

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,)
)
 Plaintiff,)
)
 v.) Civil Action
) No. 00-1849 JR
 DEPARTMENT OF JUSTICE, et al.,)
)
 Defendants.)
 _____)

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR A
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiff respectfully submits this memorandum of points and authorities in support of its motion for a temporary restraining order ("TRO") and preliminary injunction.

Preliminary Statement

This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, seeking the expedited processing and release of agency records concerning the so-called "Carnivore" surveillance system and requested by plaintiff from defendant Federal Bureau of Investigation ("FBI"). The records at issue concern a matter of intense public interest in which many commentators, including some of the nation's leading newspapers, have raised questions of potential governmental abuse. As such, the records clearly meet the standard for expedited processing of FOIA requests set forth in the regulations of defendant Department of Justice ("DOJ").

In violation of the strict time limits mandated by both the FOIA and its own regulations, defendant DOJ has failed to respond to plaintiff's request for expedited processing of the requested records. Defendant DOJ's failure to act on plaintiff's request -- the effect of which is to deny plaintiff the expedition to which it is legally entitled -- is both procedurally and substantively flawed. Because time is at the essence of plaintiff's rights and defendants' obligations, plaintiff seeks the court's expedited consideration of this matter and entry of an order compelling defendants to process and disclose the requested records immediately.

Statement of Facts

A. Initial Coverage of Defendant FBI's Carnivore System

On July 11, 2000, the *Wall Street Journal* reported that defendant FBI had deployed a surveillance system known as "Carnivore," which monitors traffic at the facilities of Internet service providers in order to intercept information contained in the electronic mail ("e-mail") of criminal suspects. The *Journal* reported that Carnivore "can scan millions of e-mails a second" and "would give the government, at least theoretically, the ability to eavesdrop on all customers' digital communications, from e-mail to online banking and Web

surfing." *FBI's System to Covertly Search E-Mail Raises Privacy, Legal Issues*, WALL STREET JOURNAL, July 11, 2000.

B. Plaintiff's FOIA Request and
Request for Expedited Processing

The following day, on July 12, 2000, plaintiff wrote to defendant FBI and requested under the FOIA "the release of all FBI records concerning the system known as 'Carnivore' and a device known as 'EtherPeek' for the interception and/or review of electronic mail (e-mail) messages."¹ Declaration of David L. Sobel ("Sobel Decl.") ¶ 5; Exhibit 1 (attached thereto). In the days subsequent to plaintiff's submission of its FOIA request, Carnivore became a subject of intense, sustained and exceptional media interest, and much of the coverage raised questions concerning both the propriety and the legality of the surveillance system.

On July 18, 2000, plaintiff sent a letter by messenger to Myron Marlin, the Director of Public Affairs for defendant DOJ, requesting expedited processing of its FOIA request for records

¹ Earlier Congressional testimony indicated that Carnivore was in some ways related to the "EtherPeek" device that is also used by federal law enforcement agencies. Testimony of Robert Corn-Revere before the Subcommittee on the Constitution of the Committee on the Judiciary, United States House of

concerning Carnivore. Sobel Decl. ¶ 6; Exhibit 2 (attached thereto). Under defendant DOJ's regulations, Mr. Marlin is the designated official to receive such requests, and plaintiff's request was in conformance with the requirements set forth in those regulations. 28 CFR 16.5(d). Plaintiff stated that its pending FOIA request meets the criteria for expedited processing under defendant DOJ's regulations, 28 CFR 16.5(d)(1)(iv), as "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." Exhibit 2.

In support of its request, plaintiff noted the extensive media coverage of the Carnivore system that had appeared since plaintiff submitted its FOIA request:

There can be no question that the FBI's use of the Carnivore system to intercept electronic mail messages has engendered "widespread and exceptional media interest" since the *Wall Street Journal* first disclosed the activity on July 11. According[] to Lexis-Nexis, more than 50 articles have appeared in the U.S. press since that disclosure, and the Attorney General was closely questioned on the matter at her weekly news briefing on July 13. CNN has reported that "[a]n FBI spokesman says the Bureau has been so inundated with

Representatives, *The Fourth Amendment and the Internet*, April 6, 2000.

requests on this issue, it may call a news briefing to answer everybody's questions all at once."

Id. at 1-2.

