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CLERK OF DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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11 UNITED STATES DISTRICT COURT  
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA

EDL

13 SAN FRANCISCO DIVISION

14 ELECTRONIC FRONTIER FOUNDATION,

15 Plaintiff,

16 v.

17 OFFICE OF THE DIRECTOR OF NATIONAL  
18 INTELLIGENCE

19 and

20 DEPARTMENT OF JUSTICE,

21 Defendants.  
22

CV

08

1023

COMPLAINT FOR INJUNCTIVE  
RELIEF

23 1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for  
24 injunctive and other appropriate relief. Plaintiff seeks the expedited processing and release of  
25 records requested from the Office of the Director of National Intelligence and Department of  
26 Justice concerning a lobbying campaign to amend federal surveillance law and ensure that  
27 telecommunications companies are not held responsible for their role in warrantless government  
28

1 surveillance activities. There is no dispute that the requested records concern a matter about which  
2 there is “[a]n urgency to inform the public about an actual or alleged federal government activity,”  
3 and were “made by a person primarily engaged in disseminating information.” 5 U.S.C. §  
4 552(a)(6)(E)(v)(II); 32 C.F.R. § 1700.12(c)(2) & 28 C.F.R. § 16.5(d)(1)(ii). Therefore, Plaintiff is  
5 statutorily entitled to the expedited treatment it seeks.

### 6 PARTIES

7 2. Plaintiff Electronic Frontier Foundation (“EFF”) is a not-for-profit corporation  
8 established under the laws of the State of California, with offices in San Francisco, California and  
9 Washington, DC. EFF is a donor-supported membership organization that works to inform  
10 policymakers and the general public about civil liberties issues related to technology, and to act as  
11 a defender of those liberties. In support of its mission, EFF uses the FOIA to obtain and  
12 disseminate information concerning the activities of federal agencies.

13 3. Defendant Office of the Director of National Intelligence (“ODNI”) is an Independent  
14 Establishment of the Executive Branch of the United States Government. ODNI is an “agency”  
15 within the meaning of 5 U.S.C. § 552(f)(1).

16 4. Defendant Department of Justice (“DOJ”) is a Department of the Executive Branch of  
17 the United States Government. DOJ is an “agency” within the meaning of 5 U.S.C. § 552(f)(1).  
18 The Office of the Attorney General, Office of Legislative Affairs, Office of Legal Policy, Office of  
19 Legal Counsel, and National Security Division are components of Defendant DOJ.

### 20 JURISDICTION

21 5. This Court has both subject matter jurisdiction over this action and personal  
22 jurisdiction over the parties pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552(a)(6)(C)(i). This Court  
23 also has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

### 24 VENUE AND INTRADISTRICT ASSIGNMENT

25 6. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §  
26 1391(e).

27 7. Assignment to the San Francisco division is proper pursuant to Local Rule 3-2(c)  
28 and (d) because a substantial portion of the events giving rise to this action occurred in this district

1 and division, where Plaintiff is headquartered.

2 **FACTUAL ALLEGATIONS**

3 **The Administration's Campaign to Shield Telecommunications Companies**  
4 **From Liability for Their Role in Unlawful Surveillance Activity**

5 8. On December 15, 2005, the *New York Times* reported:

6 Months after the Sept. 11 attacks, President Bush secretly authorized the  
7 National Security Agency to eavesdrop on Americans and others inside  
8 the United States to search for evidence of terrorist activity without the  
9 court-approved warrants ordinarily required for domestic spying,  
10 according to government officials.

11 Under a presidential order signed in 2002, the intelligence agency has  
12 monitored the international telephone calls and international e-mail  
13 messages of hundreds, perhaps thousands, of people inside the United  
14 States without warrants over the past three years in an effort to track  
15 possible "dirty numbers" linked to Al Qaeda, the officials said.

16 James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec.  
17 15, 2005 at A1, available at <http://www.nytimes.com/2005/12/16/politics/16program.html>. The  
18 following day, President Bush confirmed in a radio address that he had authorized a surveillance  
19 program to intercept international communications in which one participant was suspected of  
20 having a connection to the terrorist organization al Qaeda. President's Radio Address, Dec. 17,  
21 2005, <http://www.whitehouse.gov/news/releases/2005/12/20051217.html>.

22 9. Shortly thereafter, the *New York Times* reported that the NSA's surveillance activity  
23 was far more extensive than the operation President Bush had described. According to the *Times*:

24 The National Security Agency has traced and analyzed large volumes of  
25 telephone and Internet communications flowing into and out of the United States  
26 as part of the eavesdropping program that President Bush approved after the Sept.  
27 11, 2001, attacks to hunt for evidence of terrorist activity, according to current  
28 and former government officials.

