IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC FRONTIER FOUNDATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 07-0656 (JDB)
	)	
DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	
	)	

REPLY IN SUPPORT OF
PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Plaintiff Electronic Frontier Foundation ("EFF") initiated this action and moved for entry of a preliminary injunction on April 10, 2007. Defendant Department of Justice ("DOJ") filed an opposition on April 24, 2007.[1] DOJ opposes the motion on the grounds that 1) a preliminary injunction is not an appropriate vehicle for the relief Plaintiff seeks; 2) the FOIA does not mandate any specific time frame for the processing of an expedited request; and 3) no harm will result if the agency is permitted to process the documents on its own, undefined schedule,

[1] Defendant's opposition was untimely filed; pursuant to Local Rule 65.1(c), the government's opposition was due no later than April 17, 2007. On April 19, Defendant filed an untimely motion for extension of time, asserting that "counsel mistakenly calculated the due date for the government's opposition . . . due to counsel's erroneous application of [the Local Rules]." Defendant's Motion for Extension of Time, *Nunc Pro Tunc*, to Respond to Motion for Preliminary Injunction, ¶ 4. While Plaintiff does not intend to file an opposition to Defendant's extension motion, we note that an enlargement request "made after the expiration of the specified period" may only be granted "where the failure to act was the result of excusable neglect," Fed. R. Civ. P. 6(b), and that this Court recently noted that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect." *Howard v. Gutierrez*, No. 05-1968, 2007 U.S. Dist. LEXIS 8249, at *44 (D.D.C. February 6, 2007), quoting *In re Vitamins Antitrust Class Actions*, 327 F.3d 1207, 1210 (D.C. Cir. 2003) (internal quotation marks omitted).

without the Court's intervention. Plaintiff respectfully submits this reply to address those contentions.

I. This Court has Consistently Recognized that Preliminary Injunctions are Appropriate in FOIA Cases

Defendant DOJ asserts that motions for preliminary relief in FOIA cases "are generally inappropriate" and that "courts in this district routinely deny requests for such relief." Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction ("Def. Opp.") at 10; *id*. n.4. To the contrary, this Court has long entertained and, when appropriate, granted requests for preliminary relief in FOIA cases. For instance, in *Cleaver v. Kelley*, 427 F. Supp. 80 (D.D.C. 1976), this Court issued a preliminary injunction requiring, within 21 days, the production of all documents responsive to a FOIA request and the filing of an index detailing and justifying any withholdings. The injunction was predicated upon the Court's finding of an "exceptional and urgent need" for disclosure of the requested information. *Id*. at 81-82. Likewise, in *Aguilera v. FBI*, 941 F. Supp. 144 (D.D.C. 1996), this Court granted plaintiff's motion for a preliminary injunction and ordered the agency to "comply with plaintiff's FOIA requests" and file a *Vaughn* index within 30 days. As in *Cleaver*, the injunction was based upon a finding of "exceptional and urgent need" for disclosure. *Id*. at 152.[2]

Even in those cases where this Court *denied* applications for preliminary injunctions seeking expedited processing of FOIA requests, the Court has never suggested, as Defendant implies, that such relief is somehow improper. DOJ has cited several cases in which the Court merely determined that the specific facts before it did not warrant expedited processing. Def. Opp. at 10, n.4; *see, e.g., Assassination Archives and Research Ctr. v. CIA*, No. 88-2600, 1988

[2] Both *Cleaver* and *Aguilera* were decided before Congress enacted the 1996 FOIA amendments and created the statutory right to expedited processing at issue in this case.

U.S. Dist. LEXIS 18606 (D.D.C., Sept. 29, 1988) (denying preliminary injunction motion after conducting four-part analysis); *Al-Fayed v. CIA*, No. 00-2092, 2000 U.S. Dist. LEXIS 21476 (D.D.C. Sept. 20, 2000) (same).[3] While DOJ suggests that the range of judicial remedies in FOIA cases is somehow limited, there is no such restriction. As the D.C. Circuit has noted, "[t]he FOIA imposes no limits on courts' equitable powers in enforcing its terms." *Payne Enterprises v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988), citing *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 19-20 (1974). "[U]nreasonable delays in disclosing non-exempt documents violate the intent and purpose of the FOIA, and the courts have a duty to prevent [such] abuses." *Id*., 837 F.2d at 494 (citation omitted).[4]