Addressing the second prong of the standard for expedition contained in defendant DOJ's regulations, plaintiff cited public questions that had been raised about the potential abuse of the Carnivore system, and quoted a *St. Petersburg Times* editorial of July 17:

The FBI . . . is trying to take a bite out of Americans' privacy on the Internet. It has started using a rapacious computer program known as "Carnivore" to do cyberspace snooping on investigative targets. The program is attached to the target's Internet service provider. There, it absorbs and analyzes all the traffic or "packets" traveling through the ISP, not just the communications of the suspect. The FBI claims Carnivore can be programmed to spit out as little information as the addresses of those receiving the suspect's e-mails. The problem is, Carnivore also could be used to retain much more, and no one but the government would know.

. . . The FBI says, "Trust us: We'll only collect what we should." But there is little reassuring about the way Carnivore may snack on our electronic conversations. The agency might sound like a protective parent, but its newest snooping tool is all Big Brother.

Id. at 2. Plaintiff also quoted a *Christian Science Monitor* editorial published on July 18: "The potential for abuse is greater with Carnivore than with a simple phone tap. The program's capabilities are potentially sweeping." *Id.*

Plaintiff summed up the public concern as follows:

The American public is deeply concerned about potential government intrusions into personal affairs, particularly private communications. While the Attorney General and FBI spokesmen have acknowledged and addressed these concerns, there is no substitute for the disclosure of internal Bureau records concerning the use of the Carnivore system. Indeed, the very purpose of the FOIA is to lessen the public's dependence on official agency statements and open the underlying documentation to public scrutiny. This is clearly an instance in which expedited processing of an FOIA request is warranted.

Id. at 2-3.

Finally, plaintiff apprised Mr. Marlin of its ability to disseminate information to a wide audience:

For your information, the Electronic Privacy Information Center ("EPIC") is a non-profit educational organization that disseminates information on privacy issues to the public. We accomplish that mission through our heavily-visited website and a bi-weekly electronic newsletter that is sent to more than 13,000 recipients, many of whom cover Internet privacy issues for a variety of news outlets. Indeed, EPIC has been

recognized as a "representative of the news media" for fee assessment purposes by every federal agency that has received our FOIA requests.

Id. at 3. Plaintiff's request noted that a response was required within ten calendar days, and it was signed under penalty of perjury by plaintiff's counsel. *Id.*

After the submission of plaintiff's request for expedited processing, media interest in Carnivore continued to grow, as did public concern about potential abuses and privacy violations. On July 24, 2000, the House Judiciary Subcommittee on the Constitution convened a hearing on "Fourth Amendment Issues Raised by the FBI's 'Carnivore' Program," during which members cited the potential abuses of Carnivore, closely questioned representatives of defendant FBI and voiced significant criticism of the use of the Carnivore system. The following day, on July 25, 2000, plaintiff submitted to Mr. Marlin by messenger a transcript of the Congressional hearing and, in a cover letter, noted that "the transcript provides further evidence that [plaintiff's] FOIA request meets the criteria for expedited processing." Sobel Decl. ¶ 9; Exhibit 3 (attached thereto).

Plaintiff continued to provide supplemental material in support of its request. On July 27, 2000, one day before the mandatory deadline for a decision on its expedition request, plaintiff faxed a letter and supplemental material to Mr. Marlin. Specifically, plaintiff submitted an editorial on Carnivore that appeared in the *New York Times* on July 27, 2000, and a report on comments made by defendant Reno concerning Carnivore at a press briefing on the same day. Sobel Decl. ¶ 11; Exhibit 4 (attached thereto). The *Times* editorial stated, *inter alia*,

. . . In the absence of more stringent controls, law enforcement agencies may be tempted to conduct wholesale monitoring of digital written communications. It is probably not practical for agents to listen in on all the phone calls, for example, that go through AT&T. But new technology is making it possible for agencies like the F.B.I. to scan, read and record millions of pieces of e-mail on the network of an Internet service provider. Until now, this kind of power and its potential for abuse were not so readily available. . . .

. . . Congress also needs to provide new safeguards against the government's wrongful use of ever more powerful surveillance technology against law-abiding citizens. Serious concerns have been raised about Carnivore, the new online wiretap system used by the F.B.I. to track the

communications of individuals suspected of criminal activity.

The F.B.I. says the technology can isolate the e-mail of the target of an investigation. But the system, when hooked up to the network of the Internet service provider, gives the F.B.I. unlimited access to the e-mail of all other subscribers on the network. While a court order is still required to intercept the content of messages, the secret technology controlled exclusively by law enforcement raises fears of improper monitoring.

