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CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA

15 AMERICAN CIVIL LIBERTIES
16 UNION OF NORTHERN
17 CALIFORNIA, SAN FRANCISCO
18 BAY GUARDIAN, UNIVERSITY
19 OF CALIFORNIA SANTA CRUZ
20 STUDENTS AGAINST WAR and
21 BERKELEY STOP THE WAR
22 COALITION,

No. **05 1098**

19 Plaintiffs,
20 vs.

WHA
COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF

21 UNITED STATES DEPARTMENT
22 OF DEFENSE and its components,
23 DEPARTMENT OF THE ARMY,
24 DEPARTMENT OF THE NAVY,
25 and DEPARTMENT OF THE AIR
26 FORCE, and DOES 1-10, inclusive,

[Freedom of Information Act,
5 U.S.C. § 552 et seq.]

25 Defendants.

INTRODUCTION

1
2 1. This is an action under the Freedom of Information Act (“FOIA”),
3 Title 5 U.S.C. § 552, for injunctive and declaratory relief, seeking expedited
4 processing and release of agency records requested by plaintiffs American Civil
5 Liberties Union of Northern California (“ACLU-NC”), the San Francisco Bay
6 Guardian (“the Bay Guardian”), University of California Santa Cruz Students
7 Against War (“SAW”) and Berkeley Stop the War Coalition (“BSTW”) from
8 defendants United States Department of Defense (“DOD”) and its components
9 Department of the Army, Department of the Navy and Department of the Air
10 Force.

11 2. Pursuant to 5 U.S.C. § 552(a), plaintiffs submitted a written request to
12 the DOD and several of its components on February 1, 2006, asking that these
13 agencies make available for inspection and copying documents relating to the
14 DOD’s Threat and Local Observation Notice (“TALON”) report system and
15 database; domestic surveillance programs involving the collection of information
16 regarding plaintiffs SAW, BSTW and other domestic organizations involved in
17 political protest activities; and the retention, use and dissemination of records
18 about SAW, BSTW and other domestic organizations involved in political protest
19 activities by the DOD and/or its components or agents.

20 3. Plaintiffs requested expedited processing of their request pursuant to
21 5 U.S.C. § 552(a)(6)(E), 32 C.F.R. § 286.4(d)(3) and Sections C1.5.4.3 et seq. of
22 DOD Regulation 5400.7-R (September 1998), based on (1) the compelling need to
23 inform the public about the government’s domestic surveillance activities and
24 their impact on the exercise of constitutional rights and (2) the imminent loss of
25 substantial due process rights, including the right to privacy.

26 4. On February 13, 2006, the Office of Freedom of Information of the
27 Department of Defense denied plaintiffs’ request for expedited processing.

28 5. On February 16, 2006, the Defense Intelligence Agency, a DOD

1 component, granted plaintiffs' request for expedited processing on the basis of the
2 same FOIA request and supporting materials reviewed by the DOD's Office of
3 Freedom of Information.

4 6. On February 7, 2006, the Inspector General of the Department of
5 Defense, a DOD component, informed plaintiffs that it was forwarding plaintiffs'
6 FOIA request to the DOD's central Freedom of Information Office.

7 7. On February 22, 2006, the Department of the Army, a DOD
8 component, informed plaintiffs that it was forwarding plaintiffs' FOIA request to
9 the U.S. Army Intelligence and Security Command Freedom of
10 Information/Privacy Office, but did not otherwise provide any response to
11 plaintiffs' request for expedited processing.

12 8. Plaintiffs have not received a response to their request for expedited
13 processing from the Departments of the Navy and the Air Force, both DOD
14 components.

15 16 JURISDICTION AND VENUE

17 9. This Court has jurisdiction over this action and personal jurisdiction
18 over the parties pursuant to 5 U.S.C. § 552(a)(4)(B), § 552(a)(6)(E)(iii), 5 U.S.C.
19 §§ 701-706 and 28 U.S.C. § 1331. Venue lies in this district pursuant to 5 U.S.C.
20 § 552(a)(4)(B). Venue in San Francisco is proper under Civil Local Rule 3-2,
21 because a substantial part of the events which give rise to this claim occurred in
22 San Francisco County, where plaintiffs ACLU-NC and the Bay Guardian are both
23 headquartered.

24 25 PARTIES

26 10. Plaintiff American Civil Liberties Union of Northern California
27 ("ACLU-NC") is an affiliate of the American Civil Liberties Union, a national
28 organization that works to protect the civil liberties of all people, including

1 immigrants to the United States. ACLU-NC primarily serves the population of
2 Northern California. Because civil liberties have no boundaries, its work affects
3 persons throughout the United States.

