

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

ELECTRONIC FRONTIER FOUNDATION

1875 Connecticut Avenue, N.W.

Suite 650

Washington, DC 20009,

Plaintiff,

v.

DEPARTMENT OF DEFENSE,

The Pentagon

Washington, DC 20301,

Defendant.

CASE NUMBER 1:07CV00216

JUDGE: Emmet G. Sullivan

DECK TYPE: FOIA/Privacy Act

DATE STAMP: 01/31/2007

COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for injunctive and other appropriate relief. Plaintiff Electronic Frontier Foundation seeks the expedited processing and release of agency records requested by Plaintiff from the Defendant Department of Defense and its component, the Department of the Army. Specifically, Plaintiff seeks disclosure of records concerning an Army unit that monitors the Internet publishing activities of soldiers and seeks to have online material removed from Internet websites when it is deemed to be a security threat. Because the requested records involve a matter of substantial public interest, and there is an "urgency to inform the public" about the Army's regulation of soldiers' online speech, Plaintiff is statutorily entitled to expedited treatment of its request.

Jurisdiction and Venue

2. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552(a)(6)(E)(iii). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

Parties

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

4. Defendant Department of Defense (“DOD”) is a Department of the Executive Branch of the United States Government. DOD is an “agency” within the meaning of 5 U.S.C. § 552(f). The Department of the Army (“Army”) is a component within Defendant Department of Defense.

The Army Web Risk Assessment Cell’s Surveillance of Soldiers’ Online Speech

5. According to an article published by the Army News Service on October 12, 2006, an Army unit known as the Army Web Risk Assessment Cell (“AWRAC”) “scan[s] official and unofficial Army Web sites for operational security violations,” and “notifies webmasters and blog writers when they find documents, pictures and other items that may compromise security.”

6. On October 29, 2006, the Associated Press reported on the AWRAC’s activities. The Associated Press article cited the leader of a National Guard unit working with the AWRAC as saying, *inter alia*, that the AWRAC “has reviewed hundreds of thousands of sites every month, sometimes e-mailing or calling soldiers asking them to take material down.”

7. The Associated Press article also stated that some soldiers had changed their blogs or stopped blogging altogether because they are unsure whether their activities violated military

blogging guidelines. A Wired News article published on the same day similarly noted, “[r]esponding to a perceived crackdown, authors behind some of the web’s more popular military blogs have voluntarily shut down, or plan to curtail posts.”

8. The October 29, 2006 Wired News article also stated:

[t]he recent pressure on U.S. [military bloggers] . . . highlights the security risks of blogging by active military person[n]el—including those in Iraq with access to e-mail and the Internet. But it also signals a growing culture clash between military traditions of censorship and the expectations of young soldiers weaned on open digital culture, according to current and former military personnel.

9. After the publication of the Associated Press and Wired News articles, the AWRAC attracted substantial media interest around the globe.

**Plaintiff’s Freedom of Information Act Requests,
Requests for Expedited Processing, and
Requests for Favorable Fee Status**

10. By similar letters transmitted to Defendant DOD and the Army via facsimile on November 2, 2006, Plaintiff requested under the FOIA the following agency records from January 1, 2002 to the date of the requests (including, but not limited to, electronic records):

- A. Emails, letters, statements, memoranda, or other correspondence providing guidance or criteria to or from the Army Web Risk Assessment Cell on how to conduct Internet surveillance and/or monitoring;
- B. Records describing how data collected by the Army Web Risk Assessment Cell is retained, secured, used, disclosed to other entities, or combined with information from other sources;
- C. Any guidance or requirements issued to soldiers on blogging or posting material on the Internet;
- D. All requests or orders from Army officials to soldiers concerning revision or deletion of material from soldiers’ blogs or websites;
- E. All records concerning and/or discussing the applicability of the Privacy Act of 1974 to the Army Web Risk Assessment Cell’s collection of information about bloggers; and

F. All reviews or audits conducted on the implications of military blogging and the Army's surveillance and/or monitoring thereof.

11. On information and belief, Defendant DOD and the Army received Plaintiff's letters described in ¶ 10 on November 2, 2006.

12. Plaintiff requested expedited processing of the FOIA requests described in ¶ 10 in conformance with the requirements for such requests set forth in Defendant DOD's regulations. Plaintiff stated that its FOIA requests meet the criteria for expedited processing under 32 C.F.R. § 286.4(d)(3)(ii) because the information they request "is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity."

13. In support of its requests for expedited processing, Plaintiff provided evidence of substantial news media interest in the AWRAC, including results from a Google News search for "Army Web Risk Assessment Cell" that returned links to 135 stories from news outlets throughout the world after the publication of the Army News Service's article about the unit.

14. In further support of its requests for expedited processing, Plaintiff noted that "the Army itself has recognized both the newsworthiness of this matter and the importance of informing the public of the Army Web Risk Assessment Cell's work when it published its October 12, 2006 Army News Service article about the operation."

15. Plaintiff provided Defendant DOD and the Army extensive documentation demonstrating that Plaintiff is "primarily engaged in disseminating information" for purposes of expedited processing.

