



March 29, 2005

BY FACSIMILE – (202) 324-3752

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[www.epic.org](http://www.epic.org)RE: Freedom of Information Act Request

Dear Mr. Hardy:

This letter constitutes an expedited request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and is submitted on behalf of the Electronic Privacy Information Center (“EPIC”). We are seeking the following records (including but not limited to electronic records):

1. Any information concerning the FBI’s use of authorities granted or expanded by Sections 201, 202, 203(b), 203(d), 204, 206, 207, 209, 212, 214, 217, 218, and 220 of the USA PATRIOT Act from October 26, 2001 to the present.
2. Any information concerning the FBI’s use of Section 215 of the USA PATRIOT Act from February 23, 2003 to the present.
3. Any information or communications concerning sunset of USA PATRIOT Act provisions.

Request for Expedited Processing

This request warrants expedited processing because it pertains to a matter about which there is an “urgency to inform the public about an actual or alleged federal government activity,” and the request is made by “a person primarily engaged in disseminating information.” 28 C.F.R. § 16.5(d)(1)(ii).

There is a particular urgency for the public to obtain information about how the FBI has used expanded law enforcement powers granted by USA PATRIOT Act provisions. The government’s use of such powers raises serious civil liberties

implications, particularly in light of the fact that many of the law's most controversial provisions will become ineffective on December 31, 2005 without further action by Congress.

The urgency for Congress and the public to know how the FBI has used these sunset authorities is particularly strong now, as the House Judiciary Committee announced yesterday that it has scheduled eight PATRIOT Act oversight hearings in April and May 2005. Press Release, House Judiciary Committee, Sensenbrenner/Conyers Announce Committee Oversight Plans and Hearings for Reauthorization of PATRIOT Act, March 28, 2005, *available at* <http://judiciary.house.gov/newscenter.aspx?A=468>.

In a press release announcing the hearings, Committee Chairman Sensenbrenner discussed the critical nature of Congress' debate on the PATRIOT Act sunset: "Consideration of reauthorization of the PATRIOT Act represents one of the most important tasks Congress faces this year. Lawmakers will focus a keen eye on all aspects of this law and how it has been implemented. What improvements, if any, are needed? Does the PATRIOT Act deserve to be made permanent? These are a few of the questions that will be asked." *Id.*

Ranking Member John Conyers, Jr. noted the importance of knowing how PATRIOT Act authorities have been used, stating, "There are few issues that are more important to this Committee and the American people than protecting our citizen's precious civil rights and civil liberties while continuing the battle against terror. I look forward to a full and fair review of these issues in the coming weeks and months. I hope the Department will be forthcoming in how their powers have been used, and will work with us to craft any further legislation in a bipartisan manner." *Id.*

Indeed, members of Congress have long been concerned about the extent to which the federal investigative authority was expanded by the PATRIOT Act. As Washington Post journalist Robert O'Harrow, Jr. explains,

Giving criminal investigators unchecked . . . powers could break down constitutional safeguards against unreasonable searches and seizures, leading to abuses against U.S. citizens. Dick Arme, one of the most conservative members in Congress . . . was already discussing a "sunset" provision to the new law, placing time limits on how long parts of it would remain in effect. A sunset provision would guarantee that some of the most troubling new powers would be revisited by Congress, giving lawmakers an important check on executive authority.

NO PLACE TO HIDE 24 (Free Press 2005).

In the few weeks between the 9/11 terrorist attacks and the passage of the PATRIOT Act, numerous members of Congress expressed support for a sunset provision to allow Congress to revisit the necessity for expanded investigative powers:

