IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC FRONTIER FOUNDATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. No. 06-1773-RBW
	)	
DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION FOR *OPEN AMERICA* STAY

Plaintiff Electronic Frontier Foundation ("EFF") initiated this action to challenge the failure of the Federal Bureau of Investigation ("FBI") to timely process two requests EFF submitted under the Freedom of Information Act ("FOIA"). EFF's requests sought the disclosure of information concerning the FBI's Investigative Data Warehouse, a huge database that contains hundreds of millions of records containing personal information. Notwithstanding the significant public interest in the prompt disclosure of the requested information, defendant Department of Justice ("DOJ") has moved for a stay of proceedings for *71 months* – until February 2013 – to allow the FBI to complete its processing of the FOIA requests. For the reasons set forth below, plaintiff opposes the government's excessive request and urges the Court to direct the Bureau to expeditiously respond to EFF's requests.

Background

I. The FBI's Investigative Data Warehouse

Following the terrorist attacks of September 11, 2001, the FBI began development of the Investigative Data Warehouse ("IDW") "to provide counterterrorism investigators and analysts

with quick, easy access to the full breadth of information relating to terrorism." Federal Bureau of Investigation, Report to the National Commission on Terrorist Attacks upon the United States: The FBI's Counterterrorism Program Since September 2001 (April 14, 2004), at 53. The FBI's goal is to include in the IDW "all data that can legally be stored together." *Id.* at 54; Complaint ¶ 5; Answer ¶ 5. The IDW provides FBI agents and analysts with "instant access to photographs, biographical information, physical location information, and financial data for thousands of known and suspected terrorists." Remarks Prepared for Delivery by John E. Lewis, Deputy Assistant FBI Director, 4th Annual International Conference on Public Safety: Technology and Counterterrorism Initiatives and Partnerships, San Francisco, California (March 14, 2005). According to Mr. Lewis, as of March 2005, "[t]he database comprise[d] more than 100 million pages of terrorism-related documents, and billions of structured records such as addresses and phone numbers." *Id.*; Complaint ¶ 6; Answer ¶ 6.

The amount of information contained in the IDW appears to be growing at a tremendous rate. In May 2006, little more than a year after Mr. Lewis quantified the contents of the IDW, FBI Director Robert S. Mueller, III testified to Congress that the "IDW now contains over 560 million FBI and other agency documents." Statement of Robert S. Mueller, III, Director, Federal Bureau of Investigation, Before the Senate Committee on the Judiciary (May 2, 2006). According to Mr. Mueller, "Nearly 12,000 users can access [the IDW] via the FBI's classified network from any FBI terminal throughout the globe. And, nearly 30 percent of the user accounts are provided to task force members from other local, state, and federal agencies." *Id.*; Complaint ¶ 7; Answer ¶ 7.

To date, the FBI has not published, with respect to the IDW, a "notice of the existence and character of the system of records," under the provisions of the Privacy Act of 1974, 5

U.S.C. § 552a(e)(4). Nor has the Bureau filed a Standard Form (SF) 115, "Request for Records Disposition Authority," nor made any other submission to the Archivist of the United States concerning the IDW under the provisions of 44 U.S.C. § 3303. Furthermore, the FBI has not made publicly available, with respect to the IDW, a "privacy impact statement" under the provisions of the E-Government Act of 2002, P.L. 107-347. Complaint ¶¶ 8-10; Answer ¶¶ 8-10.

II. Plaintiff's FOIA Requests and the FBI's Failure to Respond

By letter sent by facsimile to the FBI on August 25, 2006, plaintiff requested under the FOIA agency records concerning the IDW. Specifically, plaintiff requested:

> 1) records listing, describing or discussing the categories of individuals covered by the IDW;
>
> 2) records listing, describing or discussing the categories of records in the IDW;
>
> 3) records listing, describing or discussing criteria for inclusion of information in the IDW;
>
> 4) records describing or discussing any FBI determination that the IDW is, or is not, subject to the requirements of the Privacy Act of 1974; and
>
> 5) records describing or discussing any FBI determination that the IDW is, or is not, subject to federal records retention requirements, including the filing of Standard Form (SF) 115, "Request for Records Disposition Authority."

