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10
11 **UNITED STATES DISTRICT COURT**
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN FRANCISCO DIVISION**

14 _____)
15 ELECTRONIC FRONTIER FOUNDATION,)

16 Plaintiff,)

17 v.)

18 OFFICE OF THE DIRECTOR OF NATIONAL)
19 INTELLIGENCE and UNITED STATES)
20 DEPARTMENT OF JUSTICE)

21 Defendants,)
22 _____)

No. 3:08-CV-1023 JSW

**DEFENDANTS' OPPOSITION
TO PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

SUMMARY OF ARGUMENT

1
2 Plaintiff's motion for preliminary injunction should be denied. Plaintiff's motion seeks a
3 preliminary injunction to require the defendants to complete processing of plaintiff's requests
4 under the Freedom of Information Act ("FOIA") within ten days. The relief plaintiff seeks is
5 inconsistent with the way FOIA requests are processed generally, and is also inconsistent with
6 the plain language of the expedited processing provision of the FOIA. Defendants have granted
7 plaintiff's request to expedite processing of the FOIA requests at issue. In accordance with the
8 expedited processing provision of the FOIA, defendants are working diligently to release
9 responsive records to plaintiff "as soon as practicable." 5 U.S.C. § 552(a)(6)(E)(iii). As
10 explained in the declarations submitted herewith, defendants have moved plaintiff's request to
11 the front of their respective processing queues and have made significant progress towards
12 releasing responsive records to plaintiff.

13 In addition to lacking success on the merits, plaintiff has failed to meet its essential
14 burden of identifying any irreparable harm that it might suffer if the requested relief is not
15 granted. Plaintiff's claim that it will suffer irreparable harm if defendants do not complete
16 processing of the requests within 10 days is entirely speculative, particularly given the likelihood
17 that debate over amendments to the Foreign Intelligence Surveillance Act will continue for the
18 foreseeable future because of the current legislative stalemate. Conversely, a preliminary
19 injunction ordering defendants to finish processing plaintiff's FOIA requests within 10 days
20 would impose undue burdens on defendants and injure their interests by creating a risk of
21 inadvertent disclosure of records (some of which contain classified national security
22 information) that are exempted from release under the FOIA. The proposed preliminary
23 injunction in this case also has the potential to harm the public interest by complicating and
24 disrupting the processing of other FOIA requests.

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5 28 C.F.R. § 16.1 *et seq.* *passim*

6 32 C.F.R. § 1700 *et seq.* *passim*

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9 H. R. Rep. No. 104-795 -15-, -24-

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 12 Act that Address the Foreign Intelligence Surveillance Act (FISA),
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INTRODUCTION

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2 Plaintiff Electronic Frontier Foundation (“EFF” or “plaintiff”) asks the Court to invoke
3 its extraordinary powers to award temporary emergency relief by issuing a preliminary
4 injunction to require the defendants in this case, the Office of the Director of National
5 Intelligence (“ODNI”) and the United States Department of Justice (“DOJ”), to complete
6 processing of plaintiff’s requests under the Freedom of Information Act (“FOIA”) within ten
7 days. Plaintiff’s FOIA requests seek records regarding DOJ and ODNI’s communications with
8 members of Congress and telecommunications companies concerning proposed amendments to
9 the Foreign Intelligence Surveillance Act (“FISA”), 50 U.S.C. § 1801 *et seq.*, as amended.
10 Plaintiff argues it will suffer irreparable harm if defendants do not produce all records responsive
11 to plaintiff’s FOIA requests before Congress acts to amend the FISA.

12 Plaintiff’s motion should be denied. Plaintiff’s request for relief by way of a preliminary
13 injunction – which is not preliminary in any sense but rather is an attempt to use a procedural
14 mechanism intended to provide emergency relief as a scheduling tool – is generally
15 inappropriate in FOIA cases. Plaintiff also offers the Court no compelling reason that justifies
16 granting the extraordinary relief it seeks.

17 Indeed, the relief plaintiff seeks is inconsistent with the way FOIA requests are processed
18 generally, and is also inconsistent with the plain language of the expedited processing provision
19 of the FOIA. Plaintiff attempts to invent a time limit by which defendants must complete their
20 FOIA processing by citing to the provision of the FOIA that gives agencies twenty business days
21 to make a determination about FOIA requests in the first instance. That provision, however,
22 does not establish a mandatory time by which the agency must release responsive documents to
23 plaintiff. Instead, the inability to respond within the 20-day period simply means that the
24 requester may, before a response has been made, file suit and be found to have constructively
25 exhausted administrative remedies.

26 In any event, defendants have already granted plaintiff’s request to expedite processing
27 of the FOIA requests at issue. Consistent with the expedited processing provision of the FOIA,
28 defendants are working diligently to release responsive records to plaintiff “as soon as

1 practicable.” 5 U.S.C. § 552(a)(6)(E)(iii). As explained in the attached declarations of ODNI
2 and DOJ FOIA officials, defendants have moved plaintiff’s request to the front of their
3 respective processing queues ahead of many non-expedited requests. Further, the declarations
4 establish that plaintiff’s demand that processing be completed within ten days is not practicable.

5 Plaintiff’s motion simply misunderstands the purpose and implications of FOIA’s
6 expedited processing provisions. A determination that a request warrants expedited processing
7 means only that the request should be processed ahead of other requests that have not been
8 granted expedited treatment. A grant of expedited processing by an agency does not mean that
9 the request can or should be processed within a specified time frame or on a schedule dictated by
10 the individual or organization who made the FOIA request. Instead, the FOIA provides that
11 requests, which are granted expedition by an agency, should be processed “as soon as
12 practicable,” with due regard for the agency’s processing capacity and current workload and the
13 need to ensure that requests are processed properly. Defendants, having granted plaintiff’s
14 request for expedited treatment, are working to complete the processing of plaintiff’s requests as
15 soon as practicable and, as explained in detail in the attached declarations, have taken
16 appropriate steps to that end.

17 In addition to lacking success on the merits, plaintiff has failed to meet its essential
18 burden of identifying any irreparable harm that it might suffer if the requested relief is not
19 granted. Plaintiff’s claim that it will suffer irreparable harm if defendants do not complete
20 processing of the requests according to plaintiff’s proposed 10 day schedule is entirely
21 speculative, particularly given the likelihood that debate over the FISA amendments will
22 continue for the foreseeable future because of the current legislative stalemate. Plaintiff
23 inappropriately seeks to use the preliminary injunction provisions of Federal Rule of Civil
24 Procedure 65, which are intended to provide a shield against imminent and irreparable injury
25 while a court considers the merits of a dispute, to accelerate artificially the merits proceedings in
26 this case. The injunction proposed by plaintiff does not seek to maintain the status quo; rather
27 plaintiff’s proposed injunction seeks a version of ultimate relief – the immediate disclosure of
28 non-exempt, responsive documents. Awarding plaintiff the ultimate relief it seeks by way of a

1 preliminary injunction at this early stage of these proceedings, before defendant is even required
2 to answer plaintiff's complaint, is without an appropriate basis in law.

3 For these reasons, as discussed further below, plaintiff's motion for preliminary
4 injunction should be denied. In lieu of plaintiff's unreasonable production schedule, defendants
5 should be permitted to continue processing plaintiff's FOIA requests in accordance with the
6 schedules proposed in the attached declarations. To ensure that the Court and plaintiff are
7 appropriately advised of defendants' efforts to process plaintiff's requests, defendants propose to
8 submit a status report to the Court in thirty days.

