such disclosure is necessary to comply with
4 the terms of this Agreement or an attorney to obtain legal advice or legal
5 assistance with respect to this Agreement. Such a disclosure may be made to
6 someone not a party to this Agreement only after that individual is informed of,
7 and agrees to, the nondisclosure obligations imposed by this Agreement by
8 endorsing a complete copy of this Agreement with his or her signature and the
9 statement "I agree to be bound by the nondisclosure obligations imposed by this
10 Settlement Agreement and consent to the personal jurisdiction of the U.S. District
11 Court for the Northern District of California for purposes of enforcing the
12 nondisclosure terms of the Agreement." Counsel for the respective parties shall
13 retain copies of the Agreement so endorsed until such time as the FBI has
14 permitted to expire the certification described in Paragraph 13 or the Court has set
15 the certification aside as provided under Paragraphs 13 and/or 14.

16 5. Within three days of entry of the Court's order granting the parties' administrative
17 motion described in paragraph 3, assuming the Court grants that motion, the
18 parties shall stipulate and consent to the entry of an order dismissing, with
19 prejudice, Northern District of California Case No. C 4:07-06346 CW, that also
20 recites as follows: "Pursuant to the Agreement of the parties, as indicated by their
21 signatures through counsel below, this action is dismissed with prejudice,
22 provided, however, that the Court shall retain exclusive jurisdiction over this
23 action for purposes of resolving any disputes that may arise in the future regarding
24 the Settlement Agreement between the parties, its terms or the enforcement
25 thereof."

26 6. Nothing in this Agreement prohibits plaintiffs from publicly discussing in good
27 faith the services Internet Archive provides, the kinds of material that can
28 generally be uploaded to Internet Archive, and the kinds of public and non-public

1 information it generally retains about those who access or upload materials to
2 Internet Archive. Nothing in this Agreement prohibits plaintiffs from publicly
3 disclosing that the NSL sought information about a user of the Archive.

4 7. Nothing in this Agreement prohibits plaintiffs from (1) acknowledging that they
5 have seen the redacted portions of the Attachment provided with the NSL served
6 on Internet Archive and (2) stating their view regarding whether the redacted
7 portions of that Attachment describe only non-content information.

8 8. Plaintiffs may release and publicly discuss the contents of those portions of their
9 letter to the FBI dated December 17, 2007, that are not redacted in the copy of the
10 letter that is Exhibit C hereto. Plaintiffs shall keep confidential, and not publicly
11 discuss, the information redacted from the letter that is Exhibit C. The individual
12 employees of plaintiffs who have seen the content of those redacted portions of
13 Exhibit C also shall not disclose them to any other employees of plaintiffs, except
14 to (a) counsel of record in Northern District of California Case No. C 4:07-06346
15 CW and other attorneys, secretaries, assistants, and employees of plaintiffs who
16 work with counsel of record to the extent reasonably necessary to render
17 professional services in that case or with respect to this Agreement, or (b) those to
18 whom such disclosure is necessary to comply with the terms of this Agreement or
19 an attorney to obtain legal advice or legal assistance with respect to this
20 Agreement. Such a disclosure may be made to someone not a party to this
21 Agreement only after that individual is informed of, and agrees to, the
22 nondisclosure obligations imposed by this Agreement by endorsing a complete
23 copy of this Agreement with his or her signature and the statement "I agree to be
24 bound by the nondisclosure obligations imposed by this Settlement Agreement
25 and consent to the personal jurisdiction of the U.S. District Court for the Northern
26 District of California for purposes of enforcing the nondisclosure terms of the
27 Agreement." Counsel for the respective parties shall retain copies of the
28 Agreement so endorsed until such time as the FBI has permitted to expire the

1 certification described in Paragraph 13 or the Court has set the certification aside
2 as provided under Paragraphs 13 and/or 14.

3 9. This Agreement does not constitute, and may not be construed as, a determination
4 or an admission of a violation of any law, rule, regulation, policy, or contract by
5 defendants, the truth of any allegation made in this matter, or the validity of any
6 claim asserted in this matter. This Agreement does not constitute, and may not be
7 construed as, a determination or an admission that defendants are liable in this
8 matter or that plaintiffs are a prevailing party.

9 10. This Settlement Agreement constitutes the entire agreement of the parties, and no
10 prior statement, representation, agreement, or understanding, oral or written, that
11 is not contained herein (including the exhibits thereto), will have any force or
12 effect.

13 11. The parties and their counsel shall make every reasonable effort to remedy any
14 disclosure of information redacted from the exhibits hereto (hereinafter "Protected
15 Information"). However, nothing in this Agreement requires plaintiffs to oppose a
16 motion by a non-party to unseal court records in this case.

17 12. If any Protected Information becomes public through an official and documented
18 disclosure by the federal government or a disclosure by a non-party, plaintiffs
19 shall be free to file a motion under seal for the Court to unseal the pertinent
20 portions of the documents filed in Northern District of California Case No. C
21 4:07-06346 CW, after meeting and conferring with defendants. Defendants shall
22 be free to oppose any such motion. If such portions are unsealed through a motion
23 as described in this paragraph, plaintiffs may publicly disclose and discuss their
24 contents.

