IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC FRONTIER FOUNDATION,	)	
Plaintiff,	)	
v.	)	Civil Action No: 1:07-cv-00656 (JDB)
DEPARTMENT OF JUSTICE	)	
Defendant.	)	

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION
FOR PRELIMINARY INJUNCTION

Plaintiff Electronic Frontier Foundation ("EFF" or "plaintiff") asks the Court to invoke its extraordinary powers to award temporary emergency relief by issuing a preliminary injunction aimed at requiring defendant the, the United States Department of Justice ("DOJ" or "the Department") to complete the processing of plaintiff's requests under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552,within the next twenty days and to provide a Vaughn index ten days thereafter. Plaintiff's request for such relief by way of a preliminary injunction – which is not preliminary in any sense but rather is an attempt to use a procedural mechanism intended to provide emergency relief as a scheduling tool – is generally inappropriate in FOIA cases for the reasons discussed below. Plaintiff offers the Court no reason that justifies granting the extraordinary relief it seeks.

Indeed, the relief plaintiff seeks is inconsistent with the plain language of the expedited processing provision of the FOIA. The Department has already granted plaintiff's request to

expedite processing under 5 U.S.C. § 552(a)(6)(e), and the Federal Bureau of Investigation ("FBI") has already has begun the searches required to identify responsive documents. Contrary to the claims made by plaintiff, the expedited processing provision of FOIA provides that expedited FOIA requests are to be processed by the agency "as soon as practicable," id. § 552(a)(6)(e)(iii), and imposes no time limits on such processing. The Department is proceeding under that standard, and plaintiff – who bears the burden on a motion for preliminary injunction – offers no proof to the contrary. Indeed, far from being supported by either proof or precedent, plaintiff's request is fundamentally incompatible with the statute, which requires that expedited FOIA requests be processed "as soon as practicable"and not on any one plaintiff's artificial time frame.

Plaintiff makes its request for emergency preliminary relief while at the same time failing to meet its essential burden of identifying any irreparable harm that it might suffer if responsive, non-exempt documents are not immediately ordered to be produced. Plaintiff identifies no reason why the agency must be required to complete the processing of plaintiff's request – which seeks an extraordinary volume of documents spanning a five-year period, from multiple locations within FBI Headquarters ("FBIHQ"), the majority of which are classified – within the artificial period proposed in plaintiff's injunctive demand as opposed to "as soon as practicable" as specifically set forth in FOIA.

Instead, it is plain that plaintiff seeks to use the preliminary injunction provisions of Federal Rule of Civil Procedure 65, which are intended to provide a shield against imminent injury while a court considers the merits of a dispute, to artificially accelerate the proceedings in

this case.[1] This is nothing more than a litigation tactic, and it should not be indulged.

Preliminary injunctions are an extraordinary remedy that are ordinarily intended to preserve the status quo pending a court's resolution of a case on the merits. The injunction proposed by plaintiff, on the other hand, does not seek to maintain any status quo but rather seeks a version of ultimate relief – the immediate disclosure of non-exempt documents. See 5 U.S.C. § 552(a) (4)(B) (under FOIA, court has "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld").[2] Moreover, plaintiff seeks such relief on an emergency basis despite the fact that it has been granted the special dispensation of being moved to the front of the FBI's FOIA queue, ahead of other non-expedited requesters. Awarding plaintiff the relief it seeks at this early stage of these proceedings, before defendant is even required to answer plaintiff's complaint and before the FBI has completed searches and necessary document reviews, is without any basis in law. Plaintiff relies heavily on one recent district court decision in which a court granted a preliminary injunction in a case where Plaintiff's FOIA request had been accorded expedited processing. See Electronic Privacy Information Center v. DOJ, 416 F. Supp. 2d 30 (D.D.C. 2006) ("EPIC"). As

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[1] Congress has specifically recognized that litigation involving FOIA claims is to be accelerated. See 5 U.S.C. § 552(a)(4)(C) (providing that government defendants have 30 days in which to answer a FOIA complaint as opposed to the ordinary 60 days provided by Fed. R. Civ. P. 12). Plaintiff's effort to seek a preliminary injunction is nothing more than an effort to bypass these already-accelerated procedures.

[2] Indeed, because FOIA permits a Court to exercise jurisdiction to compel the release of documents only after determining that there has been an improper withholding, see Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 150 (1980), analytically, the granting of the preliminary injunctive relief demanded here is at odds with the jurisdictional provisions of FOIA, since the Court can make no determination as to "improper" withholding until the Department has completed its searches and claimed any appropriate exemptions.

discussed below, however, EPIC was wrongly decided and it's reasoning should not be followed here. Instead, plaintiff's motion should be denied.

BACKGROUND

1. Statutory and Regulatory Framework

a. FOIA's Expedited Processing Provision

Agencies ordinarily process FOIA requests for agency records on a first-in, first-out basis. In 1996, Congress amended the FOIA to provide for "expedited processing" of certain categories of requests. See Electronic Freedom of Information Amendments of 1996 ("EFOIA"), Pub. L. No. 104-231, § 8 (codified at 5 U.S.C. § 552(a)(6)(E)). Expedition, when granted, entitles requesters to move immediately to the front of an agency processing queue, ahead of requests filed previously by other persons.

