UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC FRONTIER FOUNDATION, Plaintiff, vs. DEPARTMENT OF JUSTICE, Defendant.	)	Civil Action No. 06-cv-1773 (RBW)

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION AND SUPPLEMENT TO MOTION FOR OPEN AMERICA STAY

INTRODUCTION

Plaintiff Electronic Frontier Foundation ("EFF") seeks a preliminary injunction that would force the Federal Bureau of Investigation (FBI) to accelerate the processing of the Freedom of Information Act (FOIA) requests at issue in this litigation. Pl.'s Mot. for a Prelim. Inj. (dkt. no. 10). Specifically, EFF requests an order that would require the FBI to begin production of documents within the next twenty days, to continue releasing documents in increments of 2,500 pages every 30 days, and to complete the process of identifying documents responsive to the plaintiff's requests within 60 days and submit a status report on that process within 75 days. Mem. in Supp. of Pl.'s Mot. for a Prelim. Inj. at 14–15. The plaintiff's request should be denied, because the recent decision by the Department of Justice to grant expedited treatment does not entitle EFF to an order setting a schedule for production of documents. Expedited treatment only affects the priority of a FOIA request relative to other requests; it does not impose any specific time limit for processing. The FBI is already working to complete the processing of EFF's requests as soon as practicable and has already taken appropriate steps in

accordance with the grant of expedited treatment. The FBI is now processing EFF's requests ahead of other requests that were received earlier but have not been granted expedited treatment.

A preliminary injunction is not an appropriate mechanism for EFF to effectively cut off the Court's consideration of the defendant's motion for an Open America stay, which was filed on April 2, 2007, and remains pending before the Court, and to secure immediate imposition of EFF's preferred schedule for the processing of its FOIA requests. Preliminary injunctive relief is designed to preserve the status quo so that the court can issue a meaningful decision on the merits in a case where the plaintiff shows a likelihood of success on the merits; faces imminent, irreparable harm justifying preliminary relief; shows that preliminary relief will not harm other parties; and demonstrates that preliminary injunctive relief is in the public interest. Preliminary injunctive relief is not designed to provide a plaintiff with a means to short-circuit a motion filed by the defendant or to otherwise sidestep the ordinary FOIA litigation process.

EFF has not adequately shown a likelihood of success on the merits or that a grant of preliminary relief is necessary to prevent irreparable harm. EFF simply misunderstands the purpose and implications of FOIA's expedited processing provisions. A determination that a request warrants expedited processing means only that the request should be processed ahead of other requests that have not been granted expedited treatment. A finding that a request warrants expedited treatment does not mean that the request can or should be processed within a specified time frame or on a schedule dictated by the individual or organization who made the FOIA request. Rather, FOIA provides that expedited requests should be processed "as soon as practicable" with due regard for the agency's processing capacity and current workload and the need to ensure that requests are processed properly. The FBI has taken appropriate steps in accordance with the grant of expedited processing and has otherwise exercised due diligence in

the processing of EFF's FOIA requests.

Disclosure of documents in accordance with FOIA indeed serves the public interest, but that public interest will be fully served by permitting the FBI to process EFF's FOIA requests without judicial supervision. Imposing a preliminary injunction that would require the FBI to produce documents according to an accelerated schedule dictated by EFF would harm other parties, including other persons who have made FOIA requests, and would harm the public interest by disrupting the orderly processing of the FBI's FOIA workload. The Court should deny EFF's motion for a preliminary injunction.

The defendant also supplements its motion for Open America stay with updated information on the status of the processing of EFF's FOIA requests, including progress that has been made since the filing of the motion for Open America stay. As stated earlier, the FBI has identified 72,000 pages of documents that may be responsive to EFF's FOIA requests, and it is currently reviewing those documents to determine whether they in fact fall within the scope of the plaintiff's FOIA request. As anticipated earlier, the FBI has been able to determine that many of the documents do not fall within the scope of EFF's requests and will not have to be processed or produced. The FBI has so far reviewed approximately 21,000 pages of documents and, out of those, has isolated 750 pages of responsive documents. The FBI predicts that by September 28, 2007, it will have completed the processing and review of a portion of these 750 pages and will be able to make its first interim release of documents. The defendant also anticipates that within three months, it will have completed the initial step of identifying all the documents that fall within the scope of EFF's requests. The defendant will then be able to provide an estimate of the remaining time needed to complete the processing and release of all responsive, nonexempt documents. The FBI is prepared to file periodic status reports at 120-day

intervals to keep the Court and the plaintiff apprised of the continued progress in the processing of the plaintiff's requests. While the FBI has made considerable progress in processing the requests at issue in this litigation and other FOIA requests, FBI continues to face an immense FOIA processing workload, including the accelerated processing under court order of two other large-volume requests filed by EFF that are being litigated in separate cases before this Court, and faces other strains on its processing resources.