This Court recently recognized the propriety of preliminary relief in circumstances identical to those present here in *Electronic Privacy Information Center v. Dep't of Justice ("EPIC")*, 416 F. Supp. 2d 30 (D.D.C. 2006), a case that Defendant can only overcome by describing as "wrongly decided" and "at odds with the statute." Def. Opp. at 13. Indeed, as we discuss below, the government is attempting to relitigate the *EPIC* case here, regurgitating the precise arguments that were considered – and rejected – by the Court little more than a year ago. Defendant's tactic is clearly inappropriate. It is axiomatic that "[a] court should give considerable weight to its own previous decisions unless and until they have been overruled or undermined by the decision of a higher court or a statutory overruling," *Louisiana Wholesale*

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[3] Indeed, the D.C. Circuit, in its only discussion of the FOIA expedited processing provision, itself applied the preliminary injunction standard in affirming the district court decision in the *Al-Fayed* case. *Al-Fayed v. CIA*, 254 F.3d 300, 304 (D.C. Cir. 2001) (court conducted merits review of "whether plaintiffs are entitled to a preliminary injunction").

[4] Similarly, in *Open America v. Watergate Special Prosecution Force*, 547 F. 2d 605, 615-616 (D.C. Cir. 1976), the D.C. Circuit found that "Congress wished to reserve the role of the courts for two occasions" involving agency processing practices, one of which is "when plaintiff can show a genuine need and reason for urgency in gaining access to Government records."

Drug Co., Inc. v. Biovail Corp., 437 F. Supp. 2d 79, 83 n. 3 (D.D.C. 2006) (citation omitted), and that "considerations of stare decisis weigh heavily in the area of *statutory construction*," *In re Lorazepam & Clorazepate Antitrust Litigation*, 202 F.R.D. 12, 20 (D.D.C. 2001) (citation omitted; emphasis in original).

In *EPIC*, the Justice Department granted a request for expedited FOIA processing upon a finding that, *inter alia*, the request satisfied the same regulatory standard at issue in this case – "a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." 416 F. Supp. 2d at 34 (quoting 28 C.F.R. § 16.5(d)(1)(iv)). As in this case, despite its decision to grant "expedited processing," the agency had "neither completed the processing of EPIC's FOIA requests nor informed EPIC of an anticipated date for the completion of the processing" and the requester moved for a preliminary injunction. 416 F. Supp. 2d at 34-35. In an argument that Defendant repeats *verbatim* in this case, DOJ "question[ed] the propriety of EPIC seeking preliminary injunctive relief," and "accuse[d] EPIC of using the motion for a preliminary injunction, which according to the DOJ seeks 'a version of the ultimate relief' in the case, as a litigation tactic 'to artificially accelerate the proceedings in this case.'" *Id.* at 35; *see also* Def. Opp. at 2-3 (EFF attempts "to artificially accelerate the proceedings in this case" and motion seeks "a version of ultimate relief").

Citing the same settled authority that Plaintiff relies upon here, *see supra*, the Court rejected DOJ's argument:

> DOJ's argument that EPIC acts improperly in seeking a preliminary injunction is unavailing. On numerous occasions, federal courts have entertained motions for a preliminary injunction in FOIA cases and, when appropriate, have granted such motions. *See ACLU v. Dep't of Defense*, 339 F. Supp. 2d 501, 503 (S.D.N.Y. 2004) (granting preliminary injunction motion in FOIA case and requiring production within one month); *Aguilera v. FBI*, 941 F. Supp. 144, 152-53 (D.D.C.

> 1996) (granting preliminary injunction in FOIA case and requiring expedited processing to be completed within approximately one month); *Cleaver v. Kelley*, 427 F. Supp. 80, 81-82 (D.D.C. 1976) (granting preliminary injunction in FOIA case and requiring expedited processing to be completed within approximately twenty days); *see also Al-Fayed v. CIA*, 2000 U.S. Dist. LEXIS 21476, at *19-20 (D.D.C. Sept. 20, 2000) (denying preliminary injunction in FOIA case after conducting four-part analysis); *Assassination Archives & Research Ctr. v. CIA*, 1988 U.S. Dist. LEXIS 18606, at *1-3 (D.D.C. Sept. 29, 1988) (same).