Exhibit C (attached to Declaration of David M. Hardy ("Hardy Decl.").

By letter sent by facsimile to the FBI on September 1, 2006, plaintiff requested under the FOIA additional agency records concerning the IDW. Specifically, plaintiff requested:

> 1) records describing data expungement, restriction or correction procedures for the IDW;
>
> 2) privacy impact statements created for the IDW; and
>
> 3) results of audits conducted to ensure proper operation of the IDW.

In support of its FOIA request, plaintiff noted that the *Washington Post* had published an article concerning the IDW on August 30, 2006, and that the article reported as follows:

> Irrelevant information [in the IDW] can be purged or restricted, and incorrect information is corrected, [Gurvais Grigg, acting director of the FBI's Foreign Terrorist Tracking Task Force] said. Willie T. Hulon, executive assistant director of the FBI's National Security Branch, said that generally information is not removed from the system unless there is "cause for removal."
>
> Every data source is reviewed by security, legal and technology staff members, and a privacy impact statement is created, Grigg said. The FBI conducts in-house auditing so that each query can be tracked, he said.

Exhibit A, attached to Hardy Decl.

After the Bureau failed to respond to plaintiff's requests within the 20-working-day period required by the FOIA, 5 U.S.C. § 552(a)(6)(A), plaintiff filed this lawsuit on October 17, 2006.

III. The Controversy Surrounding the FBI's Abuse of National Security Letter Powers and Plaintiff's Request for Expedited Processing of its FOIA Requests

On March 9, 2007, defendant DOJ's Inspector General issued a report documenting numerous instances of the FBI's "improper or illegal use" of so-called National Security Letter ("NSL") authorities granted to the Bureau under the USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001). Specifically, the Inspector General "found that the FBI used NSLs in violation of applicable NSL statutes, Attorney General Guidelines, and internal FBI policies." U.S. Department of Justice, Office of the Inspector General, "A Review of the Federal Bureau of Investigation's Use of National Security Letters" (March 2007), at xlvii. Of particular relevance to the FOIA requests at issue here, the Inspector General revealed that "NSL data is periodically downloaded . . . into the FBI's Investigative Data Warehouse (IDW), a centralized repository for intelligence and investigative data with advanced search capabilities." *Id.* at 30.

By letter to defendant DOJ's Director of Public Affairs dated April 6, 2007, EFF formally requested that the processing of its pending FOIA requests for information concerning the IDW be expedited. Exhibit 1 (attached hereto). EFF asserted that its pending requests meet the criteria for expedited processing under applicable DOJ regulations, as they concern "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." 28 CFR § 16.5(d)(1)(iv).[1] Plaintiff's letter noted that the Director of Public Affairs had recently concluded that another request EFF submitted to the FBI, concerning the Bureau's use of NSLs, warranted expedited processing on this ground. Plaintiff incorporated by reference EFF's earlier letter (dated March 12, 2007) which established that there was "widespread and exceptional media interest" in the FBI's abuse of NSL authority, and that the abuses raised "possible questions about the government's integrity which affect public confidence." *Id.*; *see* Exhibit 2 (attached hereto).

In its letter of April 6, 2007, plaintiff underscored the Inspector General's finding that personal information obtained through the issuance of NSLs was incorporated into the IDW, and noted that "[t]he Bureau's continuing retention in the IDW of the personal data improperly or illegally obtained through abuses of the NSL process is obviously central to the undisputed questions about 'integrity which affect public confidence.'" Exhibit 1 at 1. Plaintiff further noted that during the Senate Judiciary Committee's hearing on the issue on March 21, Sen. Feingold had the following exchange with the Inspector General:

> Sen. Feingold: In your October 2006 memo to the attorney general on the Justice Department's top management and performance challenges for fiscal year 2006, you caution that the Patriot Act granted the FBI broad new authorities to collect information, including the authority, quote, "To review and store information

[1] Pursuant to DOJ's regulations, requests for expedited processing based upon the "widespread and exceptional media interest" standard must be submitted to the Director of Public Affairs. 28 CFR § 16.5(d)(2).

