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12
13 **UNITED STATES DISTRICT COURT**
14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
15 **SAN FRANCISCO DIVISION**

16 ELECTRONIC FRONTIER FOUNDATION,)
17 Plaintiff,)
18 v.)
19 OFFICE OF THE DIRECTOR OF NATIONAL)
20 INTELLIGENCE and DEPARTMENT OF)
21 JUSTICE,)
22 Defendants.)

NOS. 08-1023 JSW & 08-2997 JSW
REPLY IN SUPPORT OF MOTION FOR A
STAY OF PROCEEDINGS
Date: April 3, 2009
Time: 9:00 a.m.
Courtroom: 2, 17th Floor

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1 Plaintiff Electronic Frontier Foundation (“EFF”) has moved for a stay of proceedings in this
2 Freedom of Information Act (“FOIA”) litigation pending issuance of new guidelines governing the
3 FOIA by the Attorney General, as directed by President Obama on January 21, 2009. Defendants
4 Office of the Director of National Intelligence (“ODNI”) and Department of Justice (“DOJ”)
5 dispute that a stay is appropriate. We respectfully submit this reply to respond to the defendants’
6 opposition.

7 First, the defendants make no attempt to explain how they would be injured by a relatively
8 brief stay in this litigation. The agencies’ main complaint seems to be that a stay is unwarranted
9 because “briefing on the merits of the government’s exemption claims is nearly at a close.” Defs.’
10 Opp. to Mot. Stay Proceedings at 3 (No. 08-1023 Dkt. No. 74; No. 08-2997 Dkt. No. 57) (hereafter
11 “Defs. Opp. Stay Proceedings”).¹ The government does not claim that a stay will harm or even
12 inconvenience the defendants. On the other hand, if this case is resolved before the Attorney
13 General issues guidelines that might require greater disclosure of material currently withheld in
14 these cases, EFF will be forced to re-submit its FOIA requests to receive the benefit of the
15 Administration’s new policy on FOIA, which would be a wasteful exercise. *See, e.g., Trans-Pacific*
16 *Policing Agreement v. U.S. Customs Serv.*, 177 F.3d 1022, 1023 (D.C. Cir. 1999) (“[T]here is
17 really nothing of substance to be gained by requiring appellants to file a new FOIA request at the
18 administrative level; it is also clear that a new lawsuit will be costly in terms of additional time,
19 expense, and wasted judicial resources.”). A stay is clearly appropriate under these circumstances.

20 Second, the defendants assert that the new FOIA policy announced by the President, and
21 the Attorney General’s impending issuance of new guidelines implementing that policy, do “not
22 mandate a halt to ongoing FOIA litigation.” Defs. Opp. Stay Proceedings at 4. That position,
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24 ¹ The government correctly notes that EFF has not filed a reply in support of its cross motion for
25 summary judgment. Defs. Opp. Stay Proceedings at 3 n.1. After the Court issued its February 11,
26 2009 order vacating the March 13, 2009 hearing on the parties’ cross motions (No. 08-1023 Dkt.
27 No. 73; No. 08-2997 Dkt. No. 56), counsel for EFF called the Court’s courtroom deputy to ask if
28 the Court wished EFF to file its reply in any event. Counsel was instructed that the Court did not
require EFF to file its reply at this time in light of the Court’s order. Supplemental Declaration of
Marcia Hofmann in Support of Mot. Stay Proceedings (“Supp. Hofmann Decl.”) ¶ 3.

1 however, is not consistently held within the Justice Department. As EFF noted in its opening brief,
2 DOJ attorneys in another pending FOIA case agreed with EFF that postponing proceedings until
3 the Attorney General's guidelines are issued "will serve the interest of judicial economy and
4 possibly preclude unnecessary litigation." Joint Mot. Stay Proceedings & Amend Briefing
5 Schedule at 3, *Electronic Frontier Foundation v. Office of the United States Trade Rep.*, No. 08-
6 1599-RMC (D.D.C.) (Declaration of Marcia Hofmann in Support of Mot. Stay Proceedings
7 ("Hofmann Decl.") Ex. F) (No. 08-1023 Dkt. No. 71-6; No. 08-2997 Dkt. No. 54-6).² In that case,
8 Judge Collyer has stayed proceedings until thirty days after the Attorney General issues the new
9 guidelines, but no later than June 30, 2009. February 3, 2009 Order (Hofmann Decl. Ex. G).³ A
10 contrary result here would run afoul of the principle that the FOIA should be applied consistently.
11 *Cf. Al-Fayed v. CIA*, 254 F.3d 300, 307 (D.C. Cir. 2001).