416 F. Supp. 2d at 35 (footnote omitted).[5]

Consistent with its obligation to abide by its own precedent – and in keeping with the clear logic of the numerous cases recognizing the propriety of injunctive relief in FOIA cases similar to this one – the Court should reject DOJ's invitation to relitigate an issue that is now well-settled in this district.

II. Plaintiff has Demonstrated A Likelihood of Success on the Merits

Defendant DOJ next argues that Plaintiff is not entitled to relief because the FOIA "does not require agencies to process expedited requests within a specified time limit." Def. Opp. at 16. In advancing this argument, Defendant once again seeks to relitigate an issue that it lost in *EPIC* – indeed, DOJ's argument here parrots word for word the argument it presented to the Court in that case. *Compare* Def. Opp. at 16-21 *with* Defendant's Opposition to Plaintiff's Motion for a Preliminary Injunction (*EPIC v. Dep't of Justice*, Civ. No. 06-0096) (attached hereto as Exhibit A) at 11-15. The Court carefully considered DOJ's argument little more than a year ago and, upon a comprehensive review of the statutory scheme, rejected it:

[5] Defendant suggests that, in considering the manner in which motions for preliminary relief in FOIA cases have been previously handled, the Court may consider dispositions that were subsequently vacated. Def. Opp. at 10 n.4. If the Court deems such consideration appropriate, Plaintiff submits that *Washington Post v. Dep't of Homeland Security*, 459 F. Supp. 2d 61 (D.D.C. 2006), *vacated as moot*, 2007 U.S. App. LEXIS 6682 (D.C. Cir. Feb. 27, 2007), provides instructive guidance. *See, e.g., id.* at 66 ("[t]o afford the plaintiff less than expedited judicial review would all but guarantee that the plaintiff would not receive expedited agency review of its FOIA request").

> Under DOJ's view of the expedited processing provisions of FOIA, the government would have carte blanche to determine the time line for processing expedited requests, with the courts playing no role whatsoever in the process. . . . DOJ's position is easily rejected.
>
> . . . DOJ's reading of the statute would give the agency unchecked power to drag its feet and "pay lip service" to a requester's "statutory and regulatory entitlement to expedition." Further, such a reading runs counter to the language of the statute and relevant case law. FOIA, as amended, envisions the courts playing an important role in guaranteeing that agencies comply with its terms. . . . Adopting the government's position – that an agency has unfettered discretion to determine how long is practicable for processing expedited requests – would require the court to abdicate its "duty" to prevent "unreasonable delays in disclosing non-exempt documents."
>
> Furthermore, relevant case law establishes that courts have the authority to impose concrete deadlines on agencies that delay the processing of requests meriting expedition. These cases implicitly reject the notion that the decision of practicability is to be determined solely by the agency and support the contention that courts have the authority, and perhaps the obligation, to scrutinize closely agency delay.

416 F. Supp. 2d at 37-38 (citations omitted).

The Court further held that "a *prima facie* showing of agency delay exists when an agency fails to process an expedited FOIA request within the time limit applicable to standard FOIA requests." *Id*. at 39. As the Court explained,

> [t]he legislative history of the [1996 FOIA] amendments makes clear that, although Congress opted not to impose a specific deadline on agencies processing expedited requests, its intent was to "give the request priority for processing *more quickly than otherwise would occur.*" S. Rep. No. 104-272, at 17 (1996) (emphasis added). Interpreting FOIA to allow the agency *more* time than that provided in situations involving standard FOIA requests neither hastens the release of information nor does it allow for processing "more quickly than otherwise would occur." For these reasons, this court is of the view that the phrase "as soon as practicable," in the context of a provision of FOIA allowing for *expedited* processing, cannot be interpreted to impose a lower burden on the agency than would otherwise exist. Doing so would not be "consistent with the legislative purpose" of FOIA and would "produce absurd results." Therefore, the court concludes that an agency that violates the twenty-day deadline applicable to standard FOIA requests presumptively also fails to process an expedited request "as soon as practicable."