9 **BACKGROUND**

10 **1. Statutory and Regulatory Framework**

11 Agencies ordinarily process FOIA requests for agency records on a first-in, first-out
12 basis. *See Exner v. Federal Bureau of Investigation*, 542 F.2d 1121, 1123 (9th Cir. 1976). In
13 1996, Congress amended the FOIA to provide for "expedited processing" of certain categories of
14 requests. *See* Electronic Freedom of Information Amendments of 1996 ("EFOIA"), Pub. L. No.
15 104-231, § 8 (codified at 5 U.S.C. § 552(a)(6)(E)). If a request for expedited processing is
16 granted, the request moves immediately to the front of the agency's processing queue, ahead of
17 previously filed requests. *American Civil Liberties Union of Northern California v. Department*
18 *of Justice*, 2005 WL 588354 at *1 (N.D. Cal. Mar. 11, 2005).

19 As part of EFOIA, Congress directed agencies to promulgate regulations providing for
20 expedited processing of requests for records (i) "in cases in which the person requesting the
21 records demonstrates a compelling need"; 5 U.S.C. § 552(a)(6)(E)(i)(I); and (ii) "in other cases
22 determined by the agency." *Id.* § 552(a)(6)(E)(i)(II). FOIA defines "compelling need" to mean:

23 (I) that a failure to obtain requested records on an expedited basis under this
24 paragraph could reasonably be expected to pose an imminent threat to the life or
physical safety of an individual; or

25 (II) with respect to a request made by a person primarily engaged in
26 disseminating information, urgency to inform the public concerning actual or
alleged Federal Government activity."

1 5 U.S.C. § 552(a)(6)(E)(v).¹ The requester bears the burden of showing that expedition is
 2 appropriate. *See Al-Fayed v. Central Intelligence Agency*, 254 F.3d 300, 305 n.4 (D.C. Cir.
 3 2001). FOIA provides that “[a]n agency shall process as soon as practicable any request for
 4 records to which the agency has granted expedition.” 5 U.S.C. § 552(a)(6)(E)(iii).

5 Both ODNI² and DOJ have issued regulations addressing their FOIA administration and
 6 compliance with EFOIA. *See* 32 C.F.R. § 1700.1 *et seq.* (ODNI regulations); 28 C.F.R. § 16.1 *et*
 7 *seq.* (DOJ regulations). ODNI’s regulations provide that “[a]ll requests will be handled in the
 8 order received on a strictly ‘first-in, first-out’ basis.” *See* 32 C.F.R. § 1700.12(a). The
 9 regulations also include a provision addressing expedited processing, which allows requests to
 10 “be taken out of order and given expedited processing treatment whenever it is determined that
 11 they involve:”

12 (1) Circumstances in which the lack of expedited treatment could reasonably be
 13 expected to pose an imminent threat to the life or physical safety of an individual;
 or

14 (2) An urgency to inform the public concerning an actual or alleged Federal
 15 Government activity, if made by a person primarily engaged in disseminating
 information.

16 32 C.F.R. § 1700.12 (c). If a request for expedition is granted by ODNI, “the request shall be
 17 given priority and shall be processed as soon as practicable” 32 C.F.R. § 1700.12(b).

18 Similarly, DOJ’s regulations provide that FOIA requests shall be handled “according to
 19 their order of receipt.” 28 C.F.R. § 16.5(a). In the event a FOIA request satisfies the criteria for
 20

21
 22 ¹ Both Congress and the D.C. Circuit have recognized that the expedition categories are
 23 to be “narrowly applied” because, “[g]iven the finite resources generally available for fulfilling
 24 FOIA requests, unduly generous use of the expedited processing procedure would unfairly
 25 disadvantage other requesters who do not qualify for its treatment.” *Al-Fayed v. Central*
Intelligence Agency, 254 F.3d 300, 310 (D.C. Cir. 2001) (quoting H.R. Rep. No. 104-795,
reprinted at 1996 U.S.C.A.A.N. 3448, 3469 (Sept. 17, 1996)).

26 ² The position of Director of National Intelligence was created by Congress in the
 27 Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, §§ 1011(a) and
 1097, 118 Stat. 3638, 3643-63, 3698-99 (2004). The DNI serves as the head of the United States
 28 Intelligence Community and as the principal advisor to the President, the National Security
 Council, and the Homeland Security Council, for intelligence-related matters related to national
 security. *See* 50 U.S.C. §§ 403(b)(1), (2).

1 expedited processing,³ the request “will be taken out of order and given expedited treatment.”
 2 *See* 28 C.F.R. § 16.5(d)(1). Further, the DOJ regulations specify that a granted request for
 3 expedition “shall be given priority and shall be processed as soon as practicable.” 28 C.F.R. §
 4 16.5(d)(4).

5 **2. Factual Background.**

6 By letters dated December 21, 2007, plaintiff submitted nearly identical FOIA requests to
 7 ODNI and five DOJ components: Office of the Attorney General (“OAG”), Office of Legal
 8 Policy (“OLP”), Office of Legislative Affairs (“OLA”), Office of Legal Counsel (“OLC”), and
 9 National Security Division (“NSD”).⁴ *See* Plaintiff’s Memorandum, Exhibits K-N. Plaintiff’s
 10 letters requested:

11 all agency records from September 1, 2007 to the present concerning briefings,
 12 discussions, or other exchanges that [ODNI] Director McConnell or other ODNI
 13 officials [or in the case of the DOJ requests “Justice Department officials”] have
 14 had with 1) members of the Senate or House of Representatives and 2)
 15 representatives or agents of telecommunications companies concerning
 16 amendments to FISA, including any discussion of immunizing
 17 telecommunications companies or holding them otherwise unaccountable for their
 18 role in government surveillance activities. This request includes, but is not limited
 19 to, all email, appointment calendars, telephone message slips, or other records
 20 indicating that such briefings, discussions, or other exchanges took place.

21 *See id.* Plaintiff also sought expedited processing of their FOIA requests pursuant to the
 22 governing ODNI and DOJ FOIA regulations, 28 C.F.R. § 16.5(d); 32 C.F.R. § 1700.12, asserting
 23 that the public has a significant interest in the government’s efforts to amend the FISA. *See*
 24 Plaintiff’s Memorandum, Exhibits K-N.

25 In response, ODNI and all five DOJ components granted plaintiff’s request for expedited
 26 processing. In December and January 2008, ODNI and the DOJ components sent plaintiff letters
 27 acknowledging receipt of the FOIA requests and informing plaintiff that the requests would be
 28 processed on an expedited basis. *See* Plaintiff’s Memorandum, Exhibits O-S.

Plaintiff filed its complaint in this action under the FOIA on February 20, 2008, seeking

26 ³ These factors are similar to the ODNI criteria discussed above. *See* 28 C.F.R. §
 27 16.5(d)(1)(i-iv).

28 ⁴ DOJ handles its FOIA requests on a component-by-component basis (*e.g.*, FBI, DEA, ATF), *see* 28 C.F.R. § 16.3(a), whereas ODNI processes its request on an agency-wide basis.
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1 expedited processing and release of the records described above. *See* Complaint For Injunctive
2 Relief (dkt. no. 1). On February 29, 2008, plaintiff filed a motion for preliminary injunction
3 (dkt. no. 6), requesting that the Court order defendants to complete processing of plaintiff's
4 FOIA requests and to release all responsive records within ten days.

