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U.S. DEPARTMENT OF COMMERCE  
FREEDOM OF INFORMATION ACT  
CENTRAL FACILITY

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March 24, 1995

Reference: EXPORT CONTROLS-UPDATE-DOC

Departmental FOIA/PA Officer  
U.S. Department of Commerce  
Washington, D.C. 20230  
ATTN: FOIA request

Dear Sir or Madam:

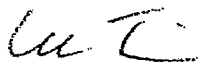
This is a request under the Freedom of Information Act [5 U.S.C. § 552(a)] on behalf of my client, Mr. John Gilmore.

Reference is made to a request currently on file with your agency which pertains to export controls on cryptography. A copy of the original request is enclosed.

This request is intended simply to update that request to reach all responsive agency records since the search cut-off date of the previous request. The request includes records of the Bureau of Export Administration and the National Institute for Standards and Technology. In all other respects the request is identical and as before I seek a fee waiver for my client.

As provided under the FOIA, I will expect a reply within ten (10) working days.

Sincerely,



Lee Tien  
Attorney at Law  
On behalf of Mr. John Gilmore

BXA-lead  
NIST-input

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December 28, 1993

Reference: EXPORT CONTROLS-DOC

Departmental FOIA/PA Officer  
U.S. Department of Commerce  
Washington, D.C. 20230  
ATTN: FOIA request

Dear Sir or Madam:

This is a request under the Freedom of Information Act [5 U.S.C. § 552(a)] on behalf of my client, Mr. John Gilmore.

I write to request a copy of all agency records or portions thereof, in electronic or other form, which pertain, relate, or refer to export controls on cryptography. This request includes records about how the controls were decided upon, what alternatives were considered, which agencies, components and individuals took what positions on export controls on cryptography, and how the controls evolved over the years since 1977.

This request also includes records which pertain to any policies, interpretive memoranda, rules or guidelines used in administering or implementing the International Traffic in Arms Regulations (ITAR) since 1977, such as policies or guidelines used in commodity jurisdiction review for determining whether items or classes of technologies are on the Munitions List. This request includes records pertaining to:

- \* the placement of cryptographic software (in binary form and/or in source code) [e.g., Data Encryption Standard (DES), Pretty Good Privacy (PGP)] in Category XIII(b) of the Munitions List;

- \* the placement of software which contains "hooks" for cryptography in Category XIII(b);

- \* the definition of "public domain" in 22 CFR § 120.11, including the meaning of the phrase "published form," and whether specific works of freely available software such as FDES, RSAREF or PGP are in the public domain;

- \* the applicability of the public domain provision of 22 CFR § 125.1(a) to cryptographic software (in binary form and/or in source code);

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\* whether information in the public domain, as defined under 22 CFR § 120.11, can be controlled as a "defense article" under 22 CFR Part 123 or as "technical data" within the meaning of 22 CFR § 120.10;

\* the applicability of the exemptions listed in 22 CFR § 125.4 to cryptographic software (in binary form and/or in source code);

\* the applicability of export controls to cryptographic software (in binary form and/or in source code) owned by a U.S. person but which physically and electronically exists only outside the borders of the United States;

\* the definition of "export" and whether it includes making information available in electronic form in the United States (e.g., on an electronic bulletin board or anonymous FTP server).

This request also includes all records pertaining to the legality or constitutionality of export controls. An example of such a document is the Memorandum to Dr. Frank Press, Science Advisor to the President, by John Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Constitutionality Under the First Amendment of ITAR Restrictions on Public Cryptography* (May 11, 1978), reprinted in House Comm. on Gov't Operations, *The Government's Classification of Private Ideas*, H.R. REP. NO. 1540, 96TH CONG., 2D SESS. 268-84 (1980).

Examples of documents covered by this request include:

\* correspondence with outside parties such as the Software Publishers' Association, Trusted Information Systems, the Austin Code Works (August 31, 1993 letter from Clyde G. Bryant, Jr. of the Office of Defense Trade Controls), or the BITNET (September 25, 1989 memorandum from Commerce General Counsel), and the drafts and notes referring or relating to such correspondence;

\* Congressional testimony, including classified testimony, such as was offered on October 12, 1993, in the House Subcommittee on Economic Policy, Trade and the Environment (any classified documents should be reviewed for declassification and only the classified portions may be withheld);

\* Federal Register notices, such as the reclassification of software in August 29, 1991, page 42825 of the Federal Register;

\* letters, notes and memoranda internal to your agency;

\* letters, notes and memoranda exchanged by your agency with other agencies, Congressional staff, and foreign governments;

\* internal guidelines, handbooks, textbooks, policies and procedures;

\* testimony, depositions and other records or discovery materials from court cases related to export of cryptography;

\* internal agency electronic mail;

\* electronic mail exchanged with other parties on this topic;

\* intercepted electronic mail or data transmissions on this topic (declassify as needed);

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\* intercepted (or otherwise obtained) physical documents or photos of documents on this topic (declassify as needed);

\* intercepted voice transmissions on this topic (declassify as needed).

This request includes records pertaining to the assertion or non-assertion of export controls over cryptographic software (in binary form and/or in source code) in any form, including cryptographic software published in printed books or magazines.

