

1 MICHAEL F. HERTZ
Acting Assistant Attorney General

2

3 JOHN R. TYLER
Assistant Director, Federal Programs Branch

4 MARCIA BERMAN (PA Bar No. 66168)
Trial Attorney, U.S. Department of Justice
5 Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W., Room 7132
6 Washington, D.C. 20530
Telephone: (202) 514-2205
7 Facsimile: (202) 616-8470
Email: marcia.berman@usdoj.gov
8 *Attorneys for Defendants*

9

10 UNITED STATES DISTRICT COURT

11 NORTHERN DISTRICT OF CALIFORNIA

12 SAN FRANCISCO

13

ELECTRONIC FRONTIER FOUNDATION,) Nos. 08-2997 JSW & 08-1023 JSW
Plaintiff,) DEFENDANTS' OPPOSITION TO
v.) PLAINTIFF'S MOTION FOR A
OFFICE OF THE DIRECTOR OF NATIONAL) STAY OF PROCEEDINGS
18 INTELLIGENCE and UNITED STATES) Date: April 3, 2009
19 DEPARTMENT OF JUSTICE) Time: 9:00 a.m.
20 Defendants.) Courtroom: 2, 17th Floor
)
)
)

21 **DEFENDANTS' OPPOSITION TO PLAINTIFF'S**

22 **MOTION FOR A STAY OF PROCEEDINGS**

23 **INTRODUCTION AND ISSUE TO BE DECIDED**

24 Plaintiff requests that the Court stay proceedings in this litigation pending the Attorney

25 General's issuance of new Freedom of Information Act ("FOIA") guidelines to the heads of

26 executive departments and agencies and require defendants, after issuance of the new guidelines,

27 to review their determinations on the thousands of documents at issue in these cases, to inform

28 plaintiff of any changes to their prior determinations, and to advise the Court in a joint status

Defs' Opp. to Plf's Mtn. for Stay – C 08-2997 & 08-1023 (JSW)

1 report as to the remaining issues to be resolved and how the parties wish to proceed. For the
2 reasons that follow, the Court should deny plaintiff's motion because a stay is unlikely to
3 promote judicial economy and will only serve to delay the conclusion of this litigation.

4 **STATEMENT OF FACTS**

5 This action involves FOIA requests by the Electronic Frontier Foundation seeking
6 records revealing communications between Office of the Director of National Intelligence
7 ("ODNI") or Department of Justice ("DOJ") officials and Members of Congress or their staffs,
8 or representatives of telecommunications companies, concerning amendments to the Foreign
9 Intelligence Surveillance Act ("FISA"). The bulk of the records at issue consists of confidential
10 email messages exchanged between ODNI or DOJ officials and congressional staff in which the
11 parties to the emails discussed, analyzed and negotiated possible amendments to FISA. Plaintiff
12 submitted its FOIA requests for this material while these sensitive negotiations were in progress.
13 Defendants completed processing plaintiff's requests and produced all responsive, non-exempt
14 records. On December 10, 2008, defendants filed their Consolidated Motion for Summary
15 Judgment, pursuant to the Court's scheduling order. On January 13, 2009, plaintiff opposed
16 defendants' motion and cross-moved for summary judgment. Defendants filed their brief in
17 opposition to plaintiff's motion and reply in support of their motion on February 3, 2009.
18 Plaintiff's reply brief was due on February 17, 2009, but plaintiff did not file it.

19 On January 21, 2009, the President issued a memorandum to the heads of executive
20 departments and agencies directing that "agencies should adopt a presumption in favor of
21 disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher
22 in a new era of open Government. The presumption of disclosure should be applied to all
23 decisions involving FOIA." See Memorandum for the Heads of Executive Departments and
24 Agencies, 74 Fed. Reg. 4683 (Jan. 21, 2009) (attached as Exhibit A to Declaration of Marcia
25 Hoffman in Support of Plaintiff's Motion for a Stay of Proceedings). The President directed the
26 Attorney General "to issue new guidelines governing the FOIA to the heads of executive
27 departments and agencies, reaffirming the commitment to accountability and transparency, and
28 to publish such guidelines in the Federal Register." Id.