25 13. On December 1, 2008, the nondisclosure requirement with respect to Protected
26 Information shall cease, unless the Director of the FBI, or his designee in a
27 position not lower than Deputy Assistant Director at FBI headquarters or a Special
28 Agent in Charge in a FBI field office designated by the Director, certifies to the

1 Court that otherwise there may result a danger to the national security of the
2 United States, interference with a criminal, counterterrorism, or
3 counterintelligence investigation, interference with diplomatic relations, or danger
4 to the life or physical safety of any person. If the Director or his designee so
5 certifies, the nondisclosure requirements of this Agreement with respect to
6 Protected Information shall continue for an additional year. If plaintiffs thereafter,
7 and after meeting and conferring with defendants, request an additional
8 certification each year following the prior certification, the certification described
9 in this Paragraph may be made thereafter to continue the nondisclosure
10 requirements from year to year, if necessary. If the Director or his designee so
11 certifies, plaintiffs, after meeting and conferring with defendants, may, on or after
12 December 1, 2012, ask the Court to modify or set aside the nondisclosure
13 obligation with respect to Protected Information. Such a review by the Court
14 under this Agreement would be conducted pursuant to the terms of 18 U.S.C.
15 § 3511(b).

- 16 14. Notwithstanding paragraph 13 above, if the nondisclosure provisions of 18 U.S.C.
17 § 2709 and/or 18 U.S.C. § 3511 are found unconstitutional or enjoined on First
18 Amendment grounds by the U.S. Supreme Court or the U.S. Court of Appeals for
19 the Ninth Circuit in a final, non-appealable order, or by another court of the
20 United States in a final, non-appealable order that binds the FBI in the Northern
21 District of California, the nondisclosure requirement with respect to Protected
22 Information shall cease one year after the date of this Agreement, unless the
23 Director of the FBI, or his designee in a position not lower than Deputy Assistant
24 Director at FBI headquarters or a Special Agent in Charge in a FBI field office
25 designated by the Director, certifies to the Court that otherwise there may result a
26 danger to the national security of the United States, interference with a criminal,
27 counterterrorism, or counterintelligence investigation, interference with
28 diplomatic relations, or danger to the life or physical safety of any person, and the

1 Court determines that the non-disclosure requirement remains appropriate under
2 the appropriate standard of review.

3 15. This Agreement may be enforced by the parties only through civil proceedings
4 before the U.S. District Court for the Northern District of California, and such
5 proceedings are the exclusive means for enforcing the Agreement. Any violation
6 of this Agreement, including the release of Protected Information, may be
7 considered by the Court for purposes of determining whether it should impose
8 sanctions and/or for purposes of determining whether the matter should be
9 referred for appropriate disciplinary proceedings.

10 16. This Settlement Agreement may not be modified or amended except by an
11 instrument in writing, agreed to and signed by the parties, nor shall any provision
12 be waived other than by a written waiver signed by the parties.

13 17. Each party shall bear its own fees and costs in Northern District of California
14 Case No. C 4:07-06346 CW.


15 18. This Agreement may be executed in counterparts, each of which shall be deemed
16 an original, and all of which together shall be deemed one and the same
17 instrument.
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1 Dated April 21, 2008

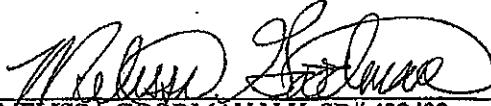
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28 *Attorneys for Plaintiffs*

EXHIBIT B



U.S. Department of Justice

Federal Bureau of Investigation

Washington, D. C. 20535-0001

April 22, 2008

Mr. Kurt Opsahl
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA 94110

Re: Internet Archive, et al. v. Michael B. Mukasey, et al.; 07-6346 (N.D. Cal.)

Dear Mr. Opsahl:

This letter confirms, on behalf of the Federal Bureau of Investigation (the "FBI"), that the FBI will and hereby does withdraw the National Security Letter delivered to your client, Internet Archive, by FBI personnel on or about November 26, 2007 (the "NSL"), and will not seek to enforce such NSL. The NSL has been challenged by your client in the above-referenced litigation, currently pending in the United States District Court for the Northern District of California. In connection with its decision not to seek enforcement of the demand for information stated in the NSL, the FBI also will not seek to enforce non-disclosure pursuant to 18 U.S.C. § 2709(c)(1) with regard to the contents of that letter, but rather non-disclosure obligations are governed by the terms of the settlement agreement to this case.

As part of the settlement of the case, the parties have agreed to keep confidential and not disclose certain portions of the NSL and Attachment, as well as portions of other documents, as set forth in the parties' settlement agreement dated April 22, 2008.

Should you have any questions in this regard, please contact the FBI's litigation counsel at the U.S. Department of Justice, Trial Attorney Steven Bressler, at (202) 514-4781.

Sincerely,

A handwritten signature in black ink, reading "James W. McJunkin".

James W. McJunkin
Deputy Assistant Director
Counterterrorism Division
Federal Bureau of Investigation