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

> (I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or
>
> (II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

5 U.S.C. § 552(a)(6)(E)(v).[3] The requester bears the burden of showing that expedition is

[3] Both Congress and the Court of Appeals have recognized that the expedition categories are to be "narrowly applied" because, "[g]iven the finite resources generally available for fulfilling FOIA requests, unduly generous use of the expedited processing procedure would

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

b. The Department's Regulations

DOJ implemented EFOIA by final rule effective July 1, 1998. See Revision of Freedom of Information Act and Privacy Act Regulations and Implementation of Electronic Freedom of Information Act Amendments of 1996, 63 Fed. Reg. 29591 (1998), codified at 28 C.F.R. Part 16. This regulation, which governs FOIA requests to all DOJ components, see 28 C.F.R. § 16.1(b), states that "[r]equests and appeals" will be "taken out of order and given expedited treatment whenever it is determined that they involve":

> (i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;
>
> (ii) An urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information;
>
> (iii) The loss of substantial due process rights; or
>
> (iv) A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence.

28 C.F.R. § 16.5(d)(1)(i)-(iv). Categories (i) and (ii) implement the FOIA's "compelling need" standard; categories (iii) and (iv) define additional categories for expedition. See 63 Fed. Reg. at 29592. Requests for expedition based on categories (i), (ii), and (iii) must be submitted to the

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unfairly 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)).

component that maintains the records requested. See 28 C.F.R. § 16.5(d)(2). Requests for expedition based on category (iv) – the Department's "special media-related standard," see 63 Fed. Reg. at 29592 – must be submitted to the Director of the Department's Office of Public Affairs ("OPA"). See 28 C.F.R. § 16.5(d)(2). This enables "the Department's media specialists [to] deal directly with matters of exceptional concern to the media." 63 Fed. Reg. at 29592.

Within ten calendar days of receiving a request for expedited processing, the component must "decide whether to grant it and . . . notify the requester of the decision." 28 C.F.R. § 16.5(d)(4); see also 5 U.S.C. § 552(a)(6)(E)(ii)(I) (requiring notice of decision within ten days of request). If the request is granted, "the request shall be given priority and shall be processed as soon as practicable." 28 C.F.R. § 16.5(d)(4). If the request is denied, "any appeal of that decision shall be acted on expeditiously." Id.; see also 5 U.S.C. § 552(a)(6)(E)(ii)(II) (requiring "expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing").

2. Factual Background.

By letter dated March 12, 2007, plaintiff submitted a request to FBI Headquarters ("FBIHQ") for the following records, "from January 1, 2003 to the present,"concerning the FBI's use of National Security Letters ("NSLs)":

1. All records discussing or reporting violations or potential violations of statutes, Attorney General guidelines, and internal FBI policies governing the use of NSLs, including, but not limited to:

    a. Correspondence or communications between the FBI and the Privacy and Civil Liberties Oversight Board concerning violations or potential violations of statutes, Attorney General guidelines, and internal FBI policies governing the use of NSLs; and

b. Correspondence or communications between the FBI and Department of Justice Office of the Inspector General concerning violations or potential violations of statutes, Attorney General guidelines, and internal FBI policies governing the use of NSLs;

2. Guidelines, memoranda or communications addressing or discussing the integration of NSL data into the FBI's Investigative Data Warehouse;

3. Contracts between the FBI and three telephone companies (as referenced in page 88 of the Inspector General's report), which were intended to allow the Counterterrorism Division to obtain telephone toll billing data from the communications industry as expeditiously as possible;

4. Any guidance, memoranda or communications discussing the FBI's legal authority to issue exigent letters to telecommunications companies, and the relationship between such exigent letters and the FBI's authority to issue NSLs under the Electronic Communications Privacy Act;

5. Any guidance, memoranda or communications discussing the application of the Fourth Amendment to NSLs issued under the Electronic Communications Privacy Act;

6. Any guidance, memoranda or communications interpreting "telephone toll billing information" in the context of the Electronic Communications Privacy Act;

7. Any guidance, memoranda or communications discussing the meaning of "electronic communication" in the context of the Electronic Communications Privacy Act;

8. Copies of sample or model exigent letters used by the FBI's Counterterrorism Division;

9. Copies of sample or model NSL approval requests used by the FBI's Counterterrorism Division; and

10. Records related to the Counterterrorism Division's Electronic Surveillance Operations and Sharing Unit (EOPS).

Pl's Ex. 1; Declaration of David M. Hardy ("Hardy Dec."), n. 1 & Ex. A. Also on March 12, 2007, Plaintiff wrote to OPA seeking expedited processing of its request, invoking 28 C.F.R. §

16.5(d)(1)(iv), and asserting that "the FBI's 'improper or illegal use' of NSL authority has engendered 'widespread and exceptional media interest'" since the release on March 9, 2008 of a report by DOJ's Inspector General entitled "A Review of the Federal Bureau of Investigation's Use of National Security Letters." See Pl's Ex 2; Hardy Dec., Ex. B. On March 29, 2007 the FBI acknowledged receipt of plaintiff's FOIA request and indicated that it had begun to search it's Central Records System ("CRS") at FBIHQ for the requested information. See Pl's Ex 3; Hardy Dec., Ex. C. On March 30, 2007, the FBI informed plaintiff that the Director of OPA had concluded that the subject matter of plaintiff's FOIA was indeed a "matter of widespread and exceptional media interest in which there exists possible questions about the government's integrity which affects public confidence," pursuant to 28 C.F.R. § 16.5(d)(1)(iv) , and accordingly had granted plaintiff's request for expedited processing. See Pl's Ex. 4; Hardy Dec., Ex. D.

On April 10, 2007, plaintiff filed the instant suit as well as a Motion for a Preliminary Injunction asking that the Court order that DOJ "complete the processing of Plaintiff's March 12, 2007 Freedom of Information Act request and produce or identify all responsive records, within 20 days of the date of this order" and to "provide [p]laintiff with a document index and declaration . . . stating defendant's justification for the withholding of any document responsive to plaintiff's request, within 30 days." See Pl's Proposed Order.