5 **3. Defendants' Efforts To Process Plaintiff's FOIA Requests.**

6 As explained more fully in the declarations submitted herewith, ODNI and the five DOJ
7 components have been working diligently to process plaintiff's FOIA requests as soon as
8 practicable.

9 **DOJ – National Security Division.** After granting plaintiff's request for expedited
10 processing, NSD immediately moved plaintiff's request ahead of fourteen other pending FOIA
11 requests received prior to plaintiff's request. *See* Declaration of GayLa Sessoms ¶ 5 (attached as
12 Exhibit 1) ("Sessoms Decl."). A search for responsive documents was then initiated within the
13 NSD offices reasonably likely to maintain records responsive to plaintiff's request. *Id.* ¶ 6.
14 Notifications and follow up reminders were sent to all NSD employees (approx. 50 people)
15 reasonably likely to maintain documents responsive to plaintiff's requests instructing them to
16 search their files for responsive records. *Id.* Because NSD's employees work on significant
17 mission-related matters pertaining to the national security of the United States, these officials
18 and employees were required to stop this critical work in order to perform the necessary searches
19 and each of them did so as soon as was practicable. *Id.* Searches were conducted by employees
20 in multiple offices within the NSD as well as by NSD's FOIA Program Analyst, FOIA
21 Coordinator and Records Officer. *Id.* ¶¶ 7-9. NSD completed its search for responsive records
22 during the week of March 10 and identified roughly two boxes of material that may be
23 responsive to plaintiff's request. *Id.* ¶ 10. NSD's FOIA staff is currently reviewing this material
24 to 1) ensure that it is responsive to plaintiff's request; 2) eliminate any duplicates; 3) identify all
25 third agency documents that require referral and/or consult; and 4) identify all classified records.
26 *Id.* NSD anticipates completing its review this week and will notify plaintiff of the exact volume
27 of responsive records no later than Friday, March 21, 2008. *Id.* Once the universe of responsive
28 documents is determined, NSD will immediately begin the review of this material for the

1 application of any FOIA exemptions. *Id.* This review will initially focus on unclassified records
2 that do not require consultation or referral to other agencies. *Id.* ¶ 12. NSD will complete its
3 review of this category of records and provide an interim release of records to plaintiff no later
4 than April 11, 2008. *Id.* With respect to responsive records that require referral and consult with
5 other agencies as well as any classified records, the NSD is not in a position at this time to
6 provide an estimated date of production given the numerous considerations and additional
7 burdens that must be taken into account before releasing such records. *Id.* ¶¶ 11-13. NSD is
8 committed to processing these records as soon as practicable and is willing to provide the Court
9 with a status report every 30 days to update the Court on the NSD's progress. *Id.* ¶ 13.

10 ***DOJ – Office of Legal Counsel.*** As soon as OLC made the decision to expedite
11 plaintiff's request, it was given priority status and moved to the front of the OLC request queue.
12 *See* Declaration of Paul Colborn ¶ 4 (attached as exhibit 2) ("Colborn Decl."). Plaintiff's request
13 is one of two expedited requests currently in the queue, and it has priority over the other
14 expedited request. *Id.* As such, it is being processed ahead of one expedited and nineteen
15 non-expedited FOIA requests currently pending. *Id.*

16 OLC initiated a search for records responsive by performing keyword search of the
17 electronic files of all OLC attorneys most likely to have responsive records. *Id.* ¶ 5. This search
18 protocol is a time-intensive process that requires information technology personnel to copy all
19 electronic files into a searchable format. *Id.* The keyword searches inevitably result in more
20 documents than are actually responsive to plaintiff's FOIA request. *Id.* Accordingly, the small
21 OLC staff and its attorneys must review these documents for duplicate and non-responsive
22 material while balancing their other competing work assignments, including urgent requests for
23 legal advice from Executive Branch agencies. *Id.* ¶ 6. The review of material in this case was
24 made more difficult by a litigation-related deadline in another FOIA case that required OLC to
25 devote the entire month of February toward review of over 15,000 pages of material. *Id.* ¶ 7
26 Notwithstanding these obstacles, OLC worked diligently over the last few weeks on plaintiff's
27 request and has now completed its search for responsive documents. *Id.* ¶ 8. OLC has identified
28 more than 5,000 documents totaling more than 10,000 pages of potentially responsive material.

1 *Id.* ¶¶ 8-9. OLC has culled this initial group to approximately 2,000 pages of material and is in
2 the process of reviewing this material more closely to determine responsiveness, to eliminate
3 duplicates, to assess which, if any, FOIA exemptions may apply, and to identify which
4 documents, if any, should be referred to other agencies for consultations. *Id.* ¶ 9. OLC
5 anticipates completing this review and issuing at least an interim response to plaintiff by no later
6 than March 25, 2008. *Id.* Based on a preliminary assessment of the documents, the interim
7 response will likely address many materials responsive to plaintiff's request. *Id.* OLC has,
8 however, identified a number of documents requiring consultations with other agencies;
9 consequently, a final OLC response will take more time. *Id.* Additionally, OLC has identified a
10 small number of classified documents for potential responsiveness. *Id.* The potential existence
11 of responsive classified material could contribute significantly to the time required complexities
12 attendant to processing plaintiff's request. *Id.* Allowing enough time for the agencies to review
13 and provide OLC their views, as well as to conduct any necessary review of any classified
14 information, OLC anticipates issuing a final response to plaintiff's request by April 22, 2008. *Id.*

15 ***DOJ – Offices of Legislative Affairs, Legal Policy, and Attorney General.*** FOIA
16 requests submitted to the senior leadership offices of the Department of Justice, including OLA,
17 OLP, and OAG, are handled by the Department's Office of Information and Privacy ("OIP").
18 *See* Declaration of Melanie Pustay ¶ 1 (attached as Exhibit 3) ("Pustay Decl."). As soon as
19 plaintiff's request was approved for expedited processing, it was moved ahead of other FOIA
20 requests received at an earlier date in OIP's FOIA queue. *Id.* ¶ 5. Immediately thereafter, record
21 searches were initiated in OLA, OLC, and OAG by informing individual staff members to search
22 all appropriate electronic and paper files for records responsive to plaintiff's request. *Id.* ¶ 6.
23 The officials in these offices typically conduct the searches themselves by hand searching large
24 paper files as well as electronic searches of a vast number of e-mail files. *Id.* While the officials
25 in these offices make every effort to respond to FOIA requests in a timely fashion, it is not
26 always possible for senior DOJ officials to stop their pressing day-to-day duties in order to
27 immediately perform a search for records responsive to a FOIA request. *Id.* These officials
28 performed the necessary searches as soon as it was practicable to do so. *Id.*

1 All three offices have completed exhaustive searches for records responsive to plaintiff's
2 request. *See id.* ¶¶ 7-22 (describing steps taken to search for records). OLA located
3 approximately 1,500 pages of material, OLP located 233 pages of material, and OAG located
4 913 pages of material. *Id.* ¶ 23. OIP is currently reviewing these documents and it is anticipated
5 that adjustments to these page counts will be made as duplicate and non-responsive material is
6 identified. *Id.* The records located all require further review, including consultations with
7 multiple DOJ components and other Executive Branch agencies, before a response can be
8 provided. *Id.* ¶ 24. Such consultations are required by Department of Justice regulation 28
9 C.F.R. § 16.4(c)(1), and are appropriate because other components within the Department and
10 other Executive Branch agencies have an interest in the documents. *Id.* Further, because none
11 of the documents originated with OIP, disclosure determinations necessarily must be made in
12 consultation with the originating offices. *Id.* Many of these consultations will need to be
13 conducted in stages, as certain offices need to know the views of other offices in order to make
14 their disclosure determinations. *Id.* Until these steps are completed, OIP cannot complete the
15 processing of the documents and make a final response to plaintiff. *Id.* Additionally, OIP has
16 located classified material, which adds significantly to the complexities attendant to processing
17 plaintiff's FOIA request. *Id.* ¶ 25.