Wiretapping in Cyberspace, NEW YORK TIMES, July 27, 2000, at 24 (attached to Exhibit 4). In the press briefing comments submitted by plaintiff, defendant Reno said, *inter alia*,

I think we all have a responsibility to explain things so that people understand them and appreciate what we're trying to do to protect privacy interests, to ensure that modern technology is used correctly, and that we provide a benchmark and a basis for giving people confidence in the process. . . .

We will continue to make sure that [Carnivore] is implemented carefully and that there is no abuse in its use, when there are valid law enforcement purposes for it.

Reno Was Not Informed Of FBI Internet Wiretapping Capabilities Before Implementation, THE WHITE HOUSE BULLETIN, July 27, 2000 (attached to Exhibit 4).

C. Defendant DOJ's Failure to Respond to Expedition Request

Notwithstanding the statutory, 5 U.S.C. § 552(a)(6)(E)(ii), and regulatory, 28 CFR 16.5(d)(4), time limit of ten calendar days, defendant DOJ has not responded to plaintiff's request for expedited processing of its FOIA request. In its request letter, which was hand-delivered to Mr. Marlin on July 18, plaintiff's counsel wrote, "[a]s applicable Department regulations provide, I will anticipate your determination within ten (10) calendar days." Exhibit 1 at 3. On July 27, plaintiff's counsel attempted to call Mr. Marlin to discuss the status of plaintiff's request, and left a message asking Mr. Marlin to return the call. Sobel Decl. ¶ 10. Mr. Marlin did not respond. *Id.* Later that day, counsel faxed a letter to Mr. Marlin providing supplemental information in support of its request. Sobel Decl. ¶ 11; Exhibit 4. Counsel again reiterated the applicable time limit: "As Department regulations provide, I will anticipate your decision on my request tomorrow. I would appreciate it if you would advise me of your decision by telephone . . ." *Id.* Plaintiff has received no communication of any kind from defendants concerning its request for expedited processing. Sobel Decl. ¶ 12.

ARGUMENT

The issues in this case are simple and not subject to serious dispute. In compliance with defendant DOJ's regulations, plaintiff requested expedited processing of a pending FOIA request seeking information of extraordinary public

interest. In support of its request, plaintiff submitted extensive information that clearly establishes its entitlement to expedited processing. In violation of both the letter and the spirit of the statutory and regulatory requirements for expedited processing, defendants have chosen to ignore plaintiff's request. Defendants' continuing failure to act upon plaintiff's request, and to grant its request for expedited processing, is clearly unlawful and should be restrained.

I. The Court has Jurisdiction to Grant the Requested Relief

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

Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and *failure by an agency to respond in a timely manner to such a request* shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

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

On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency

records improperly withheld from the complainant. In such a case the court shall determine the matter *de novo*, . . . and the burden is on the agency to sustain its action.

5 U.S.C. § 552(a)(4)(B).

The court also has jurisdiction of this case under 28 U.S.C. § 1331 ("[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States"), and the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 ("[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof").

Plaintiff has exhausted the applicable administrative remedies. As the FOIA provides, "the court shall determine the matter *de novo*," and defendants bear the burden of sustaining their actions. 5 U.S.C. § 552(a)(4)(B).

II. Plaintiff is Entitled to Entry of a Restraining Order

In considering plaintiff's request for the entry of a temporary restraining order ("TRO") compelling defendants to expedite the processing of plaintiff's FOIA request, the court

must assess "[t]he familiar factors affecting the grant of preliminary injunctive relief -- 1) likelihood of success on the merits, 2) irreparable injury to the plaintiff, 3) burden on ... others' interests, and 4) the public interest."

Jacksonville Port Authority v. Adams, 556 F.2d 52, 57 (D.C. Cir. 1977) (citing *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), and *A Quaker Action Group v. Hickel*, 421 F.2d 1111, 1116 (D.C. Cir. 1969)). Consideration of these factors here establishes plaintiff's entitlement to injunctive relief.

A. Plaintiff's Likelihood of Success on the Merits

Given the clarity of the relevant statutory and regulatory mandates at issue in this case, and defendants' failure to comply with them, plaintiff's likelihood of prevailing on the merits is extremely high. As the D.C. Circuit has held,

it is elementary that an agency must adhere to its own rules and regulations. *Ad hoc* departures from those rules, . . . cannot be sanctioned, for therein lies the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action. Simply stated, rules are rules, and fidelity to the rules which have been properly promulgated, consistent with applicable statutory requirements, is required of those to whom Congress has entrusted the regulatory missions of modern life.