At the time that the Department granted plaintiff's request for expedited processing, there were already two pending FOIA requests before the agency which were entitled to expedited processing. See Hardy Dec. ¶¶ 15-17. Although expedited processing entitled plaintiff to have its request processed ahead of those requesters in the normal FOIA queue, to whom no expedited

processing had been accorded, plaintiff was not accorded any special right to have its request processed before the already-pending expedited requests. See id. ¶ 15. Indeed, given the substantial volume of documents to be processed in the two prior expedited cases, the FBI currently has only limited resources available to work on expedited processing of plaintiff's request. See Hardy Dec. ¶¶ 15-17.

The FBI has begun the process of collecting documents responsive to plaintiff's sweeping FOIA requests, see id. ¶¶ 21-27, and currently estimates responsive documents to number approximately 172,000 pages, see id. ¶ 28, all of which must undergo at least a classification review. This tremendous volume is due to both the sweeping temporal scope of the requests (the request spans five years while the Inspector General's report covered only three years), see id. ¶ 4, and to the broad wording of the requests to include "any guidance, memoranda, or communications" concerning various topics. See id. ¶¶ 4-6. Because the FBI's search is not yet completed, and its processing of these documents has just begun, it is not yet in a position to provide the Court or plaintiff with an estimate of exactly how long it will take the FBI to complete its expedited processing of plaintiff's request. However, the FBI believes that, within 120 days, it should have a better sense of the volume of documents and the time that will be needed to process them. See id. ¶ 36. Furthermore, if plaintiff is interested in receiving documents faster, it can work with the FBI to narrow the scope of these extremely broad requests. See id. ¶ 10.

ARGUMENT

Preliminary injunctive relief such as that demanded by plaintiff is "an extraordinary measure, and . . . the power to issue such exceptional relief 'should be sparingly exercised.'"

Experience Works, Inc. v. Chao, 267 F. Supp. 2d 93, 96 (D.D.C. 2003) (quoting Dorfmann v. Boozer, 414 F.2d 1168, 1173 (D.C. Cir. 1969)) (internal quotes omitted); accord Boivin v. US Airways, Inc., 297 F. Supp. 2d 110, 116 (D.D.C. 2003) ("It frequently is observed that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion") (quoting Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (per curiam)) (emphasis in original). "[I]n considering a plaintiff's request for a preliminary injunction a court must weigh four factors: (1) whether the plaintiff has a substantial likelihood of success on the merits; (2) whether the plaintiff would suffer irreparable injury were an injunction not granted; (3) whether an injunction would substantially injure other interested parties; and (4) whether the grant of an injunction would further the public interest." Al-Fayed, 254 F.3d at 303; accord Serono Labs., Inc. v. Shalala, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998).

I. PRELIMINARY INJUNCTIONS ARE GENERALLY INAPPROPRIATE IN FOIA CASES.

Plaintiff's request for a preliminary injunction is even more extraordinary than in the usual case because plaintiff seeks such relief in a FOIA case where, for a variety of reasons, such motions are generally inappropriate.[4] *First*, absent truly dire emergencies, use of the preliminary

[4] Indeed, courts in this district routinely deny requests for such relief. See, e.g., Electronic Privacy Info. Center v. U.S. Dept. of Justice, slip op., No. 03-2078 (D.D.C., Oct. 20., 2003) (Robertson, J.) (attached as Ex. 1), vacated as moot 2004 WL 2713119 (D.C. Cir. 2004). (denying, *sua sponte*, a request for preliminary injunction "'enjoining defendant Department of Justice from continuing to deny plaintiff expedited processing of plaintiff's Freedom of Information Act request'" because such relief "would effectively grant all the relief plaintiff seeks" and was in the nature of a request for mandamus); Al-Fayed v. CIA, 2000 WL 34342564, *6 (D.D.C. 2000) (Kollar-Kotelly, J.) (attached as Ex. 2) (finding that "upon consideration of the parties' arguments, the statutory and regulatory context, and the applicable case law," emergency relief was not warranted despite the agency's delay in responding to FOIA requests); Judicial

injunction mechanism should not be encouraged because it unnecessarily adds an additional layer of procedure to FOIA litigation when available existing procedural mechanisms are entirely adequate for managing that process. Ideally for the Court and the parties, the parties can agree among themselves on a reasonable production schedule. If the parties fail to agree, the Court can enter an order setting a production schedule at an initial conference. There is no legitimate reason for complicating these straightforward procedures by resorting to the more drastic preliminary injunction remedy.

Second, FOIA plaintiffs will seldom meet the standard for irreparable harm. See infra at 22-27. As discussed infra, it is the plaintiff's burden to make a "clear showing" that denial of the requested relief will result in harm that is "certain and great" rather than "speculative." In cases where a plaintiff purports to be seeking documents to contribute to a public debate, that plaintiff frequently (if not by definition) does not know whether the request will produce responsive, non-exempt documents that will significantly contribute to a public debate. Thus, even assuming that the inability to use certain documents in a public debate constitutes irreparable harm, the typical FOIA plaintiff will generally only be guessing as to whether such irreparable harm exists because the plaintiff will not know whether there will be responsive, non-exempt documents and whether,

