



March 12, 2014

National Institute of Standards and Technology  
Catherine S. Fletcher, FOIA & Privacy Act Officer  
100 Bureau Drive, STOP 1710  
Gaithersburg, MD 20899-1710

**VIA EMAIL: [foia@nist.gov](mailto:foia@nist.gov)**

RE: Freedom of Information Act Request and Request for Expedited Processing

Dear Ms. Fletcher:

This letter constitutes a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 and 15 C.F.R. § 4.11, and is submitted to the National Institute of Standards and Technology (“NIST”) on behalf of the Electronic Frontier Foundation (“EFF”).

EFF requests the following records:

1. All records (including, but not limited to, electronic records) of correspondence sent to or from any employee, officer, agent, or representative of any of the following organizations between April 13, 2007 and the present:
  - a. American National Standard Institute (ANSI);
  - b. National Fire Protection Association (NFPA);
  - c. American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE); or
  - d. American Society for Testing and Materials (ASTM or ASTM International).
2. All records of meetings attended by any employee, officer, agent, or representative of any of the organizations listed in request number 1 occurring between April 13, 2007 and the present, including, without limitation, minutes, schedules, and attendance lists.

### **Request for News Media Fee Status**

EFF asks that it not be charged search or review fees for this request because EFF qualifies as a representative of the news media pursuant to the FOIA and 15 C.F.R. § 4.11(b)(6). In requesting this classification, we note that the Department of Homeland Security and National Security Agency, among other agencies, have recognized that EFF qualifies as a “news media” requester, based upon the publication activities set forth below. See the attached letters. We further note that the U.S. Court of Appeals for the D.C. Circuit has stressed that “different agencies [must not]

adopt inconsistent interpretations of the FOIA.” *Al-Fayed v. CIA*, 254 F.3d 300, 307 (D.C. Cir. 2001), quoting *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1287 (D.C. Cir. 1983).

The FOIA defines a “representative of the news media” as

any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term “news” means information that is about current events or that would be of current interest to the public.

5 U.S.C. § 552(a)(4)(A)(ii). The FOIA further provides that, “as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities.” *Id.*

Several courts have further defined the scope of news media status. For example, in *Nat’l Sec. Archive v. Dep’t of Def.*, the D.C. Circuit Court of Appeals held that a “representative of the news media” is “a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 880 F. 2d 1381, 1387 (D.C. Cir. 1989). The court noted that it is “critical that the phrase ‘representative of the news media’ be broadly interpreted if the Act is to work as expected.” *Id.* at 1386 (finding the National Security Archives’ activities, including “compilation and distribution of document sets [are] surely ‘publishing or otherwise disseminating information.’”). After the FOIA was amended in 2007 to clarify the definition of a news media representative, the D.C. District Court reiterated that the National Security Archive’s activities still qualified it as a “representative of the news media for all pending and future non-commercial FOIA requests.” *Nat’l Sec. Archive v. CIA*, 584 F. Supp. 2d 144, 147 (D.D.C. 2008); see also *EPIC v. Dept. of Defense*, 241 F. Supp. 2d 5, 12, 14 (D.D.C. 2003) (finding “no material difference between EPIC and National Security Archive and that, “in light of EPIC’s publication and distribution of its biweekly newsletter reporting on privacy and civil liberties issues [distributed to “over 15,000 readers”], the Court concludes that EPIC is a publisher of a periodical, and therefore falls within DoD’s definition of a representative of the news media”).

EFF meets the qualifications in the FOIA, in Department of Commerce regulations and in the cases cited above. EFF is a non-profit public interest organization that works “to confront cutting-edge issues defending free speech, privacy, innovation, and consumer rights.”<sup>1</sup> One of EFF’s primary objectives is to “educate the press and public” about online civil liberties.<sup>2</sup> To accomplish this goal, EFF routinely and systematically disseminates information in several ways.

First, EFF maintains a frequently visited web site, <http://www.eff.org>, which received 545,129 visitors in February 2014—an average of 811 per hour. The web site reports the latest

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<sup>1</sup> Charity Navigator Rating, Electronic Frontier Foundation, <http://www.charitynavigator.org/index.cfm?bay=search.summary&orgid=7576> (last visited March 11, 2014).

<sup>2</sup> *Id.*

developments and contains in-depth information about a variety of civil liberties and intellectual property issues.

EFF has regularly published an online newsletter, the EFFector, since 1990. The EFFector currently has more than 240,000 subscribers. A complete archive of past EFFectors is available at <http://www.eff.org/effector/>. EFF also maintains a presence on the social media networks Twitter (more than 176,000 followers), Facebook (more than 87,000 followers), and Google Plus (more than 2,300,000 followers).

In addition to reporting high-tech developments, EFF staff members have presented research and in-depth analysis on technology issues in no fewer than forty white papers published since 2003. These papers, available at <http://www.eff.org/wp/>, provide information and commentary on such diverse issues as electronic voting, free speech, privacy and intellectual property.

EFF has also published several books to educate the public about technology and civil liberties issues. *Everybody's Guide to the Internet* (MIT Press 1994), first published electronically as *The Big Dummy's Guide to the Internet* in 1993, was translated into several languages, and is still sold by Powell's Books (<http://www.powells.com>). EFF also produced *Protecting Yourself Online: The Definitive Resource on Safety, Freedom & Privacy in Cyberspace* (HarperEdge 1998), a "comprehensive guide to self-protection in the electronic frontier," which can be purchased via Amazon.com (<http://www.amazon.com>). Finally, *Cracking DES: Secrets of Encryption Research, Wiretap Politics & Chip Design* (O'Reilly 1998) revealed technical details on encryption security to the public. The book is available for sale at Amazon.com.