12 Finally, the government argues that a stay would be somehow inappropriate because it is
13 "speculative at best" that the forthcoming guidelines "might possibly be relevant to any of the
14 records at issues in these cases." Defs. Opp. Stay Proceedings at 4. That, however, is precisely the
15 point – in the absence of any harm that might result from the requested stay, the interests of judicial
16 economy would be best served by awaiting the issuance of the guidelines to determine whether
17 they *do* effect the disposition of the material at issue here.

18 Indeed, there is good reason to believe that the forthcoming guidelines may affect the scope
19 of the agencies' claimed withholdings in this case. The Director of DOJ's Office of Information
20 and Privacy ("OIP") has declared that President Obama's "memorandum was effective immediately
21 and supersedes former Attorney General Ashcroft's Memorandum on the FOIA dated October 12,
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23 ² Notably, the Government in that case is represented by DOJ's Office of Information and Privacy
24 ("OIP"), which "develops and provides guidance to agencies on questions relating to application of
25 the FOIA" and "manages the Department's responsibilities related to the FOIA." Dep't of Justice,
Office of Information and Privacy, <http://www.usdoj.gov/oip/oip.html>.

26 ³ Similarly, in another FOIA case pending before the District Court for the District of Columbia,
27 Judge Walton has ordered the FBI to inform the court within sixty (60) days whether its position
28 has changed under the new FOIA policies (although it is not clear that the new Attorney General
guidelines will be issued within that time period). Order, *Electronic Frontier Foundation v. Dep't*
of Justice, No. 06-1773-RBW (D.D.C. filed Feb. 11, 2009) (Supp. Hofmann Decl. Ex. 1).

1 2001.” The FOIA blog, *Department of Justice Email to FOIA Professionals*, [http://thefoiablog.](http://thefoiablog.typepad.com/the_foia_blog/2009/01/departement-of-justice-email-to-foia-professionals.html)
2 typepad.com/the_foia_blog/2009/01/departement-of-justice-email-to-foia-professionals.html (Jan.
3 30, 2009) (Supp. Hofmann Decl. Ex. 2).⁴ While the new Administration has not yet published its
4 FOIA guidelines, OIP’s action may signal a return to the Clinton-era FOIA policy which, like
5 President Obama’s January 21, 2009 memorandum, instructed agencies to apply a “presumption of
6 disclosure” when making decisions about FOIA withholdings. *Compare* President Barack Obama,
7 Memorandum for Heads of Executive Departments and Agencies (Jan. 21, 2009) (Hofmann Decl.
8 Ex. A) and Attorney General Janet Reno, Memorandum for Heads of Executive Departments and
9 Agencies (Oct. 4, 1993) (Supp. Hofmann Decl. Ex. 3.) One practical affect of this change may be
10 disclosure of material that might otherwise have been withheld under Exemption 5. Major Calvin
11 N. Anderson and Major Lawrence M. Anderson, *Freedom of Information Act: Not So Free*
12 *Anymore*, THE REPORTER, Dec. 2001, at 9, 10 (Supp. Hofmann Decl. Ex. 4) (Air Force attorneys
13 noting that the shift from the Reno policy to the Ashcroft policy “allow[ed] a greater ability to
14 withhold information under Exemption 5” and “primarily increase[d] application of the
15 deliberative process privilege.”). Thus, the Obama Administration’s new FOIA policy may have a
16 significant impact here because defendants’ overly broad Exemption 5 withholdings are at the heart
17 of the exemption dispute in this litigation. *See* Defs.’ Consolidated Mot. Summ. J. (08-2997 Dkt.
18 No. 29); Pl.’s Opp. to Defs.’ Consolidated Mot. Summ. J. and Cross Mot. Summ. J. (08-2997 Dkt.
19 No. 43).

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25 ⁴ As EFF noted in its opening brief, OIP explained at the time of the Ashcroft memorandum’s
26 issuance that it “establishe[d] a new ‘sound legal basis’ standard governing the Department of
27 Justice’s decisions on whether to defend agency actions under the FOIA when they are challenged
28 in court. This differ[ed] from the ‘foreseeable harm’ standard that was employed under the
predecessor memorandum [issued by then Attorney General Janet Reno].” Dep’t of Justice, Office
of Information and Privacy, *New Attorney General FOIA Memorandum Issued*, FOIA POST (Oct.
15, 2001) (Hofmann Decl. Ex. B).

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CONCLUSION

For the foregoing reasons, and those set forth in EFF's initial submission, plaintiff's motion to stay proceedings should be granted.

DATED: March 3, 2009

Respectfully submitted,

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