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

As part of the program approved by President Bush for domestic surveillance  
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.

1 Eric Lichtblau, *Spy Agency Mined Vast Data Trove*, N.Y. TIMES, Dec. 24, 2005, available at  
2 <http://www.nytimes.com/2005/12/24/politics/24spy.html>.  
3

4 10. On February 6, 2006, *USA Today* reported, “[t]he National Security Agency has  
5 secured the cooperation of large telecommunications companies, including AT&T, MCI and  
6 Sprint, in its efforts to eavesdrop without warrants on international calls by suspected terrorists,  
7 according to seven telecommunications executives.” Leslie Cauley and John Diamond, *Telecoms*  
8 *Let NSA Spy on Calls*, USA TODAY, Feb. 6, 2006, available at  
9 [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).  
10

11 11. Approximately 41 lawsuits have been filed throughout the United States seeking to  
12 hold the government and cooperating telecommunications carriers responsible for violating the law  
13 and the privacy of individuals through the illegal warrantless spying program. An additional seven  
14 suits have arisen from attempts by state public utility commissioners and attorneys general to seek  
15 information from telecommunications carriers about their involvement in warrantless surveillance  
16 activities. Most of these lawsuits have been consolidated and are currently pending in the United  
17 States District Court for the Northern District of California. *In re NSA Telecommunications*  
18 *Records Litigation* (MDL Docket No. 06-1791 VRW).<sup>1</sup>  
19

20 12. On August 5, 2007, President Bush signed into law the Protect America Act of  
21 2007, legislation that amended the Foreign Intelligence Surveillance Act (“FISA”) to expand the  
22 government’s power to intercept overseas communications of Americans without warrants. Pub. L.  
23 No. 110-55, 121 Stat. 552. Among other things, the law provided protection for  
24 telecommunications companies against future legal liability for participating in certain government  
25 surveillance activity.  
26

27 13. In an article published the same day, the *New York Times* reported:  
28

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

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

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

13 James Risen, *Bush Signs Law to Widen Reach for Wiretapping*, N.Y. TIMES, Aug. 5, 2007,  
14 available at <http://www.nytimes.com/2007/08/06/washington/06nsa.html>. On information and  
15 belief, the assertions quoted above are substantially correct.

16 14. Congress included a sunset provision in the Protect America Act stating that the law  
17 would expire in February 2008 without further legislative action, which guaranteed further debate  
18 over foreign intelligence surveillance law. President Bush indicated that the Administration  
19 intended to push for even greater legal immunity for the telecommunications industry:

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

25 Signing Statement, *President Bush Commends Congress on Passage of Intelligence Legislation*,  
26 Aug. 6, 2007, available at <http://www.whitehouse.gov/news/releases/2007/08/20070805.html>.

27 15. In an interview discussing the government's warrantless surveillance activities  
28 published by the *El Paso Times* on August 22, 2007, Director McConnell stated:

[U]nder the president's program, the terrorist surveillance program, the private  
sector had assisted us. Because if you're going to get access you've got to have a  
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.

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<sup>1</sup> Plaintiff is Co-Lead Coordinating Counsel in this litigation.

1 Chris Roberts, *Transcript: Debate on the Foreign Intelligence Surveillance Act*, EL PASO TIMES,  
2 Aug. 22, 2007, available at [http://www.elpasotimes.com/news/ci\\_6685679.html](http://www.elpasotimes.com/news/ci_6685679.html). On information  
3 and belief, the assertions quoted above are substantially correct.

4 16. According to an article published by *Newsweek*, “[t]he nation’s biggest  
5 telecommunications companies, working closely with the White House, have mounted a secretive  
6 lobbying campaign to get Congress to quickly approve a measure wiping out all private lawsuits  
7 against them for assisting the U.S. intelligence community’s warrantless surveillance programs.”  
8 Michael Isikoff and Mark Hosenball, *Case Dismissed? The Secret Lobbying Campaign Your  
9 Phone Company Doesn’t Want You to Know About*, NEWSWEEK, Sept. 20, 2007, available at  
10 <http://www.newsweek.com/id/41142>. On information and belief, the assertions quoted above are  
11 substantially correct.  
12