- “This bill has raised serious and legitimate concerns about the expansion of authorities for government surveillance and intelligence gathering within this country. Indeed, this bill will change surveillance and intelligence procedures for all types of criminal and foreign intelligence investigations, not just for terrorism cases. Significantly, the sunset provision included in the final bill calls for vigilant legislative oversight, so that the Congress will know how these legal authorities are used and whether they are abused over the next four years.” 147 Cong. Rec. S10991-2 (Oct. 25, 2001) (statement of Sen. Leahy).
- “If there are some abuses with the surveillance, we monitor it, we can pass new legislation, and we can change it. It sunsets in 4 years. That is reversible. I err on the side of protection for people.” 147 Cong. Rec. S11026 (Oct. 25, 2001) (statement of Sen. Wellstone).
- “Most importantly, this bill preserves a sunset over many provisions of the bill. . . . It should keep the Department of Justice in line while providing Congress the opportunity to conduct effective oversight over the implementation and use of these new law enforcement authorities.” 147 Cong. Rec. H6759 (Oct. 12, 2001) (statement of Rep. Sensenbrenner).
- “I am pleased at the compromise we have reached on the antiterrorism legislation, as a whole, which includes the sunset provision on the wiretapping and electronic surveillance component. It has been a source of considerable concern for people, and I think the sunset provision provides Congress a chance to come back and measure the record appropriately, and that is appropriate.” 147 Cong. Rec. S11027 (Oct. 25, 2001) (statement of Sen. Kerry).
- “It gives us the time to review whether there were any outrageous uses of these provisions or whether uses were appropriate under the basic intent of the bill.” 147 Cong. Rec. S11033 (Oct. 25, 2001) (statement of Sen. Feinstein).
- “The language in this bill needs improvement. That is why we at least insisted on a short sunset . . . We need time to reconsider and draft legislation without the rush that this bill has been subjected to. . . . we ought to be concerned about the wiretap provisions under this legislation.” 147 Cong. Rec. H6760-1 (Oct. 12, 2001) (statement of Rep. Scott).
- “Probably the saving grace here is that the sunset provision forces us to come back and to look at these issues again when heads are cooler and when we are not in the heat of battle.” 147 Cong. Rec. H7206 (Oct. 23, 2001) (statement of Rep. Udall).

- “I also happen to be a proponent of the sunset provisions. I am concerned about civil liberties for everyone, and I believe that it is important to note that some of these provisions may, may be unnecessary at another time in our Nation's history. So I believe that the agreement for the 4-year sunset provision is an appropriate one, and I congratulate my colleagues for coming to this compromise on it.” 147 Cong. Rec. H7203 (Oct. 23, 2001) (statement of Rep. Dreier).
- “The sunset provision obviously will give us a second look and correct the problems that we hope will not arise, but many of us fear.” 147 Cong. Rec. H7206 (Oct. 23, 2001) (statement of Rep. Delahunt).
- “One of the key provisions of the bill is the sunset provisions relating to the Foreign Intelligence Surveillance Act, electronic surveillance, and information sharing which expire on December 31, 2005, with an appropriate exception for ongoing investigations. This will enable us to see how this expanded power will work out and will require reauthorization, new legislation, if we wish to continue it beyond.” 147 Cong. Rec. S11046 (Oct. 25, 2001) (statement of Sen. Specter).
- “I remain concerned about several provisions such as those involving wiretap authorities, pen register and trap and trace, computer trespass, access to business records and other new legal authorities which will not require a showing by the government of probable cause or allow for any meaningful judicial review. The scope of these provisions may make them susceptible to abuse — allowing inappropriate, possibly unconstitutional, intrusion into the privacy of American citizens. I am pleased that some of the most disconcerting provisions of this legislation will expire in four years. This ‘sunset’ provision will give Congress the opportunity to evaluate the implementation of these new laws, and reassess the need for the changes.” 147 Cong. Rec. S11029 (Oct. 25, 2001) (statement of Sen. Cantwell).

In recent days, the Department of Justice has also shown concern about the law’s renewal by focusing much attention on the PATRIOT Act authority sunseting at the end of the year. The Attorney General’s first policy speech in his official capacity focused largely on his support for renewal of the PATRIOT Act’s sunseting provisions. Jeffrey Smith, “Attorney General Urges Renewal of Patriot Act,” *Washington Post*, March 1, 2005 at A02. Throughout March, the Attorney General has continued to voice his support for the PATRIOT Act, and has even been described by in one news article as the “leading salesman” for renewal of the law’s sunseting provisions. Andrew Zajac, “Push Begins to Strengthen Patriot Act,” *Chicago Tribune*, March 8, 2005 at C10; *see also* Bob Dart, “Patriot Act Revision Sought,” *Atlanta Journal-Constitution*, March 23, 2005, at 5A.

The Attorney General maintains that he supports a debate on the merits of the PATRIOT Act provisions subject to renewal: "Debate about government exercise of powers that might infringe upon privacy or civil liberties, I think that's an appropriate debate,' he said. 'But it's got to be a real debate; one based on facts. And I've yet to hear a strong argument as to why the Patriot Act should not be reauthorized.'"