Reuters Ltd. v. Federal Communications Commission, 781 F.2d 946, 950-51 (D.C. Cir. 1986) (citation omitted). See also *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 536 (D.C. Cir. 1986) (Scalia, J.) ("It is axiomatic that an agency must adhere to its own regulations. . . .").

In assessing plaintiff's likelihood of prevailing, the court must consider the merits of two discrete issues: whether defendants have violated the mandatory time limit for responding to plaintiff's request for expedition; and whether plaintiff has satisfied defendant DOJ's regulatory criteria for expedited processing. Plaintiff is likely to prevail on both issues.

1. Violation of the Mandatory Time Limit

The FOIA requires agencies to promulgate regulations providing that "a determination of whether to provide expedited processing *shall be made*, and notice of the determination *shall be provided* to the person making the request, *within 10 days after the date of the request*." 5 U.S.C. § 552(a)(6)(E)(ii)(I) (emphasis added). In accordance with that statutory mandate, defendant DOJ's regulations provide that "[w]ithin ten calendar days of its receipt of a request for expedited processing, the proper component *shall decide* whether to grant it and *shall*

notify the requester of the decision." 28 CFR 16.5(d)(4)

(emphasis added).²

Plaintiff's request was hand-delivered to defendant DOJ's Director of Public Affairs on July 18, 2000. Sobel Decl. ¶ 9. Defendant DOJ did not render a decision, nor notify plaintiff of a decision, within ten calendar days of receipt of plaintiff's request. Indeed, defendant DOJ still has not done so. *Id.*, ¶ 12. Plaintiff will prevail on this issue.

2. Plaintiff's Entitlement to Expedited Processing

The FOIA requires federal agencies to "promulgate regulations . . . providing for expedited processing of requests for records in cases in which the person requesting the records demonstrates a compelling need; and in other cases determined by the agency." 5 U.S.C. § 552(a)(6)(E)(i). Pursuant to that directive, defendant DOJ issued regulations providing, *inter alia*, that "[r]equests . . . will be taken out of order and given expedited treatment whenever it is determined that they involve . . . [a] matter of widespread and exceptional media interest in which there exist possible questions about the

² The "proper component" for a request like plaintiff's -- seeking expedition on the basis of exceptional media interest

government's integrity which affect public confidence." 28 CFR 16.5(d)(1).³

In its initial request letter, and its supplemental submissions, plaintiff clearly established that its FOIA request met defendant DOJ's regulatory standard for expedition. Upon *de novo* review, 5 U.S.C. § 552(a)(4)(B), this court is likely to find that the administrative record supports plaintiff's claim for expedited processing.

First, plaintiff demonstrated that its request for information on the Carnivore surveillance system "involve[s] . . . [a] matter of widespread and exceptional media interest." In its initial letter to Mr. Marlin, defendant DOJ's Director of Public Affairs, plaintiff stated that

[a]ccording[] to Lexis-Nexis, more than 50 articles have appeared in the U.S. press since [the *Wall Street Journal's*] disclosure, and the Attorney General was closely questioned on the matter at her weekly news briefing on July 13. CNN has

and possible questions of governmental integrity -- is the Director of Public Affairs. 28 CFR 16.5(d)(2).

³ This standard for expedited processing is a codification of a Justice Department policy that was first announced by defendant Reno in a memorandum to all Department components dated February 1, 1994. *Attorney General Reno Celebrates Annual Freedom of Information Day*, FOIA Update, U.S. Department of Justice, Spring 1994.

reported that "[a]n FBI spokesman says the Bureau has been so inundated with requests on this issue, it may call a news briefing to answer everybody's questions all at once."

Exhibit 2 at 1-2.⁴ In its initial and supplemental submissions, plaintiff apprised defendant DOJ of specific discussion of the Carnivore system in the *Wall Street Journal*, *St. Petersburg Times*, *Christian Science Monitor*, *New York Times* and on CNN. Exhibits 2 and 4. Plaintiff also provided defendant DOJ with the transcript of a quickly-convened Congressional hearing on Carnivore at which members of the House Judiciary Committee noted the significance of the matter. Exhibit 3.