4 11. Plaintiff ACLU-NC is a non-profit, non-partisan membership
5 organization. ACLU-NC publishes newsletters, provides news briefings, and
6 publishes and disseminates reports on civil liberties issues, right-to-know
7 documents and other materials to the public through its communications
8 department. Its material is widely available to everyone, including tax-exempt
9 organizations, not-for-profit groups, law students and faculty, for no cost or for a
10 nominal fee through its public education department. The ACLU-NC also
11 disseminates information through a public website accessible at
12 <http://www.aclunc.org/>. The website addresses civil liberties issues in depth,
13 provides features on civil liberties issues in the news, and contains numerous
14 documents that relate to civil liberties issues and concerns. The ACLU-NC also
15 disseminates information through a newsletter, which is distributed monthly to
16 subscribers by mail and is available to the general public. The ACLU-NC has
17 previously received documents pursuant to the FOIA, and has immediately made
18 documents available to the public by posting them on its website. The
19 communications department of the ACLU-NC is primarily engaged in
20 disseminating information in that its principal activity involves publishing or
21 otherwise disseminating information to the public.

22 12. Plaintiff the San Francisco Bay Guardian is the largest circulation
23 newsweekly in Northern California, with audited weekly distribution of 150,000
24 copies. The newspaper is locally owned and independent, and has been
25 continuously published since 1966. The Bay Guardian covers breaking news, arts,
26 entertainment and lifestyle issues, does detailed investigative reporting and
27 publishes editorials. It has received more than 100 state, local and national awards
28 for journalistic excellence. The Bay Guardian is a member of the California

1 Newspaper Publishers Association and the Association of Alternative
2 Newsweeklies. The Bay Guardian is primarily engaged in disseminating
3 information in that its primary activity involves publishing or otherwise
4 disseminating information to the public.

5 13. Plaintiff University of California Santa Cruz Students Against War
6 (“SAW”) is an unincorporated association. It is student-run and dedicated to
7 stopping war in all its forms. The association is working to stop the current war
8 in Iraq. SAW is committed to stopping military funding of university projects and
9 military recruitment on the University of California Santa Cruz campus. SAW
10 believes that the occupation of Iraq is unjust and illegal and that the military’s
11 “Don’t Ask, Don’t Tell” policy regarding gay members of the military violates the
12 University of California’s non-discrimination policies.

13 14. Plaintiff Berkeley Stop the War Coalition (“BSTW”) is an
14 unincorporated association. It is a diverse coalition of students on the University
15 of California Berkeley campus who oppose various military activities of the
16 United States government. BSTW supports peace, justice and equality, and
17 opposes racism, militarism and attacks on civil liberties. BSTW has organized
18 numerous protests against military recruitment on the University of California
19 Berkeley campus.

20 15. Defendant Department of Defense is a Department of the Executive
21 Branch of the United States and is an agency within the meaning of 5 U.S.C.
22 § 552 (f)(1). Defendants Department of the Army, Department of the Navy, and
23 Department of the Air Force are components of the DOD.

24 16. Plaintiffs are ignorant of the true names and capacities of defendants
25 sued herein as DOES 1-10, inclusive, and therefore sue said defendants by such
26 fictitious names. Plaintiffs are informed and believe and therefore allege on
27 information and belief, that each of them is responsible in some manner for the
28 violations alleged herein. Plaintiffs therefore sue DOES 1-10, inclusive, by such

1 fictitious names and will seek leave to amend this complaint to add their true
2 names and capacities when the same have been ascertained.

3
4 FACTS

5 17. In the years since the terrorist attacks of September 11, 2001, the
6 United States government's domestic surveillance activities have expanded
7 dramatically. This expansion has raised serious and pressing questions about why
8 and how targets of surveillance are selected and monitored, and what the
9 government does with the information it gathers about these targets. Such matters
10 are of ever increasing public concern, as reflected in both the widespread media
11 interest in these issues and Congressional action to investigate and exercise more
12 control over domestic surveillance programs.

13 18. In late 2005 and early 2006, public concern over domestic
14 surveillance and information gathering by the government intensified with the
15 revelation in media reports of several different domestic surveillance and reporting
16 programs that had previously been kept secret by the government. These
17 programs included, among others, warrantless wiretapping of telephone
18 communications by the National Security Agency and FBI surveillance of activist
19 groups in the United States.