If the requested records are not in the possession of your agency, or if other agencies may also possess such records, I ask that you forward this request to any agency that you believe may have records responsive to this request, and inform me of such action. A similar request has already been sent to the National Security Agency/Central Security Service, the National Security Council, the State Department and the Justice Department. In the alternative, I ask that you inform me of other agencies that you believe possess and control such records.

As you know, the FOIA provides that an agency must make an initial determination of whether to comply with a FOIA request within ten working days of receiving the request.

If the records that you possess were originated or classified by another organization, I ask that your organization declassify them (if needed) and release them to me, as provided in the FOIA, within the statutory time limits. If there is a conflict between the statutory time limits and some regulation or policy that requires you to refer the records, the statutory requirement takes precedence over any Executive-branch regulation, policy or practice.

Congress placed a limit on the time which may be expended in referrals. The FOIA explicitly provides that referrals to other interested agencies or agency components are treated under the provision for "unusual circumstances," and cannot justify a delay of more than an additional 10 working days. 5 U.S.C. § 552(a)(6)(B)(iii).

"[W]hen an agency receives a FOIA request for 'agency records' in its possession it must take responsibility for processing the request. It cannot simply refuse to act on the ground that the documents originated elsewhere." McGehee v. C.I.A., 697 F.2d 1095, 1110 (D.C. Cir. 1983). Even records originated by other agencies are subject to immediate release under the applicable case law, if they were at the time of the request in the possession and control of your agency.

Simply put, the FOIA and the case law take precedence over executive branch regulations or practices regarding referrals. If you do refer documents to any other agency, and they are not provided within the time limits, we intend to litigate on this point.

We also remind you that the long-standing rule that the FOIA "makes no distinction between records maintained in manual and computer storage systems," Yeager v. D.E.A., 678 F.2d 315, 321 (D.C. Cir. 1982), has recently been amplified in Armstrong v. E.O.P., No 93-5002 (D.C. Cir., Aug. 13, 1993). Any paper print-outs of electronic records, such as e-mail, must include all information in the electronic record. Assuming that there would be no loss of releasable information, such as written comments made on paper print-outs, we therefore ask you to release all responsive electronic records in electronic, i.e., machine-readable, form.

As you know, the FOIA provides that even if some requested material is properly exempted from mandatory disclosure, all segregable portions must be released. [5 U.S.C. § 552(b)] If any or all material covered by this request is withheld, please inform me of the specific exemptions that are being claimed, and mark all deletions to indicate the exemption(s)

being claimed to authorize each individual withholding. If the (b)(3) exemption is claimed, please indicate the relevant withholding statute(s).

In addition, I ask that your agency exercise its discretion to release information that may be technically exempt. As you know, the Attorney General on October 4, 1993, directed that agencies should administer the FOIA under a presumption of disclosure, and that information which need not be withheld should not be.

I remind you that under Chrysler v. Brown 441 U.S. 281, 293 (1979), the 5 U.S.C. § 552(b) exemptions are discretionary, not mandatory. An agency can generally choose to release exempt information. This discretionary review process for withholding cannot take precedence over the law, which requires a response within specified time limits. Moreover, that discretion, according to the Attorney General's October 4, 1993 memorandum, must be exercised in accordance with a presumption of disclosure. Even if a substantial legal basis exists for withholding, information is not to be withheld unless it need be.

Your agency's timely response, however, is mandatory under 5 U.S.C. §§ 552(a)(3) and (a)(6)(A). It is physically and legally possible for your agency to fully disclose all documents identified as responsive, within the time limits: it involves some photocopying and mailing.

Please do not delay processing because of uncertainty about the request. I have reasonably described the records sought. If you have any questions regarding this request, please telephone me at the above number, and we can discuss your questions.

I also request that fees be waived because Mr. Gilmore should be deemed a media requester by your agency for FOIA purposes, and because the public interest would be furthered by granting him a fee waiver. Export controls on cryptography are a major public issue today, as evidenced by the recent introduction of Rep. Cantwell's HR 3627 transferring authority over cryptographic software to the Commerce Department. As a member of the board of directors of the Electronic Frontier Foundation (EFF), he is integrally involved in the public debate. EFF has officially announced its support of the Cantwell bill, has met multiple times with more than 50 industry representatives and with the White House over this issue, and has announced its policy stance in a letter to the President and in press releases to the public. In addition to his EFF involvement, Mr. Gilmore personally speaks and publishes regularly on the topic of cryptography policy (references available on request). I have provided more detailed information about Mr. Gilmore's credentials and activities in previous correspondence.

Mr. Gilmore has little commercial interest in this information. He is co-founder of a company, Cygnus Support, which obtains less than 5% of its revenue from cryptography-related products. He is also a shareholder in IBM and Sun Microsystems, companies whose business is affected by export controls on cryptography. Any information obtained from this FOIA request would have a minor impact on his personal financial interest in these businesses. It is the public policy questions which Mr. Gilmore is interested in. Should there be any problem in this regard, Mr. Gilmore promises to pay up to \$1000 in fees, and you should therefore begin processing of this request without fee-related delays.

As provided under the FOIA, I will expect a reply within ten (10) working days.

Sincerely,