18 OIP is making every effort to process plaintiff's requests as soon as practicable. *Id.* ¶ 26.
19 OIP anticipates providing plaintiff with an interim response of records by April 14, 2008. *Id.*
20 ¶ 27. Further, OIP anticipates providing a final response on May 23, 2007, assuming
21 consultations have been finalized. *Id.* ¶ 29. In the meantime, OIP is willing to provide the court
22 with status reports every thirty days regarding its progress. *Id.* ¶ 26.

23 **ODNI.** Once ODNI approved plaintiff's request for expedited processing, plaintiff's
24 FOIA request was given priority status and moved to the front of ODNI's FOIA queue. *See*
25 Declaration of John Hackett ¶ 5 (attached as Exhibit 4) ("Hackett Decl."). Plaintiff's request is
26 currently being processed ahead of 49 pending FOIA requests. *Id.* Further, ODNI performed
27 searches in a variety of offices reasonably likely to have responsive material. *Id.* ¶ 6. The ODNI
28 employees who were asked to search for responsive records work on important matters related to

1 the national security of the United States and they were required to stop this critical work in
2 order to perform the necessary searches. *Id.* ¶ 7. As records were located, ODNI conducted a
3 continual analysis and review of the documents. *Id.* This process included the identification of
4 duplicative and non-responsive material, creation of “working” copies of the documents,
5 document indexes as needed, and an assessment of necessary consultations and/or referrals with
6 those entities maintaining equity in the documents, and the application of any FOIA exemptions
7 to the material. *Id.*

8 ODNI has completed all necessary searches for records responsive to plaintiff’s request.
9 *Id.* ¶ 7. ODNI has identified approximately 185 pages of unclassified material and
10 approximately 80 pages of classified material responsive to plaintiff’s request. *Id.* ¶ 8. Some of
11 the records that ODNI has identified contain information that is so highly classified that it is in a
12 classification compartment that is extremely sensitive. *Id.* ¶ 11. Only a small number of ODNI
13 officials are able to access this material and it must be handled under special security procedures.
14 *Id.* ODNI is actively working through these issues but the existence of these classified records
15 contributes to the complexity of processing plaintiff’s FOIA request. *Id.* Further, approximately
16 255 pages of responsive material has been forwarded to other government agencies for
17 consultation and response back to ODNI regarding the applicability of any FOIA exemptions.
18 *Id.* ¶ 9. These agencies have been advised of this litigation and have informed ODNI that
19 consultations are expected to be completed in three weeks. *Id.* ¶ 12. ODNI anticipates being
20 able to complete the processing of all the responsive records in this case and provide a final
21 response to plaintiff within three weeks of receiving the other agencies responses to its
22 consultations. *Id.* ODNI is also willing to provide the court with a status report in thirty days to
23 update its progress. *Id.*

24 ARGUMENT

25 “A preliminary injunction is an extraordinary and drastic remedy, one that should not be
26 granted unless the movant, by a clear showing, carries the burden of persuasion.” *Mazurek v.*
27 *Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (quoting 11A C. Wright, A. Miller, & M.
28 Kane, Federal Practice and Procedure § 2948, pp. 129-130 (2d ed.1995)). In determining

1 whether to grant a preliminary injunction, courts in the Ninth Circuit traditionally consider
2 “(1) the likelihood of the moving party’s success on the merits; (2) the possibility of irreparable
3 injury to the moving party if the relief is not granted; (3) the extent to which the balance of
4 hardships favors the respective parties; and (4) in certain cases, whether the public interest will
5 be advanced by granting the preliminary relief.” *Miller v. California Pacific Medical Center*, 19
6 F.3d 449, 456 (9th Cir. 1994) (en banc). The moving party must demonstrate either “(1) a
7 combination of probable success on the merits and the possibility of irreparable harm, or (2) the
8 existence of serious questions going to the merits, the balance of hardships tipping sharply in its
9 favor, and at least a fair chance of success on the merits.” *Id.* (internal quotation omitted); *see*
10 *also Taylor v. Westly*, 488 F.3d 1197, 1200 (9th Cir. 2007). “Under either formulation of the
11 test, the party seeking the injunction must demonstrate that it will be exposed to some significant
12 risk of irreparable injury.” *Associated General Contractors of Calif. v. Coalition for Economic*
13 *Equity*, 950 F.2d 1401, 1410 (9th Cir. 1991).

14 **1. Preliminary injunctions are generally not appropriate in FOIA cases.**

15 Plaintiff’s request for a preliminary injunction here is even more extraordinary than in the
16 usual case because plaintiff seeks such relief based on claims made under the FOIA where, for a
17 variety of reasons, such motions are generally inappropriate. A number of courts have denied
18 requests for preliminary injunctive relief for claims brought under the FOIA, including a recent
19 motion filed by plaintiff in a separate FOIA case seeking similar relief against the Department of
20 Justice. *See Electronic Frontier Foundation v. Dep’t of Justice*, slip op. at 10, 06-CV-1773
21 (RBW) (Sept. 27, 2007) (attached as Exhibit 5) (“[T]he Court agrees with the defendant’s
22 position that EFF misconstrues the purpose and implications of the FOIA’s expedited processing
23 provisions.”). *See also Judicial Watch, Inc. v. U.S. Dept. of Homeland Sec.*, 514 F. Supp. 2d 7,
24 11 (D.D.C. 2007) (denying motion for preliminary injunction to compel immediate disclosure of
25 records); *Al-Fayed v. CIA*, 2000 WL 34342564 at *6 (D.D.C. 2000) (finding that “upon
26 consideration of the parties’ arguments, the statutory and regulatory context, and the applicable
27 case law,” emergency relief was not warranted despite the agency’s delay in responding to FOIA
28 requests); *Assassination Archives & Research Ctr., Inc. v. CIA*, No. 88-2600, 1988 U.S. Dist.

1 LEXIS 18606 at *1 (D.D.C., Sept. 29, 1988) (rejecting motion for preliminary injunction asking
2 the Court to order expedited processing of a FOIA request). Notably, plaintiff concedes that a
3 “preliminary injunction is not the norm in FOIA cases.”⁵ See Plaintiff’s Memorandum at 13.

4 FOIA already establishes its own specialized procedural framework controlling the
5 processing of FOIA requests and procedures for FOIA litigation. See, e.g., 5 U.S.C. §
6 552(a)(3)(A) (providing that a FOIA request must reasonably describe the records sought and
7 must be filed in accordance with published rules and procedures). Moreover, Congress has
8 specifically recognized that litigation involving FOIA claims is to be accelerated. See 5 U.S.C. §
9 552(a)(4)(C) (providing that government defendants have 30 days in which to answer a FOIA
10 complaint as opposed to the ordinary 60 days provided by Fed. R. Civ. P. 12). Plaintiff,
11 consequently, should not be permitted to circumvent this explicit statutory framework through a
12 request for preliminary relief. Cf. *Electronic Frontier Foundation v. Department of Justice*, slip
13 op. at 3-4, 07-CV-0656 (JDB) at 3-4 (June 15, 2007) (attached as Exhibit T to Plaintiff’s
14 Memorandum) (imposing an accelerated production schedule on the defendant, but noting,
15 “[c]ertainly, the vehicle of a preliminary injunction motion is an imperfect means to address
16 what is, in essence, a scheduling issue. Moreover, the possibility of overuse, or even abuse, of
17 preliminary injunction requests in the FOIA scheduling context is obvious.”).