20 19. One of the secret domestic surveillance programs that has recently
21 come to public attention involves the DOD's Counterintelligence Field Activity
22 Agency ("CIFA"). In a November 2005 news article, the Washington Post
23 described CIFA as a little-known DOD component created in 2002. Walter
24 Pincus, "Pentagon Expanding Its Domestic Surveillance Activity," Wash. Post,
25 Nov. 27, 2005, at A6. CIFA's exact size, budget and scope of activities remain
26 classified, but the news article reported that CIFA is responsible for gathering and
27 analyzing information collected by the DOD and other sources, and that the White
28 House was then considering expanding CIFA's powers to increase the

1 government's domestic surveillance capabilities.

2 20. In December 2005, NBC News reported that it had obtained records
3 from a database maintained by the DOD that contained entries about several
4 antiwar and counter-recruitment meetings and demonstrations. See Lisa Myers et
5 al, "Is the Pentagon Spying on Americans?" msnbc.com, Dec. 14, 2005. The
6 database includes reports gathered through the Threat and Local Observation
7 Notice ("TALON") report system, a DOD program instituted in 2003 to track
8 groups and individuals with possible links to terrorism.

9 21. The database records obtained by NBC included entries about
10 demonstrations at the University of California Santa Cruz and the University of
11 California Berkeley in April 2005.

12 22. The DOD database records listed a University of California Santa
13 Cruz event, which was led by plaintiff SAW, as a "protest against military
14 recruiters at University of California at Santa Cruz (UCSC) on 5 April 05." The
15 event was designated as a "threat," "credible" and "closed/unresolved."

16 23. The DOD database records listed a University of California Berkeley
17 event, which was held on April 20 or 21 and led by plaintiff BSTW, as "direct
18 action protest planned against recruiters at UC Berkeley." The event was
19 designated as a "threat" but was deemed "not credible" and "closed/unresolved."
20 A comment notes that the "protest took place without incident."

21 24. The NBC report generated widespread attention from the news media
22 and public officials both nationally and locally. In the weeks since the report was
23 first published on December 14, 2005, there have been numerous news reports
24 about the TALON program and database, the role of CIFA in creating and
25 maintaining the database and the misuse of the TALON system to monitor First
26 Amendment-protected protest activities, as well as about the public's broader
27 concerns regarding the government's increasing use -- and abuse -- of domestic
28 surveillance tactics. See, e.g., David S. Cloud, "Pentagon is Said to Mishandle a

1 Counterterrorism Database,” New York Times, Dec. 16, 2005, at A36; Chris
2 Matthews, “Update: Pentagon Eyeing Activist Groups?” Hardball, Dec. 16, 2005;
3 “Pentagon Snooping Fits State’s Post 9/11 pattern,” www.insidebayarea.com, Dec.
4 27, 2005; Walter Pincus, “Unverified Reports of Terror Linger,” Washington Post,
5 Jan. 31, 2006, at A6.

6 25. Many of the news reports about the DOD’s TALON program and
7 database have focused on the issue of campus surveillance, including at the Santa
8 Cruz and Berkeley campuses of the University of California. See, e.g., “Pentagon
9 Singles out Schools as Security Threats,” www.dailycolonial.com, Dec. 25, 2005;
10 Becky Bartindale, “UCSC Chief Alleges Spying,” San Jose Mercury News, Dec.
11 29, 2005; Rob Capriccioso, “Evidence of Pentagon Surveillance,”
12 www.insiderhighered.com, Dec. 30, 2005; Becky Bartindale, “Students React to
13 Spy Charge,” San Jose Mercury News, Dec. 30, 2005; “Bad Targeting,”
14 www.washingtonpost.com, Jan. 30, 2006.

15 26. Several public officials have protested the misuse of the TALON
16 program and database and called for an investigation into the DOD’s use of the
17 program. See, e.g., Becky Bartindale, “Lofgren Seeks Probe of Pentagon
18 Activity,” San Jose Mercury News, Jan. 3, 2006; Erica Werner, “Senator Raises
19 Question on Pentagon Program,” sfgate.com, Jan. 12, 2006; “Feinstein Demands
20 Rumsfeld Explain UCSC Spying,” www.santacruzsentinel.com, Jan. 13, 2006.

21 27. Concern over the misuse of the TALON program and database has
22 been so great that the DOD publicly conceded the need to review and revamp the
23 system. See, e.g., “Pentagon Reviews Use of Suspicious People, Activity
24 Database,” www.foxnews.com, Dec. 15, 2005; “Pentagon Reviewing Handling of
25 Information on Suspicious People,” www.msnbc.msn.com, Jan. 11, 2006;
26 “Pentagon to Probe Abuse of Security Database,” www.npr.org, Jan. 11, 2006.