Second, plaintiff demonstrated beyond any doubt that Carnivore is "[a] matter . . . in which there exist possible questions about the government's integrity which affect public confidence." In its initial submission to defendant DOJ, plaintiff cited the numerous and serious questions that had already been raised about the potential abuse of the Carnivore system, including a *St. Petersburg Times* editorial:

⁴ Plaintiff notes that the Lexis-Nexis database does not include all U.S. publications and news sources. It does not, for example, include the *Wall Street Journal*, which published the first news accounts of the Carnivore system and many subsequent follow-up articles.

The problem is, Carnivore also could be used to retain much more [private information than the FBI claims], and no one but the government would know.

. . . The FBI says, "Trust us: We'll only collect what we should." But there is little reassuring about the way Carnivore may snack on our electronic conversations. The agency might sound like a protective parent, but its newest snooping tool is all Big Brother.

Exhibit 2 at 2. Plaintiff also quoted from a *Christian Science Monitor* editorial published on July 18: "The potential for abuse is greater with Carnivore than with a simple phone tap. The program's capabilities are potentially sweeping." *Id.*

Plaintiff characterized the public concern as follows:

The American public is deeply concerned about potential government intrusions into personal affairs, particularly private communications. While the Attorney General and FBI spokesmen have acknowledged and addressed these concerns, there is no substitute for the disclosure of internal Bureau records concerning the use of the Carnivore system. Indeed, the very purpose of the FOIA is to lessen the public's dependence on official agency statements and open the underlying documentation to public scrutiny. This is clearly an instance in which expedited processing of an FOIA request is warranted.

Id. at 2-3.

Plaintiff's supplemental submissions further demonstrated the "possible questions about the government's integrity" that had been raised with respect to Carnivore. Those questions run throughout the transcript of the hearing convened by the House Judiciary Subcommittee on the Constitution. The subcommittee chairman, Rep. Charles Canady, said

we should be sensitive to any potential for abuse of the Carnivore system. Even a system designed with the best of intentions to legally carry out essential law enforcement functions may be a cause for concern if its use is not properly monitored.

Fourth Amendment Issues Raised by the FBI's 'Carnivore' Program: Hearing before the House Judiciary Subcommittee on the Constitution, July 24, 2000 (unofficial transcript) (attached to Exhibit 3). Rep. Spencer Bachus said, "[t]he potential for abuse here is tremendous . . .," and asked

What assurance do we have that we're not going to have another situation here where we have, like FBI files, that they got out of the restricted area and that people viewed them and perhaps utilized them for things they weren't intended to be?

Id. The serious questions about Carnivore were also addressed by Rep. John Conyers:

The potential for law enforcement to overstep constitutional boundaries for electronic surveillance on a new stage, goes way back to, the 1970s, when the Church committee investigated the FBI's use of

electronic surveillance against Dr. Martin Luther King Jr. . . .

. . . I hope that this hearing will put to rest our fears about this system. Maybe they're unfounded. Maybe it's unclear, and we'll need some legislative guidance for our law enforcement. Does it give the FBI the ability to conduct indiscriminate searches of an individual's e-mails activity beyond what a court order would allow? Does it give the FBI the ability to search more than is permitted under the agency's [pen] register and trap and trace authority? And why does the FBI need to put this system's terminals on site at Internet service providers, rather than letting the ISP turn over the information that the FBI needs, much in the same way that the telephone company itself does?

Id.

Finally, plaintiff submitted to defendant DOJ a *New York Times* editorial which noted that "[s]erious concerns have been raised about Carnivore, the new online wiretap system used by the F.B.I. to track the communications of individuals suspected of criminal activity." The *Times* emphasized that "the secret technology controlled exclusively by law enforcement raises fears of improper monitoring." *Wiretapping in Cyberspace*, *NEW YORK TIMES*, July 27, 2000, at 24 (attached to Exhibit 4).

Plaintiff's likelihood of prevailing on the issue of whether Carnivore raises "possible questions about the

government's integrity which affect public confidence" is extremely high. Indeed, it is difficult to imagine an administrative record that could meet defendant DOJ's regulatory standard more clearly than the one under review here.