> about American citizens and others in the United States about whom the FBI has no individualized suspicion of illegal activity," unquote.
>
> You cautioned nearly six months ago that the department and the FBI need to be particularly mindful about the potential for abuse of these types of powers.
>
> First, I want to establish some basic facts alluded to in your memo. Under the existing NSL statutes, it is possible to obtain information, including full credit reports, about people who are entirely innocent of any wrongdoing. Isn't that correct?
>
> Mr. Fine: Well, it is possible, yes, as a result of the investigation there's no finding of anything and that they are innocent. Yes.
>
> Sen. Feingold: And the FBI's policy is that it will retain all information obtained via NSLs indefinitely, often in databases like the Investigative Data Warehouse that are available to thousands of investigators. Is that correct?
>
> Mr. Fine: Yes.
>
> Sen. Feingold: Now, with regard to your caution about the potential for abuse of these powers, DOJ responded in November 2006 that the FBI agrees and that it is, quote, "aggressively vigilant in guarding against any abuse," unquote.
>
> Would you agree with that statement, that the FBI has been aggressively vigilant in guarding against abuses?
>
> Mr. Fine: I would agree that the FBI was not aggressively vigilant in terms of guarding against the problems we found, yes.

Id. at 2.

Plaintiff noted that DOJ had itself acknowledged that serious questions were raised by the Inspector General's revelations:

> Indeed, the Department has recognized that the questions surrounding the retention of NSL data in the IDW are serious and require further examination. In a "Fact Sheet" issued on March 20, the Department announced "new oversight of the use and retention of NSL-derived information" and the creation of a "working group" to "examine how NSL-derived information is used and retained by the FBI." Fact Sheet: Department Of Justice Corrective Actions on the FBI's Use of National Security Letters (March 20, 2007).

> In summary, it is clear that recent events warrant the expedited processing of EFF's requests for information concerning the policies and procedures governing the inclusion and use of information in the Investigative Data Warehouse.

Id. at 2-3.

To date, the Director of Public Affairs has not responded to EFF's request to expedite the processing of the FOIA requests at issue here.[2]

Argument

I. Plaintiff's FOIA Requests are Entitled to Expeditious Handling

In requesting an extraordinary stay of 71 months, defendant DOJ seeks to rely upon the D.C. Circuit's decision in *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976), which recognized that an agency may be granted a stay of proceedings

> [when it] is deluged with a volume of requests for information vastly in excess of that anticipated by Congress, when the existing resources are inadequate to deal with the volume of such requests within the time limits of [the FOIA], and when the agency can show that it "is exercising due diligence" in processing the requests.

Id. at 616 (quoting 5 U.S.C. § 552(a)(6)(C)). The court of appeals also recognized, however, that requests should be given priority – and processed more quickly – "where exceptional need or urgency is shown." *Id*. Such requests should *not* be handled on the standard "first-in, first-out basis," but instead should be expedited:

> We believe that Congress intended for a district court to require an agency to give priority to a request for information if some exceptional need or urgency attached to the request justified putting it ahead of all other requests received by the same agency prior thereto.

Id. at 615.

[2] The agency must notify a requester of its determination on a request for expedited processing within 10 days after receipt of the request. 5 U.S.C. § 552(a)(6)(E)(ii)(I); 28 CFR § 16.5(d)(4). With respect to plaintiff's April 6, 2006 request, the 10-day time limit expired on April 16, 2007.