18 The traditional purpose of a preliminary injunction is to preserve the status quo so that
19 the court can issue a meaningful decision on the merits. See *King v. Saddleback Junior College*
20 *Dist.*, 425 F.2d 426, 427 (9th Cir. 1970). That purpose is not served in this case because plaintiff
21 seeks “mandatory preliminary relief” – that is, an order compelling accelerated processing that
22 would not merely preserve the status quo but would force specific action by defendants to grant
23 the ultimate relief to which plaintiff thinks it is entitled. Accordingly, the Ninth Circuit has held
24 that such relief is “subject to heightened scrutiny and should not be issued unless the facts and
25 law clearly favor the moving party.” *Dahl v. HEM Pharmaceuticals Corp.*, 7 F.3d 1399, 1403

27
28 ⁵ Although preliminary injunctive relief has been granted (rarely, and arguably
erroneously) in FOIA cases, see, e.g., *Elec. Privacy Info. Ctr. v. Dep’t of Justice*, 416 F. Supp.
2d 30, 35 (D.D.C. 2006), the circumstances of this case do not warrant such relief.

1 (9th Cir. 1993). Further, because preliminary injunctive relief is not intended to provide
2 plaintiffs with a means to bypass the litigation process and achieve rapid victory, a preliminary
3 injunction should not work to give a party essentially the full relief it seeks on the merits. *See*
4 *Univ. of Texas v. Camenisch*, 451 U.S. 390, 397 (1981) (“[I]t is generally inappropriate for a
5 federal court at the preliminary injunction stage to give a final judgment on the merits.”).

6 For these reasons, plaintiff has not met the exacting standard required for the relief it
7 seeks, and plaintiff’s motion should be denied because it is inappropriate for FOIA claims.

8 **2. Plaintiff has failed to demonstrate a likelihood of success on the merits**
9 **because the FOIA’s expedited processing provisions do not require that**
10 **processing be completed within a time certain.**

11 Plaintiff’s allegation that defendants have violated the FOIA is predicated on the
12 mistaken assumption that the expedited processing provision of the FOIA requires an agency to
13 complete its processing within a specific period of time. The statute, however, does not require
14 agencies to process expedited requests within a specific time limit. Instead, the statute explicitly
15 directs agencies to “process *as soon as practicable* any request for records to which [they have]
16 granted expedited processing.” 5 U.S.C. § 552(a)(6)(E)(iii) (emphasis added); *see also* 32
17 C.F.R. § 1700.12(b); 28 C.F.R. § 16.5(d)(4) (stating that ODNI and DOJ expedited FOIA
18 requests “shall be processed as soon as practicable.”). As the Senate Report accompanying the
19 FOIA amendments that inserted the expedited processing procedures explains, the intent of the
20 expedited processing provision was to give certain requests priority, not to require that such
21 requests be processed within ten days or any other specific period of time:

22 [Once] the request for expedited processing is granted, the agency must then
23 proceed to process the request “as soon as practicable.” No specific number of
24 days for compliance is imposed by the bill since depending on the complexity of
25 the request, the time needed for compliance may vary. The goal is not to get the
26 request processed within a specific time period, but to give the request priority in
27 processing more quickly than would otherwise occur.

28 S. Rep. 104-272, 1996 WL 262861, *17 (May 15, 1996); *see also* H. R. Rep. No. 104-795,
reprinted at 1996 U.S.C.A.A.N. 3448, 3461 (Sept. 17, 1996) (“certain categories of requesters
would receive priority treatment of their requests . . .”). Thus, FOIA’s expedited processing
provision is an ordering mechanism, allowing certain FOIA requesters to jump to the head of the
line and avoid the ordinary “first in, first out” processing queue. *See ACLU*, 2005 WL 588354 at
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1 *1 (“If a request for expedited processing is granted, the request moves to the front of the
2 processing queue, ahead of previously filed requests.”). Once a request is at the front of the line,
3 however, “practicability” is the standard that governs how quickly any particular request can be
4 processed. *See ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24, 38 (D.D.C. 2004) (reversing
5 agency’s denial of expedited processing and ordering the agency to “process plaintiffs’ request
6 . . . consistent with 5 U.S.C. § 552(a)(6)(E)(iii) and 28 C.F.R. § 16.5(d)(1)(4) (‘as soon as
7 practicable’)”).

8 Plaintiff’s motion ignores the plain language of the statute and Congress’s clear
9 legislative intent. Instead, plaintiff attempts to invent a time limit applicable to expedited
10 requests by citing 5 U.S.C. § 552(a)(6)(A)(i), which it characterizes as the “20-working-day
11 deadline imposed by the FOIA for processing a nonexpedited request.” *See* Plaintiff’s
12 Memorandum at 15. That provision, however, has no bearing on when expedited processing
13 must be completed. *See American Civil Liberties Union v. DOD*, 339 F. Supp. 2d 501, 503
14 (S.D.N.Y. 2004) (“While it would appear that expedited processing would necessarily require
15 compliance in fewer than 20 days, Congress provided that the executive was to ‘process as soon
16 as practicable’ any expedited request.”). An agency’s inability to respond to a FOIA request
17 within the 20-day period simply means that the requester may, before a response has been made,
18 file suit and be found to have constructively exhausted administrative remedies. *See The Nation*
19 *Magazine v. Dep’t of State*, 805 F. Supp. 68, 72 (D.D.C. 1992). The provision does not, in any
20 event, purport to establish an “outside” time limit on what is “practicable” in responding to an
21 expedited request, nor does it mandate that an agency fully process all requests within 20 days.
22 *See, e.g., Gerstein v. C.I.A.*, 2006 WL 3462658 *8 (N.D. Cal. Nov. 29, 2006) (“FOIA does not
23 set forth a specific deadline by which expedited processing must be concluded.”). Indeed, even
24 when expedited processing has been granted, courts have recognized that FOIA processing can
25 take longer than 20 days. *See Leadership Conference on Civil Rights v. Gonzalez*, 2005 WL
26 3360884 at *11 (D.D.C. Dec. 9, 2005) (ordering government to “expedite processing plaintiff’s
27 FOIA requests and produce the requested records to plaintiffs as soon as practicable, but no later
28 than September 28, 2006, two years from the date on which the complaint was initially filed”);

1 *see also Judicial Watch v. Rossotti*, 285 F. Supp. 2d 17, 26 (D.D.C. 2003) (“Certainly, it took
2 longer than twenty days to respond to Judicial Watch’s FOIA requests, but that is explained by
3 the nature of these requests, the many offices to which they were directed, the number of FOIA
4 requests [the agencies] regularly receive, and the treatment of FOIA requests on a first in/first
5 out basis.”). As such, the 20-day requirement can hardly be found to establish a mandatory
6 deadline as to the “practicability” of responding to expedited requests.