1 In light of this directive, on February 9, 2009, after the filing of three of the four
2 summary judgment briefs, plaintiff moved the Court for an order that would stay proceedings in
3 this litigation pending the issuance of new guidelines by the Attorney General and require
4 defendants to review their determinations on the documents at issue, inform plaintiff of any
5 changes to their prior determinations, and, within 30 days of the issuance of the new guidelines,
6 confer with plaintiff and submit a joint status report as to the remaining issues to be resolved and
7 how the parties wish to proceed.

8 On February 11, 2009, the Court set plaintiff's motion for a stay of proceedings for a
9 hearing on April 3, 2009, and vacated the March 13, 2009 hearing on the parties' cross-motions
10 for summary judgment, pending resolution on the stay motion.¹

11 ARGUMENT

12 A court has broad discretion to stay proceedings as part of its inherent power to control
13 the course of proceedings. See Landis v. N. Am. Co., 299 U.S. 248, 254 (1936) (“[T]he power
14 to stay proceedings is incidental to the power inherent in every court to control the disposition of
15 the causes on its docket with economy of time and effort for itself, for counsel, and for
16 litigants.”). A stay is unwarranted in this case, however, because staying the litigation would
17 provide no clear benefit to either party, to the Court, or to the public.

18 Indeed, a stay of proceedings is especially inappropriate in this case in which briefing on
19 the merits of the government's claimed exemptions is nearly at a close. The instant case is
20 distinguishable from the case on which plaintiff relies, Electronic Frontier Foundation v. Office
21 of the United States Trade Rep., No. 08-1599-RMC (D.D.C.) (Joint Motion to Stay Proceedings
22 and Amend Briefing Schedule, attached as Exhibit B to Declaration of Marcia Hoffman in
23 Support of Plaintiff's Motion for a Stay of Proceedings), in which the parties had not yet begun
24 briefing when the President issued his memorandum. Moreover, as explained in detail in
25 defendants' summary judgment papers, defendants processed documents responsive to plaintiff's
26

27 ¹ The Court did not stay the February 17, 2009 filing deadline for plaintiff's reply in support
28 of its cross motion for summary judgment. Plaintiff nonetheless did not file its reply on February
17 or thereafter.

1 FOIA requests in this case with the goal of achieving maximum disclosure, releasing all
2 reasonably segregable portions of responsive materials, and withholding only those materials
3 which, if disclosed, would plainly harm an interest protected by one or more of FOIA's statutory
4 exemptions.

5 The Government intends to proceed in this case pursuant to the principles expressed in
6 the President's January 21, 2009, memorandum on the FOIA, and also with due regard for the
7 legitimate confidentiality interests of the Executive Branch and the national security interests of
8 the United States. See Ctr. for Nat'l Sec. Studies v. DOJ, 331 F.3d 918, 925 (D.C. Cir. 2003)
9 (the FOIA must strike a balance "between the public's right to know and the government's
10 legitimate interest in keeping certain information confidential") (citing John Doe Agency v. John
11 Doe Corp., 493 U.S. 146, 152 (1989)). Applying these principles does not mandate a halt to
12 ongoing FOIA litigation. That the Attorney General's guidelines might possibly be relevant to
13 any of the records at issue in these cases is speculative at best, and a stay is not required in any
14 event in order to allow an agency to revisit particular withholdings or to exercise its discretion in
15 releasing certain information.

16 CONCLUSION

17 For the reasons above, the Court should deny plaintiff's motion for a stay.

18
19 Dated: February 24, 2009

Respectfully submitted,

20 MICHAEL F. HERTZ
Acting Assistant Attorney General

21 JOHN R. TYLER
Assistant Director, Federal Programs Branch

22
23 /s/ Marcia Berman
24 MARCIA BERMAN (PA Bar No. 66168)
25 Trial Attorney, U.S. Department of Justice
26 Civil Division, Federal Programs Branch
27 20 Massachusetts Ave., N.W., Room 7132
Washington, D.C. 20530
Telephone: (202) 514-2205
Facsimile: (202) 616-8470
E-mail: marcia.berman@usdoj.gov

28 *Attorneys for Defendants*