Id. (footnote and citation omitted; emphasis in original). Defendant DOJ does not even attempt to explain how the Court's analysis was incorrect, instead merely recycling the argument the

Court described as "easily rejected." While DOJ might wish otherwise, there is simply no reason for the Court to disturb its well-reasoned and controlling precedent.[6]

Defendant does not even attempt to meet the standard the Court established in *EPIC* for rebutting the presumption of agency delay: "credible evidence that disclosure [within twenty working days] is truly not practicable." *Id*. (footnote omitted). DOJ does not cite the standard anywhere in its brief, let alone explain how the circumstances set forth in the proffered agency declaration might rebut the "*prima facie* showing of agency delay" present in this case.

Even if it had attempted to present "credible evidence that disclosure [within twenty working days] is truly not practicable," Defendant would have fallen short. First, DOJ states that "[a]t 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." Def. Opp. at 8, *citing* Hardy Decl. ¶¶ 15-17. Processing of one of the two requests (per court order in *Gerstein*), however, was scheduled to be completed on April 27. Hardy Decl. ¶ 15. With respect to the second pending request, the FBI merely asserts without elaboration that "[a]pproximately 3,000 more pages need to be processed." *Id*. ¶ 16. The additional factor DOJ implicitly suggests as a justification for delay is the "sweeping temporal scope" and "broad wording" of Plaintiff's FOIA request. Def. Opp. at 9. Plaintiff respectfully disagrees with

[6] Ironically, the FBI asserts that one of the reasons why it cannot process Plaintiff's FOIA request more quickly is that it is attempting to comply with a court order to expedite processing in *Gerstein v. CIA, et al*., Civ. A. No. 06-4643 (N.D. Cal.). Declaration of David M. Hardy ("Hardy Decl.") ¶ 15. The order in *Gerstein* was based, in large part, on that court's application of this Court's holding in *EPIC*. *See* Exhibit E (attached to Hardy Decl.). Defendant thus appears to be suggesting that a plaintiff in this district can be *disadvantaged* by another court's reliance upon *EPIC*, but cannot *benefit* from this Court's application of its own precedent.

Defendant's characterization and refers the Court to the request itself for a determination of whether the request is somehow unreasonable or unduly burdensome.[7]

III. Both Plaintiff and the Public Interest Will Be Irreparably Harmed in the Absence of a Preliminary Injunction

As with the bulk of its opposition, Defendant's contentions with respect to irreparable harm and the public interest are word-for-word repetitions of the arguments it put forward in *EPIC*, the same arguments the Court flatly rejected. *Compare* Def. Opp. at 21-27 *with* Defendant's Opposition to Plaintiff's Motion for a Preliminary Injunction (*EPIC v. Dep't of Justice*, Civ. No. 06-0096) (attached hereto as Exhibit A) at 15-22. Given that the Court has already considered – and decided – these issues, we quote DOJ's arguments and the Court's response in the *EPIC* decision.

A. Irreparable Harm

Asserting an absence of irreparable harm, DOJ argues here:

> First, plaintiff claims that its statutory right to expedition will be "irretrievably lost" if the preliminary injunction it seeks is not granted. This argument is specious. The Department has *granted* plaintiff expedited processing. Thus,

[7] Defendant asserts that, due to the "sweeping" nature of Plaintiff's request, the FBI "currently estimates responsive documents to number approximately 172,000 pages." Def. Opp. at 9. The Bureau's methodology is shaky, at best. As Mr. Hardy explains, "[t]o date, the FBI *estimates* that *approximately* 25% of the *potentially* responsive material has been located," that material consists of "*approximately*" 43,254 pages, and the Bureau "therefore currently *anticipates* locating *approximately* 172,000 pages of material *potentially* responsive to plaintiff's request." Hardy Decl. ¶¶ 26-27 (emphasis added). Similar estimates made in other cases – and cited as justifications for delay – have proven to be notoriously unreliable. For example, in *Electronic Privacy Information Center v. Dep't of Justice*, Civ. No. 05-845, 2005 U.S. Dist. LEXIS 40318 (D.D.C. Nov. 16, 2006) (attached hereto as Exhibit B), the FBI initially estimated that 130,000 pages of documents were potentially responsive to the plaintiff's request for records concerning the renewal of the USA PATRIOT Act. Declaration of David M. Hardy ¶ 20 (filed June 29, 2005) (attached hereto as Exhibit C). In that case, as here, the FBI had not yet located or reviewed all potentially responsive documents to determine whether they were in fact responsive to the plaintiff's request. *Id*. Ultimately, the FBI determined that only 18,000 pages actually fell within the scope of the plaintiff's request — just 14% of the originally estimated universe of documents. Def.'s Response to Pl.'s Notice of Filing at 1 (filed Nov. 14, 2005) (attached hereto as Exhibit D).