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Watch v. U.S. Dept. of Justice, slip op., No. 00-1396 (D.D.C., June 27, 2000) (Robertson, J.) (attached as Ex. 3) (denying plaintiff's "emergency motion for expedited treatment" to "compel defendant to respond to plaintiff's Freedom of Information Act request"); Assassination Archives and Research Ctr., Inc. v. CIA, No. 88-2600, 1988 U.S. Dist. LEXIS 18606, *1 (D.D.C., Sept. 29, 1988) (Revercomb, J.) (attached as Ex. 4) (rejecting motion for preliminary injunction asking the Court to order expedited processing of a FOIA request). But see EPIC, 416 F. Supp. 2d 30; Judicial Watch v. Dep't of Energy, 191 F. Supp. 2d 138 (D.D.C. 2002); Nat'l Resources Defense Councel v. Dep't of Energy, 191 F. Supp. 2d 41 (D.D.C. 2002); American Civil Liberties Union v. Dep't of Defense, 339 F. Supp. 2d 501 (S.D.N.Y. 2004); Electronic Privacy Info. Center v. Dep't of Justice, Civ. NO. 05-845, 2005 U.S. Dist. LEXIS 40318, at ** 5-6 (D.D.C. Nov. 16, 2005) (Kessler, J.) (attached as Ex. 5) (discussed below).

if so, the response will contribute in any meaningful way to the public debate. See The Nation Magazine v. Dep't of State, 805 F. Supp. 68, 74 (D.D.C. 1992) (finding no irreparable harm because even if the Court "were to direct the speed up of the *processing* of their requests," plaintiffs had not shown that they were "entitled to *release* of the documents they" were seeking) (emphasis in original). Accordingly, the preliminary injunction procedure is generally incompatible with FOIA lawsuits.

In addition, the assumption that a document will lose its value to the public debate absent a preliminary injunction will seldom be justified. It is just as likely that significant new information will reinvigorate a story. It is, again, the plaintiff's burden to establish (rather than merely assert) that failure to grant a preliminary injunction will have this effect, and the requester's inability to do anything other than offer conclusory assertions is another reason why preliminary injunctions will seldom be appropriate in FOIA cases. This analysis applies equally to cases like this one where the Department has recognized that plaintiff has a right to expedited processing. Plaintiff merely asserts in a conclusory manner that "time is of the essence in this matter," Memorandum In Support of Plaintiff's Motion For Preliminary Injunction ("Pl. Mem.") at 13, because what it considers to be "delay in processing of FOIA requests 'may well result in disclosing the relevant documents after the need for them in the formulation of national . . . policy has been overtaken by events," id. at n. 13 (citation omitted). However, plaintiff offers no support for its assertion that either media interest or the public debate regarding NSLs will have waned by the time the requested documents are processed on an expedited schedule. As stated above, the standard for requests that are entitled to expedited processing is "as soon as practicable," not a specific time period. The purpose is to ensure that certain requests are

prioritized over others. Nothing in the Electronic FOIA Amendments ("EFOIA") suggests that Congress believed that the normal rules of civil procedure were inadequate to the task of ensuring that agencies prioritize certain requests over others. While plaintiff relies heavily upon the recent district court decision in EPIC, 416 F. Supp. 2d 30 (D.D.C. 2006), in which a preliminary injunction was granted in the FOIA context, it fails to note that the preliminary injunction entered in that case was later modified upon reconsideration. See EPIC, slip op., No. 06-0096 (D.D.C. Mar. 24, 2006) (Kennedy, J.) (attached as Ex. 6) (granting in part the government's expedited motion for relief from the February 16, 2006 Order, extending the deadline for several DOJ components to process plaintiff's FOIA request by 60 days or 120 days, respectively; and ordering that no Vaughn index would be required before a dispositive motion was filed). Defendant respectfully submits that the EPIC decision relied on by plaintiff was wrongly decided. See EPIC, 416 F. Supp. 2d at 39 (holding that an agency is presumed to have violated FOIA's expedited processing provisions when it fails to process the request within 20 days.). As discussed below, no requirement that an expedited FOIA request be processed within a specific time frame is found in the FOIA statute and, indeed, such a requirement is at odds with the statute.

Each of the other cases that plaintiff cites in support of its claim that "this Court and others have imposed specific processing deadlines on agencies, requiring prompt delivery of non-exempt FOIA records to requesters," see Pl. Mem. at 16, is inapposite. None of those cases sought preliminary injunctions within weeks of a FOIA request being made and all of these decisions were issued following litigation on the merits, where the relevant agencies had opportunities to provide the Court with necessary information regarding processing needs.

Moreover, each case allowed the agency far more time to complete processing the FOIA requests at issue than plaintiff demands in this case. See, e.g., Judicial Watch v. Dept. of Energy, 191 F. Supp. 2d 138 (D.D.C. 2002) (ordering that responsive non-exempt documents, and Vaughn indices, be produced within approximately a year of fiing of the complaint), Natural Resources Defense Council v. DOE, 191 F. Supp. 2d 41 (D.D.C. 2002) (ordering responsive non-exempt documents and Vaughn index to be filed within approximately one year date the FOIA request was made to agency and within approximately 4 months of filing complaint); American Civil Liberties Union v. DOD, 339 F. Supp. 2d 501 (S.D.N.Y. 2004) (ordering the identification or production of responsive documents within approximately one year of submitting FOIA request and three months of filing of complaint); Electronic Privacy Info. Center v. DOJ, Civ. No. 05-845, LEXIS 40318, at ** 5-6 (D.D.C., Nov. 16, 2005) (ordering processing and release of documents on a rolling basis until processing complete). These cases are thus wholly unlike this one, where plaintiff seeks "preliminary" relief demanding processing at an artificial pace despite the fact that defendant is not even required to answer plaintiff's Complaint for another several weeks, and less than seven weeks have passed since plaintiff's FOIA requests were received by the Department.

