

1 HANNI M. FAKHOURY (SBN 252629)
hanni@eff.org
2 JENNIFER LYNCH (SBN 240701)
jlynch@eff.org
3 ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
4 San Francisco, CA 94109
Telephone: (415) 436-9333
5 Facsimile: (415) 436-9993

6 Attorneys for Plaintiff
7 ELECTRONIC FRONTIER FOUNDATION

8
9 **UNITED STATES DISTRICT COURT**
10 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
11 **SAN FRANCISCO DIVISION**

12 ELECTRONIC FRONTIER FOUNDATION,)
13 Plaintiff,) **COMPLAINT FOR INJUNCTIVE**
14 v.) **RELIEF FOR VIOLATION OF THE**
15 DEPARTMENT OF JUSTICE,) **FREEDOM OF INFORMATION ACT,**
16 Defendant.) **5 U.S.C. § 552**
17 _____)

18 1. This is an action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for
19 injunctive and other appropriate relief. Plaintiff seeks the release of records that Plaintiff requested
20 from Defendant Department of Justice and its component Drug Enforcement Agency concerning
21 the “Hemisphere” program, a partnership between telecommunications provider AT&T and law
22 enforcement officials, including the Drug Enforcement Agency, that allows law enforcement to
23 access detailed phone records and conduct complicated analysis and data mining of those records.

24 **PARTIES**

25 2. Plaintiff Electronic Frontier Foundation (EFF) is a not-for-profit corporation
26 established under the laws of the Commonwealth of Massachusetts, with offices in San Francisco,
27 California and Washington, D.C. EFF is a donor-supported membership organization that works to
28 inform policymakers and the general public about civil liberties issues related to technology and to

1 act as a defender of those liberties. In support of its mission, EFF uses the FOIA to obtain and
2 disseminate information concerning the activities of federal agencies.

3 3. Defendant Department of Justice (DOJ) is a Department of the Executive Branch of
4 the United States Government. DOJ is an “agency” within the meaning of 5 U.S.C. § 552(f). The
5 Drug Enforcement Agency (DEA) is a component of Defendant DOJ.

6 JURISDICTION

7 4. This Court has both subject matter jurisdiction over this action and personal
8 jurisdiction over the parties pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552(a)(6)(C)(i). This Court
9 also has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

10 VENUE AND INTRADISTRICT ASSIGNMENT

11 5. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §
12 1391(e).

13 6. Assignment to the San Francisco division is proper pursuant to Local Rule 3-2(c)
14 and (d) because a substantial portion of the events giving rise to this action occurred in this district
15 and division, where Plaintiff is headquartered.

16 FACTUAL ALLEGATIONS

17 **A. The “Hemisphere” Program**

18 7. On September 1, 2013, the *New York Times* reported on the existence of a
19 partnership between telecommunications provider AT&T and law enforcement officials known as
20 “Hemisphere.”¹ Included with the *New York Times* article was a PowerPoint presentation,
21 produced by the High Intensity Drug Trafficking Areas (HIDTA) program² that explained

22 _____
23 ¹ See Scott Shane and Colin Moynihan, “Drug Agents Use Vast Phone Trove, Eclipsing N.S.A.’s,”
New York Times, September 1, 2013, available at [http://www.nytimes.com/2013/09/02/us/drug-](http://www.nytimes.com/2013/09/02/us/drug-agents-use-vast-phone-trove-eclipsing-nsas.html)
24 [agents-use-vast-phone-trove-eclipsing-nsas.html](http://www.nytimes.com/2013/09/02/us/drug-agents-use-vast-phone-trove-eclipsing-nsas.html).

25 ² The “HIDTA” is a program administered by the White House’s Office of National Drug Control
26 Policy (ONDCP) that “provides assistance to Federal, state, local, and tribal law enforcement
27 agencies operating in areas determined to be critical drug-trafficking regions of the United States.”
28 “High Intensity Drug Trafficking Areas (HIDTA) Program,”
<https://www.whitehouse.gov/ondcp/high-intensity-drug-trafficking-areas-program>. That assistance
includes intelligence sharing between law enforcement agencies nationwide. The DEA explains it
plays “a very active role” in the HIDTA program and has almost 600 special agents dedicated to
the program. “DEA Programs: High Intensity Drug Trafficking Areas (HIDTAs),” available at
<http://www.dea.gov/ops/hidta.shtml>.