Michelle Mittelstadt, "Gonzales Defends Patriot Act," *Dallas Morning News*, March 8, 2005. There is unquestionably an urgency for the FBI to make public facts about its use of the sunset provisions of the PATRIOT Act if such debate is to occur before December 31, 2005.

In addition to Congress and the Department of Justice, the media is devoting much attention to the PATRIOT Act sunset, which has been a matter of widespread and exceptional press coverage. In fact, a Google News search for "PATRIOT Act sunset" returns 62 results from news outlets across the country in the last month alone (first page of results attached hereto). The media interest in the renewal of the PATRIOT Act's sunset provisions will only intensify as December approaches.

Furthermore, the United States District Court for the District of Columbia just last year recognized the importance of the upcoming PATRIOT Act renewal debate in demonstrating an "urgency to inform the public" about a sunset provision of the law. In *ACLU v. Department of Justice*, the court held that FOIA requesters (including EPIC) were entitled to expedited processing of records concerning use of Section 215 of the PATRIOT Act. 321 F. Supp. 2d 24, 31 (D.D.C. 2004). The court noted that the FOIA request "unquestionably implicates important individual liberties and privacy concerns which are of immediate public interest in view of the ongoing debate regarding the renewal and/or amendment of the Patriot Act." *Id.* at 29. Though the impending sunset of Section 215 was not the court's sole justification for finding the requesters were entitled to expedited processing in this case, the court determined that this factor, combined with the public's right to know how Section 215 was being used as well as newsworthiness of the subject, created a showing "more than sufficient to satisfy the requirements of 28 C.F.R. § 16.5(d)(1)(ii)." *Id.* at 31. As we have demonstrated above, all of these factors exist in this request as well, and clearly satisfy 28 C.F.R. § 16.5(d)(1)(ii). (Indeed, many of the factors considered by the court in *ACLU v. Department of Justice* concerning the demonstrated public interest in the use of the PATRIOT Act apply with equal force to this request. As such, we incorporate the court's decision by reference herein in support of this request.)

The purpose of EPIC's request is to obtain information directly relevant to the FBI's use of USA PATRIOT Act powers that Congress must decide whether to renew at the end of the year. The records requested involve the manner and extent to which the FBI is using these authorities clearly meet the standard for expedited processing.

Further, as I explain below in support of our request for "news media" treatment, EPIC is "primarily engaged in disseminating information."

Request for "News Media" Fee Status

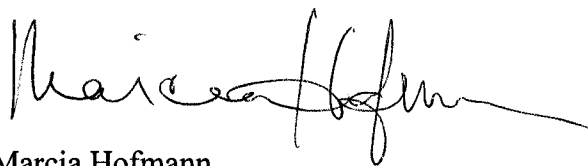
EPIC is a non-profit, educational organization that routinely and systematically disseminates information to the public. This is accomplished through several means. First, EPIC maintains a heavily visited Web site ([www.epic.org](http://www.epic.org)) that highlights the "latest news" concerning privacy and civil liberties issues. The site also features scanned images of documents EPIC obtains under the FOIA. Second, EPIC publishes a bi-weekly electronic newsletter that is distributed to over 15,000 readers, many of whom report on technology issues for major news outlets. The newsletter reports on relevant policy developments of a timely nature (hence the bi-weekly publication schedule). It has been published continuously since 1996, and an archive of past issues is available at our Web site. Finally, EPIC publishes and distributes printed books that address a broad range of privacy, civil liberties and technology issues. A list of EPIC publications is available at our Web site.

For the foregoing reasons, EPIC clearly fits the definition of "representative of the news media" contained in the FOIA and 28 C.F.R. § 16.11(b)(6). Indeed, the U.S. District Court for the District of Columbia has specifically held that EPIC is "primarily engaged in disseminating information" for the purposes of expedited processing, *ACLU*, 321 F. Supp. 2d at n.5, and is a "representative of the news media" for fee waiver purposes, *Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003). Based on our status as a "news media" requester, we are entitled to receive the requested records with only duplication fees assessed. Further, because disclosure of this information will "contribute significantly to public understanding of the operations or activities of the government," as described above, any duplication fees should be waived.

Thank you for your consideration of this request. As 28 C.F.R. § 16.5(4) provides, I will anticipate your determination on our request for expedited processing within ten (10) calendar days. Should you have any questions about this request, please feel free to call me at (202) 483-1140 ext. 112.

Under penalty of perjury, I hereby affirm that the foregoing is true and correct to the best of my knowledge.

Sincerely,



Marcia Hofmann  
Director, Open Government Project