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6 February 2009

David M. Hardy, Chief  
Record/Information Dissemination Section  
Records Management Division  
Federal Bureau of Investigation  
170 Marcel Drive  
Winchester, VA 22602-4843

Re: FOIA Request – FBI response to Congress regarding FISA warrants

Dear Mr. Hardy:

This is a request on behalf of the James Madison Project (“JMP”) under the Freedom of Information Act, 5 U.S.C. § 552, *et seq.*, for a copy of **all Federal Bureau of Investigation (“FBI”) records, including cross-references, pertaining to the classified response to Question 25 (regarding inaccurate Foreign Intelligence Surveillance Act (“FISA”) warrants) mentioned under Question 25 of the attached FBI document, Responses of the Federal Bureau of Investigation Based Upon the July 26, 2007, Oversight Hearing Before the House Committee on the Judiciary.**

When processing this request, please note that the D.C. Circuit has previously held that agencies have a duty to construe the subject material of FOIA requests *liberally* to ensure responsive records are not overlooked. *See Nation Magazine, Washington Bureau v. U.S. Customs Service*, 71 F.3d 885, 890 (D.C. Cir. 1995). Accordingly, you are hereby instructed that the term “record” includes, but is not limited to: 1) all email communications to or from any individual within your agency; 2) memoranda; 3) inter-agency communications; 4) sound recordings; 5) tape recordings; 6) video or film recordings; 7) photographs; 8) notes; 9) notebooks; 10) indices; 11) jottings; 12) message slips; 13) letters or correspondence; 14)

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*James Madison, 1822*

telexes; 15) telegrams; 16) facsimile transmissions; 17) statements; 18) policies; 19) manuals or binders; 20) books; 21) handbooks; 22) business records; 23) personnel records; 24) ledgers; 25) notices; 26) warnings; 27) affidavits; 28) declarations under penalty of perjury; 29) unsworn statements; 30) reports; 31) diaries; or 32) calendars, regardless of whether they are handwritten, printed, typed, mechanically or electronically recorded or reproduced on any medium capable of conveying an image, such as paper, CDs, DVDs, or diskettes. Furthermore, in line with the guidance issued by the DOJ on 9 September 2008 to all federal agencies with records subject to FOIA, agency records that are currently in the possession of a U.S. Government contractor for purposes of records management remain subject to FOIA. Please ensure that your search complies with this clarification on the effect of Section 9 of the OPEN Government Act of 2007 of the definition of a “record” for purposes of FOIA. Please also consider this letter an affirmative rejection of any limitation of your search to FBI-originated records.

If you deny all or part of this request, please cite the specific exemptions you believe justify your refusal to release the information or permit the review and notify us of your appeal procedures available under the law. In excising material, please “black out” rather than “white out” or “cut out.” In addition, we draw your attention to President Obama’s 21 January 2009 *Memorandum for the Heads of Executive Departments and Agencies*, directing federal agencies to adopt a presumption in favor of disclosure and stating that government information should not be kept confidential “merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears.”

We are hereby requesting a waiver of all fees in accordance with our status as a representative of the news media. JMP is a non-profit organization under the laws of the District of Columbia, has the ability to disseminate information on a wide scale, and intends to use information obtained through FOIA in original works. Stories concerning our activities have received prominent mention in many publications including, but not limited to, the *Washington Post*, *Washington Times*, *St. Petersburg Tribune*, *San Diego Union Tribune*, *European Stars & Stripes*, *Christian Science Monitor*, *U.S. News and World Report*, *Mother Jones*, and *Salon Magazine*. Our website, where much of the information received through our FOIA requests is or will be posted for all to review, can be accessed at <http://www.jamesmadisonproject.org>, and information published there has previously been used by third parties in published works. In addition, we also intend to use information obtained through FOIA in our own published opinion editorials, journal articles, and the like. JMP’s Director of FOIA Operations Kel McClanahan has already published information received through FOIA in this manner. Therefore, according to the ruling of *National Security Archive v. Department of Defense*, 800 F.2d 1381 (D.C. Cir. 1989), codified by the 2008 FOIA amendments, defining a representative of the news media as “a person or entity that gathers information of potential interest to a segment of the public, uses its

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editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience,” JMP should be considered a representative of the news media according to 5 U.S.C. § 552(a)(4)(A)(ii)(II). Similarly, our request for a public interest fee waiver should be granted. Most prior requests submitted by our organization have received fee waivers.

There can be no question that the information sought would contribute to the public’s understanding of government operations or activities and is in the public interest. Recent years have seen considerable public debate over the FISA and the role of the Foreign Intelligence Surveillance Court (“FISC”). Through the end of 2004, the FISC approved 18,761 warrants, and rejected only five. It approved 2,072, in 2005, and 2,181 in 2006, rejecting none. In 2002, the FISC accused the FBI and Department of Justice (“DOJ”) of supplying “erroneous information” in more than 75 affidavits. Disclosure of the FBI’s response to Congressional questions about these errors would clearly and significantly contribute to the public’s understanding of government operations and activities.

The FBI is required by law to respond to this request within 20 working days. Failure to timely comply may result in the filing of a civil action against your agency in the United States District Court for the District of Columbia.

We request that any documents or records produced in response to this request be provided in electronic (soft-copy) form wherever possible. Acceptable formats are .pdf, .jpg, .gif, .tif. Please provide soft-copy records by email or on a CD if email is not feasible.

Your cooperation in this matter would be appreciated. If you wish to discuss this request, please do not hesitate to contact my Director of FOIA Operations Kel McClanahan at [REDACTED] [JamesMadisonProject.org](http://JamesMadisonProject.org) or 301-728-5908.

Please respond to this request by email to [REDACTED] [JamesMadisonProject.org](http://JamesMadisonProject.org) or by fax to 240-681-2189.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark S. Zaid for', written in a cursive style.

Mark S. Zaid  
Executive Director

MSZ/km

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