1 Hemisphere.³ The existence of the program had not been previously reported.

2 8. The Hemisphere program involves the placement of AT&T employees within law
3 enforcement agencies that are part of the HIDTA program to facilitate law enforcement access to
4 electronic call detail records. Call detail records are telephone records containing a phone user's
5 dialing, routing and location information. Hemisphere allows law enforcement to conduct
6 complicated phone pattern analysis on these records to determine other phone numbers used by a
7 person, other individuals they communicate with and information about where they are when
8 making phone calls. According to the HIDTA PowerPoint presentation, the Hemisphere program
9 has call detail records going back to 1987 and contains over 4 billion call detail records on a daily
10 basis. According to the HIDTA PowerPoint, investigators submit an administrative or grand jury
11 subpoena or a court order to Hemisphere, which can then provide records to law enforcement in as
12 little as one hour.

13 10. In the presentation, HIDTA emphasized repeatedly that law enforcement must take
14 steps to "protect" the program and "keep the program under the radar."⁴ As a result, HIDTA
15 informs officers making requests "to never refer to Hemisphere in any official document," and in
16 cases where "there is no alternative to referencing a Hemisphere request, then the results should be
17 referenced as information obtained from an AT&T subpoena."⁵ The HIDTA PowerPoint stresses
18 that Hemisphere should be used as a "pointer system" that allows law enforcement to do
19 complicated analysis of phone call records to determine alternative phone numbers a suspect may
20 be using, as well as other associates they may be communicating with and even a phone's physical
21 location.⁶ Armed with this analysis, law enforcement can then issue a more traditional subpoena or
22 search warrant to the phone provider directly to obtain this information with the understanding it is
23 this subsequent subpoena or warrant that will be made public and available to criminal defendants

24 _____
25 ³ See "Synopsis of the Hemisphere Project," *New York Times*, September 1, 2013, available at
<https://s3.amazonaws.com/s3.documentcloud.org/documents/782287/database.pdf>.

26 ⁴ *Id.* at p. 8, available at
<https://s3.amazonaws.com/s3.documentcloud.org/documents/782287/database.pdf#page=8>.

27 ⁵ *Id.* at p. 12, available at
<https://s3.amazonaws.com/s3.documentcloud.org/documents/782287/database.pdf#page=12>.

28 ⁶ *Id.* at p. 10, available at
<https://s3.amazonaws.com/s3.documentcloud.org/documents/782287/database.pdf#page=10>.

1 through the discovery process. According to the slides, this allows the information obtained via
2 Hemisphere to be “walled off” from public scrutiny.⁷

3 **B. Plaintiff’s FOIA Requests and Requests for Expedited Processing.**

4 10. In a letter dated February 5, 2014 and sent by facsimile and email to the DEA,
5 Plaintiff requested under the FOIA seven categories of agency records, including electronic
6 records, concerning the Hemisphere program and requested expedited processing of the request.

7 11. DEA acknowledged Plaintiff’s request via a letter dated February 21, 2014. By
8 letter dated March 11, 2014, the DEA declined Plaintiff’s request for expedited processing. By
9 letter dated March 19, 2014, the DEA requested Plaintiff reformulate its request as to six of the
10 seven categories, explaining Plaintiff’s original request “does not reasonably describe records” and
11 was “overly broad and burdensome.” The DEA acknowledged the seventh request in Plaintiff’s
12 original request was acceptable as written and was being processed.

13 12. On April 15, 2014, Plaintiff submitted a reformulated request that narrowed the
14 information sought and the specific DEA offices to be searched.

15 13. Ultimately, Plaintiff requested DEA search its Headquarters in Springfield, Virginia
16 and the Los Angeles, San Diego and San Francisco field divisions, as well as all the offices within
17 those divisions, for the following records dated between 2008 and the present:

- 18 a. DEA memoranda, policies, procedures, forms, training and practice manuals,
19 concerning the “Hemisphere” program produced or possessed by DEA headquarters
20 these field divisions or the offices within those divisions;
- 21 b. Information contained with the Investigative Reporting and Filing System (“IRFS”)
22 concerning DEA headquarters, these field divisions, or the offices within those
23 divisions’ use of “Hemisphere” to obtain records or data in the course of an
24 investigation. Consistent with 28 C.F.R. § 502(b)(3), this request sought only
25 “incontrovertible, factual matters” limited to the name of a suspect charged in a
26 criminal case as a result of evidence obtained through “Hemisphere,” the docket
27 number of that criminal case, and the court of criminal prosecution, whether state or