Congress codified *Open America*'s recognition of a right to expedited processing in the Electronic Freedom of Information Act Amendments of 1996, Pub. L. 104-231, § 8, 110 Stat. 3048, requiring agencies to promulgate regulations providing for expedition "in cases in which the person requesting the records demonstrates a compelling need; and *in other cases determined by the agency*." 5 U.S.C. § 552(a)(6)(E)(i) (emphasis added). Pursuant to that directive, DOJ's regulations provide for expedition, *inter alia*, under the "exceptional media interest" standard that plaintiff relies upon here. *See* 28 CFR § 16.5(d).[3] The courts are empowered to review agency denials of requests for expedition, as well as an agency's failure to timely respond to such a request. 5 U.S.C. § 552(a)(6)(E)(iii); *American Civil Liberties Union v. Dep't of Justice*, 321 F. Supp. 2d 24, 28 (D.D.C. 2004).

In support of its expedition request, plaintiff made the following showing before the agency:

- According to a search of the Lexis-Nexis "News, Most Recent 90 Days" database, more than 125 articles containing the terms "FBI" and "National Security Letters" appeared in the first three days after the Inspector General's report was released. A search of Google News using the same terms indicates that 1,235 online articles appeared during the same period. Exhibit 2 (attached hereto).

- Further demonstrating that there has been "widespread and exceptional media interest" in the issue, FBI Director Mueller convened a press conference to answer questions about the IG's report less than two hours after it was released. *See* http://www.fbi.gov/pressrel/pressrel07/nsl_transcript030907.htm. In addition, the FBI's homepage featured a link to the Bureau's "response to the DOJ Inspector General's report on the use of National Security Letters and our answers to questions about their use and investigative value." *Id*.

[3] This standard for expedited processing was first adopted by the Department of Justice in 1994. Memorandum from United States Dep't of Justice, Office of Public Affairs (Feb. 3, 1994); Department of Justice, FOIA Update, Vol. XV, No. 2, 1994, http://www.usdoj.gov/oip/foia_updates/Vol_XV_2/page1.htm. *See also*, *Electronic Privacy Information Center v. Dep't of Justice*, 865 F. Supp. 1 (D.D.C. 1994).

- It is clear that "there exist possible questions about the government's integrity which affect public confidence." Such questions are exemplified in the following exchange at Director Mueller's press conference:

> Question: Director, you talked about how critically important these letters are to the mission of the FBI. And we also know that the FBI's allowed to do this without seeking a court order for the information. Is part of your frustration that this is about trust; that Congress gives you this authority to go out and do this, (inaudible) in dealing with these issues?
>
> Director Mueller: Well, I think Congress and the American people should have a lot of trust in the FBI. Occasionally, there are areas where we need to admit mistakes that we've made – this is one of them; areas where we should've done a better job – this is one of them. And I think Congress and ourselves should both trust but also verify.

Id.

- Similarly, in remarks made shortly after the release of the IG report, the Attorney General acknowledged that "we must act quickly and decisively to restore the public's confidence." Prepared Remarks of Attorney General Alberto R. Gonzales at the International Association of Privacy Professionals Privacy Summit Washington, D.C., March 9, 2007 (available at http://www.usdoj.gov/ag/speeches/2007/ag_speech_070309.html). *Id*.

- Editorials in the country's leading newspapers raised questions about "integrity" and "public confidence." *See, e.g.*, The Washington Post, "Abuse of Authority; The FBI's gross misuse of a counterterrorism device," March 11, 2007, p. B6 ("The report depicts an FBI cavalierly using its expanded power to issue 'national security letters' without adequate oversight or justification."); The New York Times, "The Failed Attorney General," March 11, 2007, p. 13, Section 4 ("[The] inspector general exposed the way the Federal Bureau of Investigation has been abusing yet another unnecessary new power . . ."). *Id*.

- The Bureau's continuing retention in the IDW of the personal data improperly or illegally obtained through abuses of the NSL process is obviously central to the undisputed questions about "integrity which affect public confidence." During the Senate Judiciary Committee's hearing on the issue on March 21, Sen. Feingold's exchange with DOJ Inspector General Glenn Fine addressed such questions. Exhibit 1 (attached hereto).