Third, it is generally inappropriate to seek, purportedly by way of a "preliminary" remedy, the relief which it will ultimately seek on the merits, i.e. the grant of plaintiff's requests for expedition and a fee waiver and the disclosure of non-exempt documents. See Univ. of Texas v. Camenisch, 451 U.S. 390, 397 (1981) ("[I]t is generally inappropriate for a federal court at the preliminary injunction stage to give a final judgment on the merits"). Although the district court in EPIC, 416 F. Supp. 2d 30, granted a preliminary injunction setting deadlines for expedited

processing under FOIA similar to the ones that plaintiffs seek here, that injunction was later modified to create deadlines that reflected the time needed by the agency to process and release the documents. See EPIC, slip op., No. 06-0096 (D.D.C. Mar. 24, 2006). Furthermore, defendant respectfully submits that the EPIC decision relied on by plaintiff erroneously held that an agency has an obligation to process an expedited FOIA request on a schedule other than "as soon as practicable." See EPIC v. DOJ, 416 F. Supp. 2d at 39 (holding that an agency is presumed to have violated FOIA's expedited processing provisions when it fails to process the request within 20 days.). As discussed below, such a requirement is not found in the FOIA statute and indeed is at odds with it.

Apart from plaintiff's failure to meet the basic preliminary injunction requirements, discussed as discussed infra, this case provides a particularly apt example of the poor fit between the preliminary injunction procedure and the Freedom of Information Act. Plaintiff's proposed order, for example, asks that the Court order defendants to provide Vaughn indexes within 30 days of the Court's order even though courts generally do not require Vaughn indexes until dispositive motions are filed.[5] See Proposed Order. Plaintiff does not even attempt to explain why, for example, the failure to obtain a Vaughn index would result in irreparable harm.

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[5] See, e.g., Miscavige v. IRS, 2 F.3d 366, 369 (11th Cir. 1993) (The "early attempt in litigation of this kind to obtain a Vaughn index . . . is inappropriate until the government has first had the chance to provide the court with the information necessary to make a decision on the applicable exemptions."); United States Committee on Refugees v. Department of State, No. 91-3303, 1992 WL 35089, *1 (D.D.C. Feb. 7, 1992) ("the preparation of a Vaughn index is unwarranted before the filing of dispositive motions in FOIA actions because the filing of a dispositive motion, along with detailed affidavits, may obviate the need for indexing the withheld documents") (internal quotation marks and citation omitted); Stimac v. U.S. Dep't of Justice, 620 F. Supp. 212, 213 (D.D.C. 1985) ("the preparation of a Vaughn Index would be premature before the filing of dispositive motions").

There is also no indication in this case of significant delay in the processing of plaintiff's request. To the contrary, the FBI has timely begun its work in of gathering, reviewing, and processing potentially responsive documents despite the fact that it continues to ork on two expedited requests that pre-dated plaintiff's request. See Hardy Dec. ¶¶ 15-16, 21-27. Had plaintiff met and conferred with defendant, as required by Local Rule 7(m), prior to filing its Motion for Preliminary Injunction, the parties could potentially have agreed (and still can agree) upon a schedule for completing the processing of the request. Use of the preliminary injunction procedure accomplishes nothing that could not be achieved through the standard procedures that generally apply in FOIA cases.

II. PLAINTIFF FAILS TO DEMONSTRATE LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE FOIA'S EXPEDITED PROCESSING PROVISIONS DO NOT REQUIRE PROCESSING TO BE COMPLETED WITHIN A TIME CERTAIN.

Plaintiff's allegation that DOJ has violated FOIA is predicated on the assumption that the expedited processing provision of FOIA requires an agency to complete its processing within a specific period of time. The statute, however, does not require agencies to process expedited requests within a specific time limit. Instead, the statute directs agencies to "process as soon as practicable any request for records to which [they have] granted expedited processing." 5 U.S.C. § 552(a)(6)(E)(iii) (emphasis added); see also 28 C.F.R. § 16.5(d)(4) ("If a request for expedited treatment is granted, the request shall be given priority and shall be processed as soon as practicable") (emphasis added). As the Senate Report accompanying the FOIA amendments which inserted the expedited processing procedures explains, the intent of the expedited processing provision was to give certain requests priority, not to require that such requests be processed within a specific period of time:

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

S. Rep. 104-272, 1996 WL 262861, *17 (May 15, 1996) (emphasis added); 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, the expedited processing provision of FOIA 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. Once a request is at the front of the line, however, "practicability" is the standard that governs how quickly any particular request can be processed.

Consistent with the plain language of the statute, and Congress's clearly stated intent, this Court has repeatedly recognized that when expedited processing of a FOIA request is granted, the appropriate standard to be applied to determine when documents might be identified for release is "as soon as practicable." See American Civil Liberties Union v. DOJ, 321 F. Supp. 2d 24, 38 (D.D.C. 2004) (Huvelle, J.) (granting request for expedited processing and ordering that DOJ "shall process plaintiffs' requests for all records relating to section 215 consistent with 5 U.S.C. § 552(a)(6)(E)(iii) and 28 C.F.R. § 16.5(d)(4) ('as soon as practicable')"); Edmonds v. FBI, 2002 WL 32539613, *4 (D.D.C. 2002) (Huvelle, J.) (attached as Ex. 7) (directing defendants to advise the Court "of the date when the request will be processed consistent with 5 U.S.C. § 552(a)(6)(E)(iii) and 28 C.F.R. § 16.5(d)(4) ('as soon as practicable')"); see also Leadership Conf. on Civil Rights v. Gonzales,404 F. Supp. 2d 246, 260 (D.D.C. 2005) (Lamberth, J.) (ordering DOJ to "expedite processing plaintiff's FOIA requests and produce the requested

documents to plaintiff as soon as practicable, but no later than . . . two years from the date on which the complaint was initially filed").