27 28. To date, the public has only had access to very limited information
28 about the TALON program and the DOD’s involvement in domestic surveillance

1 activities.

2 29. On February 1, 2006, plaintiffs submitted a written request to
3 defendant DOD, the three DOD components named as defendants herein and the
4 Defense Intelligence Agency and the Inspector General of the Department of
5 Defense, both DOD components, pursuant to Title 5 U.S.C. § 552(a), asking that
6 the agencies make available for inspection and copying on an expedited basis
7 documents relating to (1) surveillance of and collection of information regarding
8 plaintiffs SAW and BSTW; (2) the retention, use, dissemination and destruction of
9 records about SAW and BSTW; (3) surveillance of and information gathering
10 regarding antiwar and counter-recruitment demonstrations held in April and
11 October 2005 at the University of California Santa Cruz, and in April 2005 at the
12 University of California Berkeley; (4) authorizations, regulations, procedures and
13 protocols governing the DOD's TALON report system and database; (4) the
14 failure to purge information from the TALON database as required by DOD
15 regulations; (5) CIFA regulations governing the gathering, retention, use,
16 dissemination and destruction of information on activities within the United
17 States; and (6) analysis of the DOD's practice of documenting and retaining
18 records regarding domestic antiwar and counter-recruitment activities.

19 30. Title 5 U.S.C. § 552(a)(6)(E) requires each government agency
20 subject to the FOIA to "promulgate regulations..., providing for expedited
21 processing for requests for records - (I) in cases in which the person requesting the
22 records demonstrates a compelling need; and (II) in other cases determined by the
23 agency.

24 31. Title 32 C.F.R. §286.4(d)(3), a regulation of the Department of
25 Defense, provides in relevant part:

26 Expedited Processing. A separate queue shall be established for
27 requests meeting the test for expedited processing. Expedited
28 processing shall be granted to a requester after the requester requests
such and demonstrates a compelling need for the information. Notice
of the determination as to whether to grant expedited processing in
response to a requester's compelling need shall be provided to the

1 requester within 10 calendar days after receipt of the request in the
2 DoD Component's office that will determine whether to grant
3 expedited processing. Once the DoD Component has determined to
4 grant expedited processing, the request shall be processed as soon as
5 practicable. Actions by DoD Components to initially deny or affirm
6 the initial denial on appeal of a request for expedited processing, and
7 failure to respond in a timely manner shall be subject to judicial
8 review.

9 (I) Compelling need means that the failure to obtain the records on an
10 expedited basis could reasonably be expected to pose an imminent
11 threat to the life or physical safety of the individual.

12 (ii) Compelling need also means that the information is urgently
13 needed by an individual primarily engaged in disseminating
14 information in order to inform the public concerning actual or alleged
15 Federal Government activity. An individual primarily engaged in
16 disseminating information means a person whose primary activity
17 involves publishing or otherwise disseminating information to the
18 public. Representatives of the news media ... would normally qualify
19 as individuals primarily engaged in disseminating information. Other
20 persons must demonstrate that their primary activity involves
21 publishing or otherwise disseminating information to the public.

22 (A) Urgently needed means that the information has a particular value
23 that will be lost if not disseminated quickly. Ordinarily this means a
24 breaking news story of general public interest. However, information
25 of historical interest only, or information sought for litigation or
26 commercial activities would not qualify, nor would a news media
27 publication or broadcast deadline unrelated to the news breaking
28 nature of the information.

...

(iv) Other reasons for expedited processing. Other reasons that merit
expedited processing by DoD Components are an imminent loss of
substantial due process rights and humanitarian need. A
demonstration of imminent loss of substantial due process rights shall
be made by a statement certified by the requester to be true and
correct to the best of his or her knowledge.

32. Plaintiffs sought expedited processing of the request pursuant to 5
U.S.C. § 552(a)(6)(E), 32 C.F.R. § 286.4(d)(3) and Regulation C1.5.4.3 of DOD
5400.7-R, September 1998, based on (1) the compelling need to continue to
inform the public about the federal government's domestic surveillance activities
and due to its immediate impact on the continuing exercise of constitutional rights
and the chilling effect on the exercise of those rights, and (2) the imminent loss of
substantial due process rights, including the right to privacy, of plaintiffs SAW
and BSTW and other domestic antiwar activists.