B. Plaintiff will Suffer Irreparable Injury in
the Absence of the Requested Injunctive Relief

Unless defendants' unlawful failure to expedite the processing of its FOIA request is immediately enjoined, plaintiff will suffer irreparable harm.⁵ The very nature of the right that plaintiff seeks to vindicate in this action -- expedited processing -- depends upon timeliness. The courts have recognized that preliminary injunctive relief is appropriate, and the requisite injury is present, in cases where "time is of the essence." See, e.g., *United States v. BNS, Inc.*, 858 F.2d 456, 465 (9th Cir. 1988); *Martin-Marietta Corp.*

⁵ Given the strength of plaintiff's position on the merits, even "a relatively slight showing of irreparable injury" is adequate to justify the issuance of a TRO. As the D.C. Circuit has held,

[i]f the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak. An injunction may be justified, for example, where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury.

CityFed Financial Corp. v. Office of Thrift Supervision, 58 F.3d 738, 747 (D.C. Cir. 1995) (citation omitted). Nonetheless, plaintiff's showing of harm here is substantial.

v. Bendix Corp., 690 F.2d 558, 568 (6th Cir. 1982). Under the statutory scheme Congress established in the FOIA, it is clear that "time is of the essence" here and that any further delay in the processing of plaintiff's request will cause irreparable injury.

The FOIA provides that upon receipt of an FOIA request, an agency shall

determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination.

5 U.S.C. § 552(a)(6)(A). The Act thus requires agencies, under routine circumstances, to process requests within twenty working days. However, by requiring that "[a]n agency shall process as soon as practicable any request for records to which the agency has granted expedited processing," 5 U.S.C. § 552(a)(6)(E)(iii), Congress clearly anticipated that "expedited processing" would result in agency compliance with a request in less than twenty working days. That urgency is also reflected in the statutory requirement (violated here) that an agency must respond to a request for expedited processing within *ten calendar days*. 5

U.S.C. § 552(a)(6)(E)(ii). Unless defendants are ordered to process plaintiff's request immediately, plaintiff's right to expedition under the FOIA will be irretrievably lost.

In addition to the loss of its clearly established legal right, any further delay in the processing of plaintiff's FOIA request will irreparably harm plaintiff's ability (and that of the public) to engage in informed discussion and debate on the issue of government surveillance of the Internet and the protection of constitutional rights. Sobel Decl. ¶ 14.

Congress has already held its first hearing on Carnivore and the extent of the threat it poses to Fourth Amendment issues. At least three bills have been introduced in Congress to address the legal issues that Carnivore raises. *Id.*, ¶ 15. In the wake of the initial disclosure of the Carnivore system, the Administration has announced its intention to introduce legislation that it claims will address those issues, as well. *Id.*, ¶ 16; Exhibit 5 (attached thereto). Without the expedited access to information about Carnivore to which it is legally entitled, plaintiff's ability to engage in an urgent and current public policy debate will be irretrievably lost. *Id.*, ¶ 17.

Because time is of the essence in this matter, plaintiff will be irreparably harmed unless the court acts now, "when it [is] still possible to grant effective relief," and before "all opportunity to grant the requested relief [is] foreclosed." *Local Lodge No. 1266, International Association of Machinists and Aerospace Workers v. Panoramic Corp.*, 668 F.2d 276, 290 (7th Cir. 1981).

C. Injunctive Relief Will Not Burden Others' Interests

Defendants cannot be said to be "burdened" by a requirement that they comply with the law. The immediate relief plaintiff seeks will require nothing more of defendants than what the law already mandates -- the expedited processing of plaintiff's FOIA request. Nor will the requested relief burden the interests of other parties who have submitted FOIA requests to defendant FBI 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. Fulfillment of the legislative intent cannot be characterized as a burden on any party's interests.

D. The Public Interest Favors the Requested Relief

The final criterion for the issuance of a TRO is clearly satisfied in this case. The D.C. Circuit has long recognized that "there is an overriding public interest . . . in the general importance of an agency's faithful adherence to its statutory mandate." *Jacksonville Port Authority*, 556 F.2d at 59 (D.C. Cir. 1977). Such adherence is all that plaintiff seeks here. The public interest will also be served by the expedited release of the requested records, which will further the FOIA's core purpose of "shedding light on an agency's performance of its statutory duties." *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989). As this court has noted, "[t]here is public benefit in the release of information that adds to citizens' knowledge" of government activities. *Center to Prevent Handgun Violence v. U.S. Department of the Treasury*, 49 F. Supp. 2d 3, 5 (D.D.C. 1999). The public interest favors the issuance of an order directing defendants to expedite the release of the requested information.

CONCLUSION

Plaintiff's motion for a temporary restraining order should be granted.

Respectfully submitted,

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