BACKGROUND

I. Statutory and Regulatory Background

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 FOIA 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)). Expedited treatment means that a request is moved toward the front of an agency's processing queue, ahead of requests filed earlier that have not been granted expedited treatment. The FOIA provides for expedited treatment in two broad classes of situations: One provision specifies expedited treatment when the requester demonstrates a "compelling need" as defined by the statute. 5 U.S.C. § 552(a)(6)(E)(i)(I); see also id. § 552(a)(6)(E)(v) (defining "compelling need"). A second, separate provision provides for expedited treatment when the request presents other circumstances in which the agency has chosen to accord expedited treatment in its discretion. Id. § 552(a)(6)(E)(i)(II) (providing for expedited treatment "in other cases determined by the agency").

Pursuant to the second provision, in 1998, the Department of Justice issued a regulation providing for expedited treatment of requests meeting a "special media-related standard." Revision of Freedom of Information Act and Privacy Act Regulations and Implementation of

Electronic Freedom of Information Act Amendments of 1996, 63 Fed. Reg. 29,591, 29,592 (June 1, 1998). This regulation extends expedited treatment in cases where the requester does not necessarily have a "compelling need" but the request pertains to "[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)(iv); see also 63 Fed. Reg. at 29,592 (explaining that the Department of Justice is "adopting expedited processing categories beyond the two categories authorized by Congress").[1]

II. Electronic Frontier Foundation's FOIA requests and litigation

Plaintiff Electronic Frontier Foundation (EFF) filed its complaint in this action under the Freedom of Information Act (FOIA) on October 17, 2006, seeking disclosure of records pertaining to the FBI's Investigative Data Warehouse (IDW), a law enforcement database "that holds hundreds of millions of records containing personal information." Compl. for Injunctive Relief (dkt. no. 1) ¶ 1. The complaint alleged that EFF had submitted two requests for records pertaining to the IDW on August 25, 2006, and September 1, 2006. Compl. for Injunctive Relief ¶¶ 11–18. In its answer, the defendant stated that it had received and acknowledged the September 1, 2006, request but had no record of having received the request allegedly submitted on August 25, 2006. Answer (dkt. no. 3) ¶¶ 11–18. EFF provided the FBI with a copy of that request, and the FBI agreed to treat the request as if it had been received on August 25, 2006. Def.'s Supplemental Answer (dkt. no. 5).

On April 2, 2007, the defendant filed a motion seeking a stay of proceedings in this litigation pursuant to 5 U.S.C. § 552(a)(6)(C) and Open America v. Watergate Special

[1]The Department of Justice also issued regulations implementing the statutory provisions providing for expedited processing in cases of compelling need. 28 C.F.R. § 16.5(d)(1)(i)–(ii).

Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976). Mot. for Open America Stay (dkt. no. 7). The defendant argued that although the FBI was exercising due diligence in processing EFF's FOIA requests, exceptional circumstances, in the form of the FBI's immense processing workload and its limited processing capacity, justified a stay of proceedings under Open America. Mem. of P. & A. in Supp. of Mot. for Open America Stay (dkt. no. 7). The FBI noted that it had identified approximately 72,000 pages of potentially responsive documents. Based on that volume, the FBI requested a stay of proceedings of 71 months. However, the FBI also noted that the volume of potentially responsive documents could be significantly reduced once the documents have been reviewed to isolate the documents that are within the scope of the plaintiff's requests. The FBI indicated that, at that point, the FBI would be able to provide the Court and the plaintiff with a revised estimate of the total time required to complete processing of the plaintiff's requests. The FBI suggested the Court impose a scheme under which the FBI would provide periodic updates to the Court and the plaintiff on the status of the processing of the requests and the estimated time needed to complete processing, starting 120 days from the date of the court's order and with continuous reports at 120-day intervals thereafter.

On April 6, 2007—after the defendant filed its motion for an Open America stay—EFF submitted an administrative request to the Department of Justice Office of Public Affairs requesting expedited processing of the FOIA requests pursuant to 28 C.F.R. § 16.5(d)(1)(iv). Pl.'s Opp'n to Def.'s Mot. for Open America Stay (dkt. no. 8) Ex. 1. This regulation, promulgated by the Department of Justice pursuant to 5 U.S.C. § 552(a)(6)(E)(i)(II), provides that a FOIA request "will be taken out of order and given expedited treatment" if the Office of Public Affairs determines that it involves "[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)(iv). EFF's request did not seek expedited processing according to the "compelling need" standard recognized in the statute.