1 33. In support of their request for expedited processing, plaintiffs cited
2 over 70 separate news articles -- many of them republished by multiple news
3 outlets -- including the articles described in paragraphs 19-27 above.

4 34. As reflected in the widespread and ongoing media coverage and the
5 outcry from public officials, uncovering and disseminating information about the
6 government's domestic surveillance efforts and operations is a matter of
7 continuing public interest and immediate urgent concern. Providing the public
8 with additional information about the TALON program and CIFA's related
9 policies and practices quickly is critical to enabling the public to understand and
10 assess the government's continuing use of domestic surveillance methods at the
11 present time, to its understanding and evaluation of the scope of their use and
12 efficacy in the "war on terror," and to its understanding and evaluation of whether
13 civil liberties are being sacrificed to wage that war. Because First Amendment
14 rights are at stake, prompt disclosure of this information is also crucial to reducing
15 fear and anxiety among persons and groups exercising their First Amendment-
16 protected rights and ensuring that lawful protest activities are not chilled by the
17 mystery surrounding government surveillance.

18 35. Because the records requested relate to surveillance of and retention,
19 use and/or dissemination of information about individuals and organizations based
20 on their political views, they concern the loss of substantial due process and other
21 constitutional rights, including the right to privacy. For example, members of
22 plaintiffs SAW and BSTW have no other means of determining whether their
23 inclusion in the TALON database has resulted in their being placed on airport
24 watch lists or in other government databases that could affect their due process
25 rights.

26 36. In addition, there is a very real risk that the information sought will
27 be lost if the plaintiffs' request is not processed on an expedited basis. News
28 reports indicate that information from the TALON database is supposed to be

1 purged after 90 days. In response to revelations that this policy has been violated,
2 the DOD is now taking steps to comply with the 90-day rule. As a result,
3 plaintiffs have a compelling need for the records sought , which may be lost if
4 processing is not expedited.

5 37. On February 13, 2006, the Office of Freedom of Information for the
6 Department of Defense denied plaintiffs’ request for expedited processing based
7 on a determination that (1) the information requested “is not the subject of a
8 breaking news story because, as you have demonstrated, the subject of your
9 request has already been addressed in several news articles from across the
10 country,” and (2) the information sought does not implicate the loss of substantial
11 due process rights.

12 38. On February 16, 2006, the Defense Intelligence Agency (“DIA”), a
13 DOD component, granted plaintiffs’ request for expedited processing on the basis
14 of the same FOIA request and supporting materials reviewed by the DOD’s Office
15 of Freedom of Information.

16 39. The Inspector General of the Department of Defense has informed
17 plaintiffs that it forwarded their FOIA request to the DOD’s central FOIA offices.

18 40. Defendants Department of the Army, Department of the Navy and
19 Department of the Air Force have not provided plaintiffs with a determination on
20 their request for expedited processing.

21 REQUISITES FOR RELIEF

22 41. The denial of plaintiffs’ request for expedited processing by the
23 DOD’s Office of Freedom of Information and the failure to respond to plaintiffs’
24 request for expedited processing by defendants Department of the Army,
25 Department of the Navy and Department of the Air Force are subject to immediate
26 judicial review. See 5 U.S.C. § 552(a)(6)(E)(iii).
27

28 42. An actual controversy exists: Plaintiffs submit that the DOD’s failure

1 to expedite processing of the FOIA request violates federal law. Plaintiffs are
2 informed and believe that the DOD contends that its failure to expedite processing
3 of plaintiffs' requests is consistent with federal law.

4 43. Plaintiffs and the public have a compelling need for the information
5 requested.

6 44. Plaintiffs and the public are suffering irreparable harm.

7 45. Domestic surveillance activities, and the public concerns about those
8 activities, have shown no signs of abeyance since February 1, 2006, when
9 plaintiffs submitted their request.

10 46. Plaintiffs have no adequate remedy at law to redress their rights.

11
12 FIRST CLAIM FOR RELIEF

13 47. Defendants' failure to grant plaintiffs' request for expedited
14 processing of their February 1, 2006 FOIA request violates the FOIA, 5 U.S.C.
15 § 552(a)(6)(E).

16
17 SECOND CLAIM FOR RELIEF

18 48. Defendants' failure to grant plaintiffs' request for expedited
19 processing of their February 1, 2006 FOIA request violates Title 32 C.F.R. §
20 286.4(d)(3) and Sections C1.5.4.3 et seq. of DOD Regulation 5400.7-R
21 (September 1998).

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