13 17. Congress is currently considering whether to make additional changes to FISA. As  
14 of the filing of this lawsuit, the House of Representatives has passed the RESTORE Act of 2007,  
15 which would not protect telecommunications companies from civil liability for their role in the  
16 government’s warrantless surveillance program. On February 12, 2008, however, the Senate passed  
17 its own version of legislation to amend FISA, which purports to require dismissal of any state or  
18 federal lawsuit against a carrier for facilitating government surveillance if the Attorney General  
19 certifies to the court that the company was assisting in certain intelligence activity authorized by  
20 the President. Congress allowed the Protect America Act to expire on February 16, 2008 without  
21 reaching an agreement to extend the controversial law. *See generally* Tim Starks, *House Allows  
22 FISA Law to Expire*, CONGRESSIONAL QUARTERLY, February 17, 2008, available at  
23 <http://www.cqpolitics.com/wmspage.cfm?docID=weeklyreport-000002672840>.  
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**Plaintiff's FOIA Requests and Requests for Expedited Processing**

1  
2 18. In a December 21, 2007 letter sent by facsimile to ODNI, EFF requested under the  
3 FOIA all records from September 1, 2007 to December 21, 2007 “concerning briefings,  
4 discussions, or other exchanges that Director McConnell or other ODNI officials have had with 1)  
5 members of the Senate or House of Representatives and 2) representatives or agents of  
6 telecommunications companies concerning amendments to FISA, including any discussion of  
7 immunizing telecommunications companies or holding them otherwise unaccountable for their role  
8 in government surveillance activities. This request includes, but is not limited to, all email,  
9 appointment calendars, telephone message slips, or other records indicating that such briefings,  
10 discussions, or other exchanges took place.”  
11

12 19. In letters sent by facsimile on December 21, 2007 to the DOJ Office of the Attorney  
13 General, Office of Legislative Affairs, Office of Legal Policy, Office of Legal Counsel, and  
14 National Security Division, EFF requested under the FOIA all records from September 1, 2007 to  
15 December 21, 2007 “concerning briefings, discussions, or other exchanges that Justice Department  
16 officials have had with 1) members of the Senate or House of Representatives and 2)  
17 representatives or agents of telecommunications companies concerning amendments to FISA,  
18 including any discussion of immunizing telecommunications companies or holding them otherwise  
19 unaccountable for their role in government surveillance activities. This request includes, but is not  
20 limited to, all e-mail, appointment calendars, telephone message slips, or other records indicating  
21 that such briefings, discussions, or other exchanges took place.”  
22  
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24 20. In its December 21 letters, EFF formally requested that the processing of each  
25 request be expedited because it pertains to information about which there is “[a]n urgency to  
26 inform the public about an actual or alleged federal government activity,” and were “made by a  
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1 person primarily engaged in disseminating information.” 5 U.S.C. § 552(a)(6)(E)(v)(II); 32 C.F.R.  
2 § 1700.12(c)(2) & 28 C.F.R. § 16.5(d)(1)(ii).

3 21. By letter dated December 27, 2007, the DOJ National Security Division  
4 acknowledged receipt of EFF’s FOIA request, and by letter dated January 29, 2008 informed EFF  
5 that its request for expedited processing had been granted.  
6

7 22. By letter dated December 28, 2007, the DOJ Office of Information and Privacy  
8 acknowledged receipt of EFF’s FOIA requests to the Office of the Attorney General, Office of  
9 Legislative Affairs, and Office of Legal Policy, and informed EFF that its requests for expedited  
10 processing had been granted.

11 23. By letter dated January 7, 2008, ODNI acknowledged receipt of EFF’s FOIA  
12 request, and informed EFF that its request for expedited processing had been granted.  
13

14 24. By letter dated January 9, 2008, the DOJ Office of Legal Counsel acknowledged  
15 receipt of EFF’s FOIA request and informed EFF that its request for expedited processing had been  
16 granted.

17 25. Notwithstanding ODNI and DOJ’s purported decisions to expedite the processing of  
18 all of EFF’s December 21 FOIA requests, to date, the agencies have not completed the processing  
19 of any of the requests nor informed EFF of an anticipated date for the completion of the processing  
20 of the requests.  
21

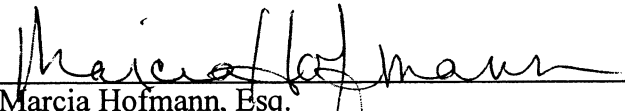
22 26. Not only have ODNI and DOJ failed to expedite the processing of EFF’s requests,  
23 they have also exceeded the generally applicable 20-day deadline for the processing of *any* FOIA  
24 request.

25 27. EFF has exhausted all applicable administrative remedies.  
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1  
2 DATED: February 20, 2008

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