Due to these extensive publication activities, EFF is a "representative of the news media" under the FOIA and Department of Commerce regulations.

### **Request for a Public Interest Fee Waiver**

EFF is entitled to a waiver of duplication fees because disclosure of the requested information is in the public interest within the meaning of 5 U.S.C. § 552(a)(4)(a)(iii) and 15 C.F.R. § 4.11(k). To determine whether a request meets this standard, the agency must assess whether "[d]isclosure of the requested information . . . is likely to contribute significantly to public understanding of the operations or activities of the government," 15 C.F.R. § 4.11(k), and whether such disclosure "is not primarily in the commercial interest of the requester." *Id.* This request satisfies these criteria.

First, communications with standards organizations concerning standards that are or may be incorporated into federal law necessarily implicate "the operations or activities of the government." *Id.* These activities are an integral part of federal agency rulemaking. OMB Circular A-119 instructs agencies to "participate with [standards bodies] in the development of voluntary consensus standards when consultation and participation is in the public interest...."

With this request, EFF seeks to inform the public about the use of private sector standards in federal policymaking.

Second, disclosure of the requested information will contribute to a public understanding of government operations or activities. *Id.* EFF has requested information that will shed light on NIST's and federal agencies' participation in voluntary consensus standards, and in particular, government and private assessments of whether there is and has been adequate public access to such standards. This information will contribute not only to EFF's understanding of public access to primary legal sources, but also to the understanding of a reasonably broad audience of persons interested in the subject. EFF will make the information it obtains under the FOIA available to the public and the media through its web site and newsletter, and the other channels discussed above.

Furthermore, a fee waiver is appropriate here because EFF has no commercial interest in the disclosure of the requested records. 15 C.F.R. § 4.11(k). EFF is a 501(c)(3) nonprofit organization and will derive no commercial benefit from the information at issue here.

Thank you for your consideration of this request. If you have any questions or concerns, please do not hesitate to contact me at (415) 436-9333 x142. As the FOIA provides, I will anticipate a determination on this request for expedited processing within 10 calendar days.

I certify that, to the best of my knowledge and belief, all information within this request is true and correct.

Sincerely,

/s/ Mitchell Stoltz

Mitchell Stoltz  
Staff Attorney

Enclosures

# **ATTACHMENTS**



NATIONAL SECURITY AGENCY  
CENTRAL SECURITY SERVICE  
FORT GEORGE G. MEADE, MARYLAND 20755-6000

FOIA Case: 52276  
6 February 2007

Ms. Marcia Hofmann  
Electronic Frontier Foundation  
1875 Connecticut Avenue, NW  
Suite 650  
Washington, DC 20009

Dear Ms. Hofmann:

This is an initial response to your Freedom of Information Act (FOIA) request submitted via facsimile on 23 January 2007, which was received by this office on 24 January 2007, for all agency records (including, but not limited to, electronic records) related to the NSA's review of and input on the configuration of the Microsoft Windows Vista operating system ("Vista"). Your request has been assigned Case Number 52276.

As we began to process your request, we realized that the first page of the actual request was missing from your 18-page facsimile package. On 1 February 2007, a member of my staff contacted you to advise you of this fact. As a result, you submitted another facsimile of your original five-page request, which we received and have begun to process. There is certain information relating to this processing about which the FOIA and applicable Department of Defense (DoD) and NSA/CSS regulations require we inform you.

For purposes of this request and based on the information you provided in your letter, you are considered a representative of the media. Unless you qualify for a fee waiver or reduction, you must pay for duplication in excess of the first 100 pages. Your request for a fee waiver has been granted. In addition, please be advised your request for expedited treatment has been accepted. We are currently in the process of searching for responsive documents and will notify you of the status of your request as soon as that search has been completed.

Correspondence related to your request should include the case number assigned to your request, which is included in the first paragraph of this letter. Your letter should be addressed to National Security Agency, FOIA Office

(DC34), 9800 Savage Road STE 6248, Ft. George G. Meade, MD 20755-6248  
or may be sent by facsimile to 443-479-3612. If sent by fax, it should be  
marked for the attention of the FOIA office. The telephone number of the FOIA  
office is 301-688-6527.

Sincerely,

*for Marianne Stepan*

PAMELA N. PHILLIPS  
Chief  
FOIA/PA Office

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

ELECTRONIC FRONTIER )  
FOUNDATION )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
DEPARTMENT OF HOMELAND )  
SECURITY, )  
 )  
Defendant. )  
\_\_\_\_\_ )

Civil Action No. 06-1988 (ESH)

**STIPULATED DISMISSAL OF PLAINTIFF’S SECOND CAUSE OF ACTION**

Plaintiff Electronic Frontier Foundation (EFF) and Defendant Department of Homeland Security (DHS), by counsel, hereby stipulate and agree as follows:

1. Defendant DHS has granted news media status to Plaintiff EFF based on the representations contained in EFF’s FOIA requests, which demonstrate that EFF is an “entity that is organized and operated to publish or broadcast news to the public.” 6 C.F.R. § 5.11(b)(6). Defendant DHS will continue to regard Plaintiff EFF as a “representative of the news media” absent a change in circumstances that indicates that EFF is no longer an “entity that is organized and operated to publish or broadcast news to the public.” 6 C.F.R. § 5.11(b)(6).
2. Accordingly, the parties herewith agree to the dismissal of Plaintiff EFF’s Second Cause of Action, related to EFF’s status as a “representative of the news media.”
3. The parties further agree that each will pay its own fees and costs for work on the dismissed claim.

SO STIPULATED AND AGREED this 27<sup>th</sup> day of February, 2007.



/s/ David L. Sobel

DAVID L. SOBEL  
D.C. Bar 360418

MARCIA HOFMANN  
D.C. Bar 484136

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/s/ John R. Coleman

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