7 The practicability standard makes logical sense in the FOIA context because the time
8 required to process a FOIA request varies according to a number factors, including the requests’s
9 size, scope, detail, the number of offices with responsive documents, other agencies or
10 components that must be consulted or to which documents might have to be referred for
11 additional review, and FOIA exemption issues. *See generally* Sessoms Decl.; Colborn Decl.;
12 Pustay Decl.; Hackett Decl. *See also* 28 C.F.R. § 16.4 (describing FOIA consultation and
13 referral procedures); 28 C.F.R. § 16.7 (describing FOIA classified information review
14 procedures). Further, the existence of classified materials, which are present in this case,
15 contributes significantly to the complexities attendant to processing a FOIA request. *See*
16 Sessoms Decl. ¶ 11; Colborn Decl. 9; Pustay Decl. ¶ 25; Hackett Decl. ¶ 10. Responsive
17 documents that may contain classified information must undergo an additional, and
18 time-sensitive, review to ensure that all documents are appropriately classified in accordance
19 with Executive Order 12958, as amended. *See id.* Such review also includes a page-by-page and
20 line-by-line review of the documents to determine which, if any, FOIA exemptions may apply.
21 *See id.* In light of the sensitive nature of classified information, potentially responsive material
22 must then be reviewed by any appropriate entities with equities in the documents to ensure that
23 no processing errors have been made and that no improper disclosures are made. *See id.* As
24 Congress has recognized, review of classified national security information may require
25 additional time. *See* H. R. Rep. No. 104-795, 1996 U.S.C.A.A.N. at 3466 (“In underscoring the
26 requirement that agencies respond to requests in a timely manner, the Committee does not intend
27 to weaken the interests protected by the FOIA exemptions. Agencies processing some requests
28 may need additional time to adequately review requested material to protect these exemption

1 interests. For example, processing some requests may require additional time to properly screen
2 material against the inadvertent disclosure of material covered by the national security
3 exemption”).

4 Moreover, documents subject to other exemptions, *see generally* 5 U.S.C. § 552(b), must
5 similarly be identified and, where necessary, redacted, and documents generated by other
6 agencies or authorities must be referred for review back to those same agencies or authorities.
7 *See* Sessoms Decl. ¶ 10-13; Colborn Decl. ¶ 8-9; Pustay Decl. ¶ 23-30; Hackett Decl. ¶ 9-13.
8 The attached declarations establish that defendants have made significant progress on these
9 complex tasks. Plaintiff offers no reason to believe that the agency is not performing these tasks
10 as soon as practicable, and thus fails to meet its burden of demonstrating, “by a clear showing,”
11 *Mazurek*, 520 U.S. at 972, that a preliminary injunction is warranted at this juncture.

12 The obstacles that make it impracticable to process plaintiff’s requests on its desired
13 schedule relate to the amount and intensity of work that FOIA processing entails and the
14 limitations of and burdens on defendants’s processing capacity—not to any failure with respect
15 to the grant of expedited treatment. As discussed above, defendants have appropriately
16 implemented the grant of expedited treatment by moving plaintiff’s requests to the front of their
17 respective FOIA queues ahead of other FOIA requests. *See* Sessoms Decl. ¶ 5; Colborn Decl.
18 ¶ 4; Pustay Decl. ¶ 5; Hackett Decl. ¶ 5. However, a grant of expedited treatment does not
19 eliminate any of the time-consuming and labor-intensive steps required to complete processing:
20 the review of potentially responsive documents to isolate the documents falling within the scope
21 of the plaintiff’s FOIA requests; the review of documents for classified information; the review
22 to determine whether documents are exempt from disclosure; and appropriate conferral with
23 entities that have equities in the documents. As detailed more fully in the declarations,
24 defendants have already made considerable progress on plaintiff’s requests with several
25 components anticipating an interim release of records within the next several weeks.

26 In addition to the factual basis supporting the denial of relief, the cases that plaintiff cites
27 in support of its claim that “courts have imposed specific processing deadlines on agencies,
28 requiring the prompt delivery of non-exempt records to FOIA requesters,” *see* Plaintiff’s

1 Memorandum at 23, are inapposite. Many of the cases cited by plaintiff allowed the government
2 far more time to complete processing the FOIA requests at issue than plaintiff demands in this
3 case. *See, e.g., Judicial Watch v. Dept. of Energy*, 191 F. Supp. 2d 138 (D.D.C. 2002) (ordering
4 that responsive non-exempt documents be produced within approximately a year of filing of the
5 complaint), *Natural Resources Defense Council v. DOE*, 191 F. Supp. 2d 41 (D.D.C. 2002)
6 (ordering responsive non-exempt documents to be filed within approximately one year of the
7 date the FOIA request was made to agency and within approximately 4 months of filing
8 complaint); *American Civil Liberties Union*, 339 F. Supp. 2d at 505 (ordering the identification
9 or production of responsive documents within approximately one year of submitting FOIA
10 request and three months of filing of complaint); *Electronic Privacy Info. Center v. DOJ*, Civ.
11 No. 05-845, 2005 U.S. Dist. LEXIS 40318, at * 5-6 (D.D.C., Nov. 16, 2005) (ordering
12 processing and release of documents on a rolling basis until processing complete). These cases
13 are thus wholly unlike this one, where plaintiff seeks “preliminary” relief demanding processing
14 at an artificial pace despite the fact that defendants are not even required at this time to answer
15 plaintiff’s complaint.

16 Although plaintiff relies heavily upon the decision in *Electronic Privacy Information*
17 *Center (“EPIC”) v. Dep’t of Justice*, 416 F. Supp. 2d 30 (D.D.C. 2006), in which a preliminary
18 injunction was granted in the FOIA expedited processing context requiring the agency to
19 produce or identify all responsive documents within 20 days, as discussed above, *EPIC* is in
20 tension with the FOIA statutory and regulatory framework and the general principles governing
21 issuance of preliminary relief. Moreover, plaintiff fails to note that the preliminary injunction
22 entered in that case was later modified upon reconsideration, following a factual submission by
23 the government regarding its processing capacity. *See EPIC*, slip op., No. 06-0096 (D.D.C. Mar.
24 24, 2006) (Kennedy, J.) (attached as Exhibit 6) (granting in part the government’s expedited
25 motion for relief from the February 16, 2006 Order, extending the deadline for several DOJ
26 components to process plaintiff’s FOIA request by 60 days or 120 days, respectively).
27 Defendants respectfully submit that the *EPIC* decision was incorrectly decided and contend that
28 the FOIA’s 20 day administrative exhaustion requirement has no bearing on the date by which

1 an agency must produce records responsive to an expedited request.⁶ In any event, even
2 assuming this Court adopts the *EPIC* framework, the *EPIC* court's decision was greatly
3 influenced by its view that the agency did not "present[] evidence that processing *EPIC*'s FOIA
4 requests within the next twenty days would be impracticable." *Id.* at 39-40. Indeed, the *EPIC*
5 court emphasized that "[t]he presumption of agency delay raised by failing to respond to an
6 expedited request within twenty days is certainly rebuttable if the agency presents credible
7 evidence that disclosure within such time period is truly not practicable." *Id.* at 39. In this case
8 defendants have overcome the presumption of agency delay with detailed declarations
9 explaining their efforts to process plaintiff's FOIA requests and the reasons why plaintiff's
10 request for immediate relief is unreasonable and not practicable.