Plaintiff ignores the plain language of the statute and clear legislative intent, and instead, attempts to invent a time limit applicable to its expedited requests by citing 5 U.S.C. § 552(a)(6)(A)(i), which it characterizes as the "20 working day time frame for processing of any FOIA request."[6] Pl. Mem. at 7. That provision has no bearing on when expedited processing must be completed. See American Civil Liberties Union v. DOD, 339 F. Supp. 2d 501, 503 (S.D.N.Y. 2004) ("While it would appear that expedited processing would necessarily require compliance in fewer than 20 days, Congress provided that the executive was to 'process as soon as practicable' any expedited request."). An agency's inability to respond within the 20-day period simply means that the requester may, before a response has been made, file suit and be found to have constructively exhausted administrative remedies. See The Nation Magazine v. Dep't of State, 805 F. Supp. 68, 72 (D.D.C. 1992). The provision does not purport to establish an "outside" time limit on what is "practicable" in responding to an expedited request.

Indeed, courts have found that the 20-working day response time is not itself a rigid requirement, and have routinely allowed agencies to process FOIA requests under the "first in, first out" rule. See Judicial Watch v. Rossotti, 285 F. Supp. 2d 17, 26 (D.D.C. 2003) (Collyer, J.) ("Certainly, it took longer than twenty days to respond to Judicial Watch's FOIA requests, but that is explained by the nature of these requests, the many offices to which they were directed, the number of FOIA requests [the agencies] regularly receive, and the treatment of FOIA requests

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[6] 5 U.S.C. § 552(a)(6)(i) provides that an agency shall "determine within twenty working days (except Saturdays, Sundays, and legal public holidays) after the receipt of the request whether to comply with such request."

on a first in/first out basis."); see also id. ("there are often instances where an agency will not be able to meet [the twenty-day] deadline"). Thus, under FOIA, a court may grant an extension to allow the agency to finish its search and processing where the agency has been unable to meet the deadline because of exceptional circumstances. See 5 U.S.C. § 552(a)(6)(c); see also Open America v. Watergate Special Prosecution Force, 547 F. 2d 605, 615 (D.C. Cir. 1976).[7] Such circumstances make the 20-day deadline "not mandatory but directory." Id. at 616. As such, the 20-day requirement can hardly be found to establish a mandatory deadline as to the "practicability" of responding to expedited requests.

Instead, what is practicable will vary depending on the size, scope, detail, number of offices with responsive documents, other agencies or components which must be consulted or to which documents might have to be referred for additional review, and exemption issues. Plaintiff has made broad FOIA requests seeking "any guidance, memoranda or communications discussing" numerous topics related to NSLs. See Pl's Ex. 1.

Plaintiff's request seeks documents spanning five years, covering subject matter which, by its very nature, is largely classified. See Hardy Dec. ¶ 26. The existence of any significant volume of classified materials contributes mightily to the complexities attendant to processing a FOIA request. See Hardy Dec. ¶ 30. Thus, classified documents responsive to plaintiff's request must be evaluated for release under 5 U.S.C. § 552(b)(1), and Executive Order 12958, as

[7] As the Court of Appeals explained in Ogelsby v. United States Dep't of Army, 920 F.2d 57 (D.C. Cir. 1990), "[f]requently if the agency is working diligently, but exceptional circumstances have prevented it from responding on time, the court will refrain from ruling on the request itself and allow the agency to complete its determination." Id. at 64.

amended, 68 Fed. Reg. 15315 (March 25, 2003); see also 28 C.F.R. § 16.4(e), § 16.7.[8] As Congress has recognized, such review may require additional time. See H. R. Rep. No. 104-795, 1996 U.S.C.A.A.N. at 3466 ("In underscoring the requirement that agencies respond to requests in a timely manner, the Committee does not intend to weaken the interests protected by the FOIA exemptions. Agencies processing some requests may need additional time to adequately review requested material to protect these exemption interests. For example, processing some requests may require additional time to properly screen material against the inadvertent disclosure of material covered by the national security exemption"). Moreover, documents subject to other exemptions, see generally 5 U.S.C. § 552(b), must similarly be identified and, where necessary, redacted, and documents generated by other agencies or authorities must be referred for review back to those same agencies or authorities. Plaintiff offers no reason to believe that the agency is not performing these tasks as soon as practicable, and thus fails to meet its burden of demonstrating, "by a clear showing," Mazurek, 520 U.S. at 972, that relief of any kind is

[8] Executive Order 13292, 68 Fed. Reg. 15315, sets forth the amended text of Executive Order 12958, which establishes a uniform system for classifying, safeguarding, and declassifying national security information, and specifically provides that "[w]hen an agency receives any request for documents in its custody that contain information that was originally classified by another agency . . . it shall refer copies of any request and the pertinent documents to the originating agency for processing, and may, after consultation with the originating agency, inform any requester of the referral unless such association is itself classified under this order or its predecessors." Id. § 3.6(b). Department regulations similarly provide that "[w]henever a request is made for a record containing information that has been classified, or may be appropriate for classification, by another component or agency under Executive Order 12958 or any other executive order concerning the classification of records, the receiving component shall refer the responsibility for responding to the request regarding that information to the component or agency that classified the information, should consider the information for classification, or has the primary interest in it, as appropriate." 28 C.F.R. § 16.4(e). Those regulations further provide that "[i]n processing a request for information that is classified under Executive Order 12958 . . . or any other executive order, the originating component shall review the information to determine whether it should remain classified." 28 C.F.R § 16.7.

warranted at this juncture.