- Defendant DOJ has recognized that the questions surrounding the retention of NSL data in the IDW are serious and require further examination. In a "Fact Sheet" issued on March 20, the Department announced "new oversight of the use and retention of NSL-derived information" and the creation of a "working group" to "examine how NSL-derived information is used and retained by the FBI." Fact Sheet: Department of Justice Corrective Actions on the FBI's Use of National Security Letters (March 20, 2007). *Id*.

Upon review of defendant DOJ's failure to grant EFF's request to expedite the processing of its FOIA requests for information concerning the policies and procedures governing information in the Investigative Data Warehouse, the Court should recognize plaintiff's entitlement to expedition and reject the FBI's request to stay proceedings for 71 months.

II. The FBI has Failed to Show that it Should Be Permitted Six Additional Years to Process EFF's FOIA Requests

Even if plaintiff's FOIA requests did not require expedited processing, the government would not be entitled to the extraordinary relief it requests. In support of its motion, defendant DOJ acknowledges that it is seeking a "lengthy stay" of proceedings in which to process plaintiff's requests, but maintains that the FBI is entitled to *six additional years* pursuant to the FOIA and *Open America*. Defendant's Memorandum ("Def. Mem.") at 2. The legal standard that DOJ must satisfy to demonstrate an entitlement to a stay is well established. The "exceptional circumstances-due diligence" standard derives from two sources: the FOIA itself, 5 U.S.C. § 552(a)(6)(C)(i)-(iii); and the D.C. Circuit's opinion in *Open America*, 547 F. 2d 605, which construed the statutory provision. This Court recently recognized that:

> [u]nder D.C. Circuit law, a stay pursuant to [the statute] and the *Open America* doctrine may be granted "(1) when an agency is burdened with an unanticipated number of FOIA requests; *and* (2) when agency resources are inadequate to process the requests within the time limits set forth in the statute; *and* (3) when the agency shows that it is exercising 'due diligence' in processing the requests; *and* (4) the agency shows reasonable progress in reducing its backlog of requests."

The Wilderness Society v. Dep't of the Interior, No. 04-0650, 2005 U.S. Dist. LEXIS 20042, at **31-32 (D.D.C. Sept. 12, 2005) (citations omitted; emphasis in original) (attached hereto as Exhibit 3).[4] *See also Electronic Privacy Information Center v. Dep't of Justice*, No. 02-0063,

[4] The court noted in *Wilderness Society* that:

2005 U.S. Dist. LEXIS 18876, at **10-11 (D.D.C. Aug. 31, 2005) (same) (attached hereto as Exhibit 4). Under this standard, defendant has failed to show that it should be granted the wildly excessive stay that it seeks.

A. The FBI Has Failed to Demonstrate That Exceptional Circumstances Exist to Justify a Stay

In addition to a relatively large (but, for many years, routine) FOIA request backlog, the FBI claims that it has encountered three "exceptional" circumstances weighing in favor of a 71-month stay of proceedings. First, the Bureau has relocated its FOIA operations from Washington, DC to Frederick County, Virginia, and has lost a number of FOIA staff as a result. Def. Mem. at 23-24; Hardy Decl. ¶¶ 11-14. Second, the FBI cites three federal district court deadlines, which defendant claims are "tak[ing] resources away from other pending FOIA requests." Def. Mem. at 24; Hardy Decl. ¶¶ 15-18. Finally, defendant asserts that a "high volume" of administrative appeals further exacerbates the FBI's FOIA backlog. Def. Mem. at 24-25; Hardy Decl. ¶ 20. However, defendant has failed to show that these events justify a six-year stay of proceedings in this case.

First, this Court recently determined that an agency's other processing commitments and personnel difficulties are insufficient to justify an *Open America* stay. In *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246 (D.D.C. 2005), the Department of Justice sought an additional 44 months to complete the processing of the plaintiff's six FOIA requests.

> [p]ursuant to the 1996 amendments, Congress *tightened the standard* for obtaining a stay by defining the term "exceptional circumstances" so as to exclude any "delay that results from a predictable agency workload of requests . . . unless the agency demonstrates reasonable progress in reducing its backlog of requests." 5 U.S.C. § 552(a)(6)(C)(ii).