> 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.

Def. Opp. at 21-22 (citation omitted; emphasis in original).

The Court in *EPIC* rejected this argument:

> DOJ insists that EPIC will suffer no harm if the court were to deny EPIC's motion for a preliminary injunction because DOJ has already afforded EPIC all the relief to which it is entitled. Because it has already expedited EPIC's FOIA requests by administratively granting them expedited status and prioritizing them over other pending requests, DOJ argues that EPIC is entitled to "nothing more." This argument stretches the limits of plausibility. EPIC's right to expedition is certainly not satisfied by DOJ's *decision* to give priority to EPIC's requests. What matters to EPIC is not how the requests are labeled by the agency, but rather when the documents are actually released. As EPIC contends, "merely paying lip service" to EPIC's statutory right does not negate "the harm that results from the agency's failure to *actually* expedite its processing. Unless the requests are processed without delay, EPIC's right to expedition will be lost.

416 F. Supp. 2d at 41 (citation omitted; emphasis in original).

DOJ further argues here:

> 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. 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").
>
> . . . [P]laintiff's claim that it cannot adequately participate in the public debate concerning the program [sic] 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. 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.

Def. Opp. at 22-23 (citations omitted).

Again, the Court rejected the same argument in *EPIC*:

> Beyond losing its right to expedited processing, EPIC will also be precluded, absent a preliminary injunction, from obtaining in a timely fashion information vital to the current and ongoing debate . . . . [A meaningful debate] can only occur if DOJ processes its FOIA requests in a timely fashion and releases the information sought.
>
> DOJ argues that "based upon the information that the government has already made public . . . plaintiff is fully able to participate in the current public debate." This argument is quickly rejected, for as EPIC correctly argues, "a meaningful and truly democratic debate [. . .] cannot be based solely upon information that the Administration voluntarily chooses to disseminate."

416 F. Supp. 2d at 41 & *id*. n.9 (citations omitted).

B. <u>Public Interest</u>

With respect to the public interest, DOJ argues here:

> Plaintiff's request for the proposed preliminary injunction . . . 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.

Def. Opp. at 26.

The Court rejected the same argument in *EPIC*:

> . . . DOJ suggests that requiring the agency to finish its processing within twenty days will increase the chances that the agency will inadvertently disclose exempted documents.
>
> To be sure, the court does not wish for DOJ to inadvertently release exempted materials. . . . However, "merely raising national security concerns cannot justify unlimited delay." Congress has already weighed the value of prompt disclosure against the risk of mistake by an agency and determined that twenty days is a reasonable time period, absent exceptional circumstances, for an agency to properly process *standard* FOIA requests. . . . Vague suggestions that inadvertent release of exempted documents *might* occur are insufficient to outweigh the very tangible benefits that FOIA seeks to further — government openness and accountability.

416 F. Supp. 2d at 42 (citation omitted; emphasis in original).

In summary, it is clear that Defendant DOJ seeks to oppose Plaintiff's motion with nothing more than a rehash of meritless arguments the Court has already considered and rejected.

Plaintiff merely asks the Court to do what it has done before in similar circumstances, consistent with the D.C. Circuit's directive that "unreasonable delays in disclosing non-exempt documents violate the intent and purpose of the FOIA, and the courts have a duty to prevent these abuses." *Payne Enterprises*, 837 F.2d at 494 (citation omitted). Plaintiff is clearly entitled to the relief it seeks.[8]

Conclusion

For the foregoing reasons, and those set forth in our opening brief, Plaintiff's motion for a preliminary injunction should be granted.

Respectfully submitted,

/s/

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[8] It is apparent that, in the absence of an injunction, the processing of Plaintiff's "expedited" FOIA request will be left to the unfettered discretion of the agency and will languish. The most concrete statement Defendant is willing to offer with respect to processing time is that "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." Def. Opp. at 9 (citation omitted). In other words, the Bureau intends to wait until the request has been pending for *five and a half months* before even estimating a date for the completion of processing.