III. PLAINTIFF FAILS TO IDENTIFY THE EXISTENCE OF ANY IRREPARABLE HARM IN THE ABSENCE OF A PRELIMINARY INJUNCTION.

"The basis of injunctive relief in the federal courts has always been irreparable harm." CityFed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 747 (D.C. Cir.1995) (citing Sampson v. Murray, 415 U.S. 61, 88 (1974)). In order for a plaintiff to meet its burden of demonstrating irreparable harm sufficient to warrant the entry of preliminary injunctive relief, the injury complained of must be both certain and great; it must be actual and not theoretical. Injunctive relief "will not be granted against something merely feared as liable to occur at some indefinite time." Wisc. Gas. Co. v. Federal Energy Regulatory Comm'n, 758 F.2d 669, 764 (D.C. Cir. 1985) (citation omitted). Instead, the party seeking injunctive relief must show that "[t]he injury complained of [is] of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm." Id. (citations and internal quotations omitted). It is a "well known and indisputable principle[]" that a vague or speculative harm cannot constitute "irreparable harm" sufficient to justify injunction relief. Id. A plaintiff's failure to meet its burden of establishing irreparable harm is sufficient, in itself, to deny emergency relief. CityFed Fin. Corp., 58 F.3d at 747.

Plaintiff seeks an order compelling the Department to release records that the FBI is still in the process of identifying and reviewing within the narrow time frame of twenty days. Yet, plaintiff has identified no "certain and great" harm it will incur if the records are not processed within that time frame. First, plaintiff claims that its statutory right to expedition will be "irretrievably lost" if the preliminary injunction it seeks is not granted. Pl. Mem. at 12. This argument is specious. The Department has granted plaintiff expedited processing. Thus,

plaintiff's requests have been prioritized over other requests pending when plaintiff's were filed, and have moved to the front of the FBI's queue for immediate processing. Plaintiff's statutory right to expedited processing entitles it to nothing more. Rather, as is plain from the terms of the statute, "[a]n agency shall process as soon as practicable any request for records to which the agency has granted expedited processing." 5 U.S.C. § 552(a)(6)(e)(iii) (emphasis added). Thus, the expedited processing provision is an ordering mechanism only – intended to give certain requesters priority over all other requesters who remain subject to the ordinary "first in, first out" processing queues. That provision does not – and indeed, could not in light of the various factors that must be taken into account by an agency processing a FOIA request – guarantee any FOIA requester a response to its request in any particular time.

Plaintiff's second claimed injury is similarly insufficient to establish a right to the extraordinary remedy of a preliminary injunction. Plaintiff argues that its ability "and that of the public to obtain in a timely fashion information vital to the current and ongoing debate surrounding the FBI's improper use of NSLs" will be irreparably harmed if preliminary relief is not awarded. Pl. Mem. at 12. This formulation begs the question: What certain and great harm will plaintiff suffer in the immediate future as a result of not having this information in the artificial time frame that plaintiff demands, as opposed to the time frame that Congress has established ("as soon as practicable"). For one thing, plaintiff appears to be describing a harm that is suffered primarily by the public, not by plaintiff itself. The public interest is properly considered as its own factor in the injunction analysis – and, as explained below, in this case the public interest counsels against the award of the preliminary injunction plaintiff seeks – but it

cannot be substituted for a showing that plaintiff itself will be harmed.[9]

Plaintiff's argument that it requires disclosure in order to inform the "meaningful" public debate or in order to know "what the Government is up to," see Pl. Mem. at 12-13 simply fails to demonstrate any irreparable harm that plaintiff will suffer if the documents it demands are not processed within the next twenty days. As a preliminary matter, plaintiff's claim that it cannot adequately participate in the public debate concerning the program rings substantially hollow. As noted by plaintiff, the DOJ Inspector General has recently released a 126-page report on the subject of DOJ's use of NSL authority. Pl. Mem. at 3. Based upon the information that the government has already made public, therefore, plaintiff is fully able to participate in the current public debate and can demonstrate no harm stemming from the absence of the injunctive relief it seeks.

Moreover, in light of the fact that plaintiff cannot now show what non-exempt information – if any – it may eventually receive as a result of the completed processing of its FOIA requests, plaintiff cannot meet its burden of demonstrating that it will be irreparably harmed if it fails to receive that information in the next twenty days. See The Nation Magazine, 805 F. Supp. at 74 (denying motion for preliminary injunction on ground that plaintiff had failed to demonstrate irreparable harm because "[e]ven if this Court were to direct the speed up of processing of their requests, [plaintiffs] have not shown at this time that they are entitled to the

[9] Plaintiff notes that a bill addressing "the issue of NSL reform" has been introduced in the U.S. House of Representatives and notes that "[t]his Court has found that the existence of pending legislation related to the subject of a FOIA request weighs in favor of a grant of expedited processing." Pl. Mem. at 12. Plaintiff's observation is immaterial here, however, because plaintiff has already been granted expedited processing. Plaintiff could not and does not maintain that the pendency of related legislation mandates that an expedited FOIA request be expedited within a time frame other than "as soon as practicable."

release of the documents that they seek. To the contrary, it is undisputed that at least some of the documents are probably exempt from production under FOIA"). Even with respect to any non-exempt documents that may be released once processing is complete, plaintiffs' ability to inform the public about the subject matter of its FOIA requests will not be precluded, but merely postponed (and, as already noted, plaintiff's requests have already been granted expedition and thus, any such release will occur as soon as practicable). Thus, even if a delay in the discussion would cause some unidentified harm – and plaintiff makes no showing of such – that harm, which can be cured at a later date, is hardly irreparable. Wisc. Gas Co., 758 F.2d at 674 ("[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm") (quoting Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958)).