Id. at *31 (emphasis added).

In support of its motion, the government cited circumstances similar to those in this case, such as a "large backlog of pending FOIA requests," including a number of requests "in the 'project' category which take a much longer time to process than other requests." *Id.* at 259. The agency also argued that "the work of the [FOIA processing] unit has not only been disrupted by court orders requiring maximum manpower on an emergency basis to other litigation and cases but also personnel issues." *Id*. On these facts, the Court found that the Department failed to demonstrate that exceptional circumstances existed to justify an *Open America* stay, explaining:

> The Court is in no position to determine which "projects" warrant an emergency treatment and which "projects" do not. Furthermore, the Court will not get involved in defendants' personnel and project management difficulties. Therefore, defendants have shown the existence of a *predictable* backlog of FOIA requests. In addition, defendants have not convinced the Court that they are acting with due diligence to decrease their backlog. Accordingly, defendants motion for an *Open America* stay . . . is denied.

Id. (emphasis added).

Furthermore, there is little evidence that the litigation deadlines cited by defendant will significantly affect the Bureau's ability to process plaintiff's FOIA requests in a timely manner. The FBI's court-imposed processing deadline (March 16) in *Hidalgo v. FBI*, Civ. No. 06-1513 (D.D.C.) has already passed. Hardy Decl. ¶ 18. Furthermore, the Court has ordered the FBI to complete its processing of the documents at issue in *Gerstein v. CIA*, Civ. No. 06-4643 (N.D. Cal.) before the end of this month (by April 27). Hardy Decl. ¶ 16. There is no indication that these cases should significantly affect the FBI's capability to process plaintiff's requests, and their mere existence does not justify the six-year stay defendant seeks.

Finally, the FBI's assertion that a high volume of administrative appeals constitutes an exceptional circumstance is unavailing. According to defendant, the Bureau received 1,015 administrative appeals in 2006. Def. Mem. at 24; Hardy Decl. ¶ 20. As of February 28, 2007,

520 administrative appeals were pending resolution. Def. Mem. at 24; Hardy Decl. ¶ 20. As the FBI concedes, "this number does not represent an increase," but "remains another significant drain on resources." Def. Mem. at 24; Hardy Decl. ¶ 20. The FBI presents no evidence that these administrative appeals are anything more than part of the Bureau's predictable FOIA backlog, nor that the agency is taking steps to reduce the number of administrative appeals pending resolution. Thus, the pending appeals cannot be considered an "exceptional circumstance" weighing in favor of a stay.

Therefore, regardless of how difficult or time-consuming the processing of plaintiff's FOIA requests may be when facing a large FOIA request backlog, litigation deadlines and personnel difficulties, defendant has failed to cite the kind of "exceptional circumstances" sufficient to satisfy the well-established *Open America* standard as construed in this Circuit.

B. The FBI has not Exercised "Due Diligence" in Its Processing of Plaintiff's FOIA Requests

The Bureau has also failed to satisfy the "due diligence" prong of the standard. The D.C. Circuit has recognized that the FOIA's legislative history requires an agency to have exercised "due diligence" *from the outset* in order to qualify for the kind of relief the FBI seeks here. *Oglesby v. Dep't of the Army*, 920 F.2d 57, 62 n.3 (D.C. Cir. 1990) ("The court [has] authority to allow the agency additional time to examine requested records in exceptional circumstances where the agency was exercising due diligence in responding to the request *and had been since the request was received*.") (quoting H.R. Conf. Rep. No. 1380, 93d Cong., 2d Sess. 11 (1974)) (emphasis added).