28 ⁷ *Id.*

- 1 federal;
- 2 c. Any communications or discussions with AT&T or any other telecommunications
- 3 providers concerning technical or legal difficulties the DEA headquarters or these
- 4 DEA field divisions and the offices within the divisions have encountered in
- 5 obtaining records and data through “Hemisphere;”
- 6 d. Any communications or discussions that DEA headquarters or these DEA field
- 7 divisions and the offices within had with other law enforcement agencies, including,
- 8 but not limited to Immigrations and Customs Enforcement (“ICE”), the Federal
- 9 Bureau of Investigation (“FBI”) and state and local law enforcement agencies
- 10 related to coordinating or managing the “Hemisphere” program, or any data
- 11 obtained through “Hemisphere;”
- 12 e. Any contracts or compensation agreements that DEA headquarters, these field
- 13 divisions or the offices within these divisions had with AT&T or any other
- 14 telecommunications provider concerning the “Hemisphere” program;
- 15 f. Any communications, discussions, contracts or compensation agreement that DEA
- 16 headquarters, these field divisions or the offices within these divisions had with the
- 17 following fusion centers related to coordinating or managing the “Hemisphere”
- 18 program or any data obtained through “Hemisphere:” the California State Threat
- 19 Assessment Center, Central California Intelligence Center, Northern California
- 20 Regional Intelligence Center, Los Angeles Joint Regional Intelligence Center,
- 21 Orange County Intelligence Assessment Center, and the San Diego Law
- 22 Enforcement Coordination Center; and
- 23 g. Any briefings, discussions, or other exchanges between DEA or DOJ officials and
- 24 members of the Senate or House of Representatives concerning the existence and
- 25 operation of “Hemisphere.”
- 26 14. On May 23, 2014, via letter, DEA acknowledged receipt of the reformulated request
- 27 and stated it had begun the process of gathering and reviewing records.
- 28 15. On April 7, 2015, DEA produced records in response to Plaintiff’s request via postal

1 mail. DEA determined it had located 308 pages of responsive pages, of which it withheld 132
2 pages in full. DEA released the remaining 176 pages, however these were heavily redacted.

3 16. In the April 7, 2015 letter, DEA identified three statutory grounds under the FOIA
4 for withholding and redacting records: (a) 5 U.S.C. § 552(b)(5), which exempts privileged inter-
5 agency documents; (b) 5 U.S.C. § 552(b)(6), which exempts sensitive records; and (c) 5 U.S.C. §
6 552(b)(7), which exempts records compiled for a law enforcement purpose.

7 17. On April 28, 2014, via fax Plaintiff timely filed an administrative appeal of DEA's
8 response to Plaintiff's request with the Department of Justice's Office of Information Policy (OIP)
9 on the ground that the DEA has applied its claimed exemptions more broadly than the FOIA
10 allows. The faxed appeal was sent to the publicly available fax number for the OIP—202 514
11 1009—listed on the DOJ's website.⁸

12 18. As of the date of the filing of this Complaint, OIP has failed to respond
13 substantively to Plaintiff's administrative appeal.

14 19. As the statutory time period by which Defendant must respond to Plaintiff's appeal
15 has passed, Plaintiff has exhausted all applicable administrative remedies.

16 20. Defendant continues to wrongfully withhold the requested records from Plaintiff.

17 **CAUSES OF ACTION**

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

19 21. Plaintiff repeats and realleges paragraphs 1-20.

20 22. Defendant has wrongfully withheld agency records requested by Plaintiff by failing
21 to produce all records in the agency's possession responsive to Plaintiff's request and by failing to
22 adequately segregate responsive from non-responsive records.

23 23. Plaintiff has exhausted applicable administrative remedies with respect to
24 Defendant's wrongful withholding of the requested records.

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

27 _____
28 ⁸ See U.S. Department of Justice Office of Information Policy FOIA Contact, *available at*
<http://www.justice.gov/oip/oip-foia>.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

REQUESTED RELIEF

WHEREFORE, Plaintiff prays that this Court:

- 1. order Defendant to disclose the requested records in their entirety and make copies available to Plaintiff;
- 2. award Plaintiff its costs and reasonable attorneys fees incurred in this action; and
- 3. grant such other relief as the Court may deem just and proper.

DATED: July 9, 2015

By /s/ Hanni M. Fakhoury
Hanni M. Fakhoury

Jennifer Lynch
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109

Attorneys for Plaintiff
ELECTRONIC FRONTIER FOUNDATION