11 For similar reasons, plaintiff's reliance on *Gerstein v. C.I.A.*, 2006 WL 3462658 (N.D.
12 Cal. Nov. 29, 2006), is misplaced. In that case, the court granted the FOIA plaintiff's motion for
13 expedited processing after the agency denied the plaintiff's request at the administrative level.
14 After analyzing and reversing the agency's decision, the court went on to discuss the time line
15 for processing responsive documents, noting that "FOIA does not set forth a specific deadline by
16 which expedited processing must be concluded." *Id.* at *8. The court, however, granted
17 plaintiff's request to produce responsive documents within 30 days of the court's ruling because
18 the defendant did "not respond to this request and, in particular, [did] not contend that it is not
19 'practicable' for them to process [plaintiff's] FOIA request within 30 days." *Id.* *Gerstein* is
20 distinguishable for several reasons. First, the FOIA request in *Gerstein* had been pending "for
21 more than eight months" without production of any responsive documents whereas the requests
22 in this case have been pending roughly three months. *Id.* Second, unlike the defendant in
23 *Gerstein*, defendants have produced detailed declarations explaining that they are working
24 diligently to process plaintiff's requests as soon as practicable.⁷ See *Electronic Frontier*

25
26 ⁶ This Court, of course, is not required to adopt the *EPIC* analysis. See *Starbuck v. City*
27 *and County of San Francisco*, 556 F.2d 450, 457 n.13 (9th Cir. 1977) (one district court judge is
not required to follow the decision of another).

28 ⁷ In the interest of simplicity and clarity, defendants note that the arguments above apply
equally to the court's second decision in *Gerstein*. See *Gerstein v. C.I.A.*, 2006 WL 3462659

1 *Foundation v. Dep't of Justice*, slip op., 06-CV-1773 (RBW) (attached as Exhibit 3) at 5
 2 (denying motion for preliminary injunction seeking expedited processing in FOIA case based on,
 3 *inter alia*, the fact that “defendant has demonstrated that it is processing plaintiff’s FOIA request
 4 as soon as practicable.”).

5 The court’s decision in *Electronic Frontier Foundation v. ODNI*, 2007 WL 4208311
 6 (N.D. Cal. Nov. 27, 2007), is also distinguishable from the present context. That court’s
 7 decision to grant in part plaintiff’s preliminary injunction motion was predicated in part on the
 8 fact that congressional legislation was set to expire in several weeks. *Id.* at *7. Here, plaintiff
 9 has not identified a similar event that would turn a purported delay in processing plaintiff’s
 10 FOIA request into an irreparable injury. As noted above, it appears the legislative and public
 11 debate regarding the FISA – a debate that has been ongoing for several years – will continue for
 12 the foreseeable future. Moreover, even applying the *Electronic Frontier Foundation* court’s
 13 analytical framework to this case,⁸ the central question identified by that court was: “Whether
 14 defendant is actually processing the [FOIA] request ‘as soon as practicable.’” *Id.* at *4. The
 15 attached declarations establish that defendants are, in fact, processing plaintiff’s FOIA request as
 16 soon as practicable.

17 For the reasons explained above, there is no appropriate legal or factual basis for the
 18 Court to order defendants to meet plaintiff’s proposed processing schedule, particularly where no
 19 such requirement is found in the FOIA statute and, indeed, such a requirement is at odds with the
 20 statute.

21 **3. Plaintiff has not established a significant risk of irreparable injury.**

22 In addition to failing to demonstrate a likelihood of success on the merits, plaintiff also
 23 has not established that the preliminary injunction it requests is necessary to prevent irreparable
 24 harm. The focus of the harm inquiry in this case is whether plaintiff will suffer irreparable injury

25 _____
 26 (N.D. Cal. Nov. 29, 2006). Although both *Gerstein* decisions contained substantially similar
 27 analysis of the legal issues discussed above, they arise in slightly different procedural contexts,
 which explain the court’s separate opinions.

28 ⁸ *ODNI* relied largely upon the analysis in *EPIC*. As explained above, defendants
 contend that the *EPIC* analysis is inconsistent with the terms of the FOIA.

1 if its FOIA requests are not processed on the schedule that plaintiff requests but instead are
2 processed according to the time frame that Congress has established, “as soon as practicable.”
3 Plaintiff speculates that the denial of emergency relief in this case could impose irreparable harm
4 because the records plaintiff seeks from defendants are only of value now – that is, before
5 Congress votes on permanent amendments to the FISA – but the records will be useless if it is
6 produced after Congress amends the FISA. Plaintiff’s argument is pure speculation, and it is not
7 sufficient to support issuance of a preliminary injunction. *See Caribbean Marine Services Co.,*
8 *Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (“Speculative injury does not constitute
9 irreparable injury sufficient to warrant granting a preliminary injunction.”).

10 As an initial matter, plaintiff’s delay in bringing this matter to the court’s attention belies
11 their claim of emergency. Plaintiff does not explain why it waited nearly two months to file the
12 preliminary injunction motion. According to plaintiff’s legal theory, which defendants dispute
13 for the reasons stated above, the agencies should have finished processing the FOIA requests
14 within 20 working days of receipt. Accordingly, plaintiff could have filed the preliminary
15 injunction motion two months ago in early January 2008. “By sleeping on its rights a plaintiff
16 demonstrates the lack of need for speedy action.” *See Lydo Enters. v. City of Las Vegas*, 745
17 F.2d 1211, 1213-14 (9th Cir. 1984) (“We would be loath to withhold relief solely on that ground,
18 but we do give that fact consideration in measuring the claim of urgency.”).

19 In any event, plaintiff has not established that release of agency records according to a
20 schedule guided by the “as soon as practicable” standard will diminish their value to the public,
21 let alone impose irreparable injury to plaintiff. *See Al-Fayed v. C.I.A.*, 2000 WL 34342564 at *5
22 (D.D.C. Sept. 20, 2000) (denying preliminary injunction for expedited processing based in part
23 on plaintiff’s failure to explain why “information will not retain its value if procured through the
24 normal FOIA channels.”). The public and legislative debate regarding proposed amendments to
25 the FISA has been ongoing for nearly three years, *see, e.g.*, Implementation of the USA Patriot
26 Act: Sections of the Act that Address the Foreign Intelligence Surveillance Act (FISA), 109th
27 Cong. (April 26 & 28, 2005), Hearing Before the Subcommittee on Crime, Terrorism, and
28 Homeland Security of the Committee on the Judiciary of the House of Representatives. More

1 recent media reports indicate that the “gulf between the administration and House Democratic
2 leaders is now so wide” on the FISA amendments “that the issue may not be resolved until a new
3 president takes office next year.” See Jonathan Weisman, *House Passes A Surveillance Bill Not*
4 *To Bush’s Liking*, Washington Post, March 15, 2008, at A2. Thus, contrary to plaintiff’s claim
5 that time is of the essence, there appears to be no concrete event on the horizon that would
6 suddenly diminish the value of the records plaintiff seeks or cause the public interest in the FISA
7 debate to evaporate. Even assuming that congressional debates over national issues “cannot be
8 restarted or wound back,” see Gerstein, 2007 WL 3462659 at *4, it appears quite likely that the
9 FISA debate will continue for the foreseeable future. Given this state of affairs, plaintiff will not
10 suffer any irreparable harm if defendants process the FOIA requests according to the schedules
11 proposed in the attached declarations.