Plaintiff's claim that preliminary injunctive relief is necessary because DOJ granted plaintiff's request for expedited processing, thereby recognizing the urgency of the matter, is circular. If plaintiff's view prevailed, anyone who sought to have their FOIA request processed on an expedited basis would automatically have a claim of irreparable injury regardless of whether any real harm existed. This was not the result contemplated by Congress when it authorized a limited exception for expedited processing. Instead, Congress deferred to the necessity for ensuring adequate time for appropriate agency. Thus, while the purported urgency of plaintiff's request may be a factor in determining whether a request for expedited treatment will be granted, see 5 U.S.C. § 552(a)(6)(E)(v)(ii), it is not a factor in determining the speed by which an agency needs to complete the request, nor does it mean that plaintiff will suffer any harm by adhering to the statute, let alone irreparable harm. As previously explained, the statute

does not require an agency to complete the processing "as soon as a requester needs it" or "as soon as possible." Plaintiff makes no showing of irreparable harm, and has demonstrated no resaon for the Court to invoke its emergency powers even before the agency has had the opportunity to answer the complaint.

Finally, plaintiff's exaggerated claim that preliminary injunctive relief must be granted because "time is of the essence" and, if it is not, "all opportunity to grant the requested relief [is] foreclosed," Pl. Mem. at 13, is perplexing if not utterly nonsensical. Plaintiff appears to be suggesting that if this Court does not step in to hurry the processing of documents, neither plaintiff nor the public will ever gain access to any non-exempt documents responsive to plaintiff's FOIA requests that are in the possession of defendants. It is scarcely necessary to point out that this Court will be just as capable of ordering production of any documents it might find to be improperly withheld later as it is now. Because plaintiff has failed to establish irreparable harm stemming from denial of the preliminary injunction that it seeks, its motion should be denied. Plaintiff made the same claim in EPIC, yet, although the documents requested in that case could not be processed in the twenty days plaintiff requested, plaintiff was not prevented from participating in public debate. The same holds true here.

IV. THE REQUESTED PRELIMINARY INJUNCTION WILL HARM THE PUBLIC INTEREST.

Plaintiff's failure to show that it would be irreparably harmed if the requested injunction is not granted is by itself sufficient to defeat their motion for preliminary injunction. CityFed Fin. Corp., 58 F.3d at 747. There is further reason, however, not to grant the injunction. In addition to any harm that may befall plaintiff in the absence of the requested injunction, the court must consider whether an injunction of the sort demanded by plaintiff would be in the public

interest. See Al-Fayed, 254 F.3d at 303; accord Serono Labs., Inc., 158 F.3d at 1317-18. Although plaintiff claims that it seeks merely to have DOJ adhere to its own statutory mandate, Pl. Mem. at 14, it in fact seeks much more. As already described, FOIA requires that expedited requests be processed by the agencies "as soon as practicable," a principle that this Court has repeatedly recognized. See American Civil Liberties Union, 321 F. Supp. 2d at 38; Edmonds, 2002 WL 32539613, at *4; Leadership Conference on Civil Rights, 404 F. Supp. 2d at 260. Plaintiff's effort to impose an artificial time frame on DOJ does not take account of the realities attendant to processing a request like plaintiff's, including the necessity to search for and identify responsive materials, get those materials electronically scanned for processing, to identify, review a significant volume of classified materials, review the responsive materials for applicable FOIA exemptions and redactions, and to consult with the appropriate operational divisions prior to releasing any non-exempt, responsive documents. See, e.g., Hardy Dec. ¶¶ 11-14, 28-33. That process simply cannot be completed in the twenty-day time frame plaintiff proposes.

Plaintiff's request for the proposed preliminary injunction ignores these realities, and, as a result, threatens to compromise the delicate balancing of the public interest that Congress undertook in enacting FOIA between the general interest in disclosure of government information and the necessity of ensuring that certain types of documents, the disclosure of which would cause harm, were not to be disclosed. The exemptions listed in § 552(b) embody a judgment by Congress that the public interest would best be served by allowing the agencies to withhold certain records – for example, those records whose disclosure would interfere with other vital public interests such as national security, 5 U.S.C. § 552(b)(1); efficient and frank intra- and inter-agency deliberations and attorney-client communications, 5 U.S.C. § 552(b)(5);

or effective law enforcement, 5 U.S.C. § 552(b)(7). As noted above, Congress specifically noted that even with respect to expedited requests, in certain cases, depending on the subject matter of the request, additional time would be required to ensure that the public's interest in preventing the public disclosure of these exempted documents was not compromised. See H. R. Rep. No. 104-795, 1996 U.S.C.A.A.N. at 3466 ("In underscoring the requirement that agencies respond to requests in a timely manner, the Committee does not intend to weaken the interests protected by the FOIA exemptions. Agencies processing some requests may need additional time to adequately review requested material to protect these exemption interests. For example, processing some requests may require additional time to properly screen material against the inadvertent disclosure of material covered by the national security exemption"). As Congress acknowledged, those concerns are only heightened in a case such as this one, where numerous classified documents are at issue, and the Department has independent obligations under federal regulations and Executive Order to ensure that no unwarranted disclosure occurs.

Ordering the Department to disclose documents not "as soon as practicable" as dictated by FOIA, but rather on plaintiff's artificial timetable, causes significant harm to this delicate balancing of these competing public interests. The bare fact that the records may shed light on "what the government is up to," Pl. Mem. at 13, does not outweigh the harm to the public interest that would be caused by compelling disclosure before appropriate agency review, intended to protect material that is subject to statutory exemptions from disclosure, can be completed.

CONCLUSION

For all the foregoing reasons, plaintiff's motion for preliminary injunction should be denied.

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Respectfully submitted,

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