The record clearly establishes that the Bureau has not even approached the requisite showing in its handling of plaintiff's requests to date. EFF's requests were submitted to the FBI on August 25 and September 1, 2007. Since then, the agency has located "approximately 72,000

pages of records potentially responsive to plaintiff's request[s]," Hardy Decl. ¶ 38, but has not yet even assigned them to a FOIA/Privacy Act processing analyst for review. Hardy Decl. ¶ 39. By no stretch of the imagination can the FBI's response be deemed diligent "since the request was received," *Oglesby*, where it has taken almost *eight months* to merely collect documents that *may* be responsive. Notwithstanding any representations that might be made in the government's submissions, it is beyond dispute that defendant has failed to meet its burden of satisfying the "exceptional circumstances-due diligence" test. Thus, the Court should not grant the FBI an additional 71 months to process EFF's requests, but should instead order the agency to process and release non-exempt material responsive to the requests within 60 days.

C. Courts Routinely Order Agencies to Complete the Processing of FOIA Requests by a Date Certain

The approach that plaintiff suggests is not unusual. This Court has recently imposed specific processing deadlines on agencies, requiring the prompt delivery of non-exempt records to FOIA requesters. For example, in *Judicial Watch, Inc. v. Dep't of Energy*, 191 F. Supp. 2d 138 (D.D.C. 2002), the Court ordered the Commerce Department and the Transportation Department to process, respectively, 9000 and 6000 pages of material; to complete the processing within 60 days; and to provide the requester with a *Vaughn* index within 72 days. *Id.* at 141. It is worth noting that the requesters of the FOIA requests at issue in that case did *not* claim to be entitled to expedited processing.

Similarly, in *Natural Resources Defense Council v. Dep't of Energy* ("*NRDC*"), the Court ordered the Energy Department to process 7500 pages of material; to complete the processing of the "vast majority" of the material within 32 days; to complete all processing within 48 days; and to provide the requester with a *Vaughn* index within 63 days. 191 F. Supp. 2d 41, 43-44 (D.D.C. 2002). Again, the FOIA request in *NRDC* had *not* been granted expedited treatment.

More recently, in *ACLU v. Department of Defense*, 339 F. Supp. 2d 501 (S.D.N.Y. 2004), a case involving an expedited request, the court ordered a variety of agencies to "produce or identify all responsive documents," and to provide the requesters with a *Vaughn* index, within 30 days. *Id*. at 505. Furthermore, in *Electronic Privacy Information Center v. Dep't of Justice*, this Court ordered the FBI to "complete the processing of 1500 pages every 15 calendar days, and provide to Plaintiff all responsive non-exempt pages contained therein, until processing is complete," after the agency had granted a request for expedited processing but failed to produce any responsive records. Civ. No. 05-845, 2005 U.S. Dist. LEXIS 40318, at **5-6 (D.D.C. Nov. 16, 2005). Likewise, in another case between the same parties, this Court ordered defendant to process the plaintiff's request, which had been granted expedited treatment, within 20 days of the date of the Court's order, and produce a *Vaughn* index accounting for any withholdings within 10 days thereafter. *Electronic Privacy Information Center v. Dep't of Justice*, 416 F. Supp. 2d 30, 43 (D.D.C. 2006).

For these reasons, the Court should not only deny defendant's motion for an *Open America* stay of 71 months, but also order the FBI to complete processing of plaintiff's requests within 60 days.

CONCLUSION

For the foregoing reasons, the Court should deny defendant's motion for entry of an *Open America* stay, and require defendant DOJ and its component the FBI to process plaintiff's FOIA requests for records concerning the FBI's Investigative Data Warehouse within 60 days of the Court's order. Should the Court grant the FBI a longer period of time to process EFF's requests, plaintiff respectfully asks that the Court order the agency to make interim releases of documents responsive to plaintiff's request every four weeks, and submit periodic reports to the

Court and plaintiff on the Bureau's progress toward completing the processing of plaintiff's FOIA requests.

Respectfully submitted,

/s/ *David L. Sobel*
DAVID L. SOBEL
D.C. Bar No. 360418

MARCIA HOFMANN
D.C. Bar. No. 484136

Electronic Frontier Foundation
1875 Connecticut Avenue, N.W.
Suite 650
Washington, DC 20009
(202) 797-9009

Counsel for Plaintiff