16. In its letters dated November 2, 2006, Plaintiff further requested that it not be charged search or review fees for the processing of its FOIA requests because EFF qualifies as a “representative of the news media” pursuant to the FOIA and Defendant DOD’s regulations, specifically 32 C.F.R. § 286.28(e)(7).

17. Plaintiff provided Defendant DOD and the Army extensive documentation demonstrating that it qualifies as a “representative of the news media” for fee assessment purposes.

The Army’s Failure to Respond to Plaintiff’s Request for Expedited Processing and Plaintiff’s FOIA Request

18. By letter dated November 6, 2006, the Army acknowledged receipt of Plaintiff’s FOIA request.

19. To date, the Army has not responded to Plaintiff’s request for expedited processing, nor has it released documents in response to Plaintiff’s FOIA request.

Defendant DOD’s Denial of Plaintiff’s Request for Expedited Processing and Failure to Respond to Plaintiff’s FOIA Request

20. By letter dated November 13, 2006, DOD acknowledged receipt of Plaintiff’s request, and denied Plaintiff’s request for expedited processing, stating, “[t]he information you have requested would not be considered the subject of a breaking news story because it has already been the subject of multiple national news stories, including an Army News Service article. Accordingly, I have determined that the criteria for granting expedited processing . . . are not met in this case. For these reasons, your request for expedited processing is denied.”

21. Defendant DOD also denied Plaintiff’s request for favorable news media fee status, stating, “[a]lthough I note that EFF publishes an online newsletter, I find that publishing and/or

disseminating information is not a main professional activity of EFF; therefore, EFF does not qualify as a representative in the news media.”

22. By facsimile transmitted to Defendant DOD on December 12, 2006, Plaintiff appealed DOD’s determination on both expedited processing and Plaintiff’s fee status.

23. By letter dated January 16, 2007, Defendant DOD granted EFF’s request that it be treated as a “representative of the news media” for fee assessment purposes. However, DOD upheld its denial of expedited processing.

24. In its letter to Plaintiff dated January 16, 2007, Defendant DOD asserted that Plaintiff had failed to demonstrate that there is an “urgency to inform the public” about the subject of Plaintiff’s FOIA request, but did not challenge Plaintiff’s assertion that EFF is “primarily engaged in disseminating information.”

25. To date, Defendant DOD and the Army have failed to disclose any records responsive to Plaintiff’s requests.

26. Plaintiff is entitled to expedited processing of its FOIA requests under the standards set forth in the FOIA and Defendant DOD’s regulations.

27. Defendant DOD and the Army have violated the 20-working-day statutory time limit for the processing of FOIA requests.

28. Plaintiff has exhausted all applicable administrative remedies.

29. Defendant DOD and the Army have wrongfully withheld the requested records from Plaintiff.

CAUSES OF ACTION

First Cause of Action:

Violation of the Freedom of Information Act for Failure to Grant Expedited Processing

30. Plaintiff repeats and realleges ¶¶ 1-29.

31. Defendant DOD and the Army's failure to grant Plaintiff's requests for expedited processing violate the FOIA, 5 U.S.C. § 552(a)(6)(E)(i), and Defendant DOD's own regulation promulgated thereunder, 32 C.F.R. § 286.4(d)(3)(ii).

32. Plaintiff has exhausted the applicable administrative remedies with respect to Defendant DOD and the Army's failure to grant Plaintiff's requests for expedited processing.

33. Plaintiff is entitled to injunctive relief with respect to its requests for expedited processing.

Second Cause of Action:

Violation of the Freedom of Information Act for Wrongful Withholding of Agency Records

34. Plaintiff repeats and realleges ¶¶ 1-29.

35. Defendant DOD and the Army have wrongfully withheld agency records requested by Plaintiff by failing to comply with the statutory time limit for the processing of FOIA requests.

36. Plaintiff has exhausted the applicable administrative remedies with respect to Defendant DOD and the Army's wrongful withholding of the requested records.

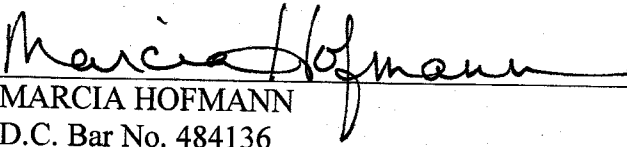
37. Plaintiff is entitled to injunctive relief with respect to the release and disclosure of the requested documents.

Requested Relief

WHEREFORE, Plaintiff prays that this Court:

- A. Order Defendant DOD and its component the Army to expedite the processing of Plaintiff's November 2, 2006, FOIA requests;
- B. Order Defendant DOD and the Army to expeditiously disclose the requested records in their entireties and make copies available to Plaintiff;
- C. Provide for expeditious proceedings in this action;
- D. Retain jurisdiction of this action to ensure that the processing of Plaintiff's request is expedited;
- E. Award Plaintiff its costs and reasonable attorneys fees incurred in this action; and
- F. Grant such other relief as the Court may deem just and proper.

Respectfully submitted,


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