12 There is also no appropriate legal or factual basis to tether release of agency records in a
13 FOIA case to Congress’s legislative calendar, particularly given that the FOIA provides that
14 expedited processing shall proceed “as soon as practicable.” Indeed, courts have denied similar
15 requests to condition FOIA processing deadlines upon upcoming national presidential elections.
16 See *The Nation Magazine*, 805 F. Supp. at 73-74 (denying motion for temporary restraining
17 order in FOIA case seeking release of records about presidential candidate prior to 1992
18 election); *Assassination Archives and Research Center, Inc. v. C.I.A.*, 720 F. Supp. 217, 218-19
19 (D.D.C. 1988) (refusing to order CIA to expedite a FOIA request for documents about George
20 Bush even though the 1988 presidential election was imminent and the plaintiff argued that the
21 information should be disseminated to the public before voters cast their ballots). A contrary
22 decision would improperly convert any request for records relating to pending legislation into an
23 emergency requiring immediate release of documents prior to a vote on the legislation, without
24 any consideration of the equities and burdens on the government agency processing the
25 documents and in direct contravention of the terms of the FOIA statute. Further, such a holding
26 would likely lead to exactly the type of “overuse, or even abuse” of the preliminary injunction
27 mechanism in the FOIA context identified by the Court in *Electronic Frontier Foundation v.*
28 *Department of Justice*, slip op. at 3-4, 07-CV-0656 (JDB) at 3-4 (June 15, 2007) (attached as

1 Exhibit T to Plaintiff’s Memorandum). A preliminary injunction, which the Supreme Court has
2 described as an “extraordinary and drastic remedy,” *Mazurek*, 520 U.S. at 972, should not be
3 issued routinely in the common situation in which a government agency grants a request for
4 expedited FOIA processing and Congress is considering legislation about the subject of the
5 FOIA request. If this view prevailed, anyone who sought to have their FOIA request processed
6 on an expedited basis would automatically have a claim of irreparable injury regardless of
7 whether any real harm existed. This is not the proper standard to be applied in the issuance of a
8 preliminary injunction, and it is not the result contemplated by Congress when it authorized a
9 limited exception for expedited processing. Instead, Congress deferred to the necessity for
10 ensuring adequate time for appropriate agency processing, and mandated only that expedited
11 requests be processed “as soon as practicable.” Thus, while the purported urgency of plaintiff’s
12 request may be a factor in determining whether a request for expedited treatment will be granted
13 by the agency, *see* 5 U.S.C. § 552(a)(6)(E)(v)(ii), it is not a factor in determining the speed by
14 which an agency is required to complete processing of the request, nor does it mean that plaintiff
15 will suffer any irreparable harm by adhering to the terms of the FOIA statute.

16 **4. An order requiring defendants to accelerate processing of plaintiff’s FOIA**
17 **requests would impose undue burdens on defendants and not serve the**
public interest.

18 In contrast to plaintiff’s speculative claims of harm, a preliminary injunction ordering
19 defendants to finish processing plaintiff’s FOIA requests within ten days would impose undue
20 burdens on defendants and injure their interests. Indeed, the balance of harms tips decidedly in
21 favor of denying plaintiff’s motion for preliminary injunction. As explained in the attached
22 declarations, imposing a 10 day production deadline on defendants is simply not practicable. *See*
23 *Sessoms Decl.* ¶ 12; *Colborn Decl.* ¶ 10; *Pustay Decl.* ¶ 30; *Hackett Decl.* ¶ 13. Any such
24 requirement would harm defendants by not allowing them sufficient time to finish consultations
25 with other agencies that have equities in the records subject to plaintiff’s request. *See Sussman*
26 *v. U.S. Marshals Service*, 494 F.3d 1106, 1118 (D.C. Cir. 2007) (“FOIA explicitly permits
27 consultation with another agency having a substantial interest in the determination of the
28 request.”) (internal quotations and ellipses omitted). Further, an unreasonably accelerated

1 production deadline increases the risk of inadvertent disclosure of records that are exempted
2 from release under the FOIA. Given the presence of classified national security information in
3 these records, defendants stand to suffer significant harm if such records are disclosed before
4 defendants conduct an appropriate review of these records.

5 The proposed preliminary injunction in this case also has the potential to harm the public
6 interest by complicating and disrupting the processing of other FOIA requests.⁹ *See The Nation*
7 *Magazine*, 805 F. Supp. at 74 (finding that a temporary restraining order would likely harm third
8 parties in light of the defendants' limited FOIA processing resources and the court's load of
9 cases seeking judicial review of FOIA activities). Expedition already disadvantages normal
10 FOIA requesters by placing them farther back in an agency's processing queue. Imposing
11 artificial deadlines beyond an agency's capabilities through the use of preliminary injunctions
12 would only hinder the average FOIA requestor even further by favoring the most litigious FOIA
13 requesters. *See Long v. Department of Homeland Security*, 436 F. Supp. 2d 38, 45 (D.D.C.
14 2006) (placing plaintiffs' request ahead of others that are awaiting responses to their requests
15 would injure others who made their requests before the plaintiff or who have presented more
16 meritorious applications for expedited processing). The public interest, therefore, is not well
17 served by permitting FOIA requesters to avoid the plain terms of the FOIA, nor is it served by
18 forcing government agencies to accelerate FOIA processing based on nothing more than
19 speculative claims that the requested information is time sensitive and potentially perishable due
20 to pending legislation in Congress.

21 Plaintiff's motion ignores these realities, and, as a result, threatens to compromise the
22 delicate balancing of the public interest that Congress undertook in enacting FOIA between the
23

24
25 ⁹ Plaintiff's own interest in its FOIA request to further its private lobbying efforts in
26 support of collateral litigation should not be equated with the public interest. *See Ellen*
27 *Nakashima, A Story of Surveillance*, Washington Post, Nov. 7, 2007, at D1 ("lawyers for the
28 Electronic Frontier Foundation, which filed [a class action lawsuit against various
telecommunications companies] . . . are urging key U.S. senators to oppose a pending White
House-endorsed immunity provision that would effectively wipe out the lawsuits."). *See also*
Massey v. FBI, 3 F.3d 620, 625 (2d Cir. 1993) ("[T]he mere possibility that information may aid
an individual in the pursuit of litigation does not give rise to a public interest.").

1 general interest in disclosure of government information and the necessity of ensuring that
2 certain types of documents, the disclosure of which would cause harm, were not to be disclosed.
3 *See* 5 U.S.C. §522(b). Congress specifically noted that even with respect to expedited requests,
4 in certain cases, depending on the subject matter of the request, additional time would be
5 required to ensure that the public's interest in preventing the public disclosure of these exempted
6 documents was not compromised. *See* H. R. Rep. No. 104-795, 1996 U.S.C.A.A.N. at 3466,
7 *quoted supra*. As Congress acknowledged, those concerns are only heightened in a case such as
8 this one, where the request involves classified information, and defendants have independent
9 obligations under federal statutes, regulations, and Executive Orders to ensure that no
10 unwarranted disclosure occurs. *See, e.g.*, 50 U.S.C. § 403-1(i)(1) (requiring the Director of
11 National Intelligence to "protect intelligence sources and methods from unauthorized
12 disclosure"). Ordering defendants to disclose records according plaintiff's unreasonable time
13 frame and other than "as soon as practicable," as dictated by the FOIA, causes significant harm
14 to this predetermined balancing of competing public interests.

15 CONCLUSION

16 For the foregoing reasons, plaintiff's motion for preliminary injunction should be denied.
17 A proposed order is attached hereto.

18
19 Dated: March 18, 2008

Respectfully submitted,

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