On April 23, 2007, EFF filed a memorandum opposing the defendant's motion for an Open America stay. EFF argued that the Court should deny the Open America stay and require production of the requested documents within 60 days because the Department of Justice had earlier determined that a separate request pertaining to the FBI's use of National Security Letters warranted expedited processing. In its reply, the FBI argued that the analysis of whether a request warrants expedited processing and the analysis of whether an Open America stay is warranted are separate and distinct. Def.'s Reply Mem. in Supp. of Mot. for Open America Stay (dkt. no. 9). The FBI further argued that the fact that the Department of Justice found that the National Security Letters request was entitled to expedited treatment would not necessarily compel an identical determination with respect to EFF's separate requests related to the Investigative Data Warehouse.[2]

Meanwhile, EFF's request for expedited treatment of the Investigative Data Warehouse

[2]As EFF describes it, the Department of Justice stated in its Open America reply brief that the requests at issue in this litigation did not warrant expedited treatment under the applicable regulation, and has now "reversed its position." Mem. in Supp. of Pl.'s Mot. for Prelim. Inj. at 2. This is not accurate. At the time, EFF's request for expedited treatment was still being considered by the Department of Justice Office of Public Affairs, the office responsible for making determinations under the special media-related standard that EFF invoked. The reply brief filed by the Department of Justice only contested EFF's argument that EFF was automatically entitled to court-imposed expedited treatment based solely on the Department of Justice's grant of expedited treatment on a separate, tangentially related FOIA request. See Def.'s Reply Mem. in Supp. of Mot. for Open America Stay at 11 ("EFF cannot simply rely on the fact that the Department of Justice determined that those factors were present in EFF's request pertaining to the tangentially related subject of National Security Letters."); Def.'s Reply Mem. in Supp. of Mot. for Open America Stay at 9 (section heading reading, "A determination by the Department of Justice that media interest and concerns about government integrity justified expedited processing of a separate, tangentially related FOIA request does not compel an identical finding with respect to the requests at issue in this litigation.").

requests proceeded through the administrative process within the Department of Justice. By letter dated August 3, 2007, the FBI informed EFF that its request for expedited treatment had been granted.

III. Current status of FBI's processing

When the parties conferred before EFF filed the instant motion for a preliminary injunction, the defendant advised EFF that it was working to prepare an update on the status of the processing of EFF's FOIA requests, based on the review and processing that had been completed since the filing of the defendant's Open America motion and the recent grant of expedited treatment. However, the defendant was not able to provide a full update immediately. EFF indicated that it would proceed with the filing of its motion for a preliminary injunction, and the parties agreed that the defendant could provide its update along with its opposition to the plaintiff's motion for preliminary injunction.

The defendant is now able to estimate that it will make its first interim release of documents to EFF by September 28, 2007, as explained in the attached Second Declaration of David M. Hardy (hereinafter Second Hardy Decl.) (attached as Ex. 1). As stated in previous filings, the FBI initially identified 72,000 pages of records potentially responsive to EFF's FOIA requests. The FBI has been reviewing those records to isolate the documents that are in fact responsive to EFF's FOIA requests and eliminate the documents that are not responsive. Since March 2007, the FBI has reviewed approximately 21,000 pages of documents; of those, it has identified 750 pages as responsive and eliminated the remainder as nonresponsive. Second Hardy Decl. ¶¶ 5–7. The FBI expects that within the next three months, it will have finished its review of the remaining 51,000 documents and thereby completed the initial step of identifying the documents that fall within the scope of EFF's request. Second Hardy Decl. ¶ 14.

Before any of these documents can be released, they must be scanned into electronic format and loaded into the FBI's paperless FOIPA Document Processing System (FDPS). Second Hardy Decl. ¶ 16. The Record/Information Dissemination Section (RIDS) Classification Unit must then review the documents page by page and line by line to determine whether the documents contain classified information, determine whether any classified information should be declassified, and to properly mark and stamp the classified information. Second Hardy Decl. ¶ 16. The FOIPA Disclosure Unit must then review the responsive documents page by page and line by line to determine whether any FOIA exemptions apply. Second Hardy Decl. ¶ 17. This process includes redaction of any exempt material, notation of the applicable exemptions, and preparation of information sheets indicating the deletion of entire pages. Second Hardy Decl. ¶ 17. During the course of this review, the FOIPA Disclosure Unit may need to consult with other government agencies about the releasability of other agencies' information contained in FBI records or refer non-FBI documents to the originating agencies for processing and direct response to EFF. Second Hardy Decl. ¶ 17. Finally, the documents proposed to be released must be reviewed by the appropriate FBI Divisions and offices which have interests in the release or denial of the information contained in the documents. Second Hardy Decl. ¶ 18.

The FBI anticipates that this extensive process will soon be completed on approximately 200 of the 750 responsive documents identified to date. Second Hardy Decl. ¶ 15. The portion of those 200 documents that is not exempt from disclosure under FOIA will be released to EFF on or before September 28, 2007. Second Hardy Decl. ¶ 15 & n.4. At the same time, the FBI will process the remaining 550 pages of documents so far identified as responsive. Second Hardy Decl. ¶ 19. The FBI anticipates continuing to make interim releases as it completes review and processing of the remaining pages. The FBI will also continue with the review and

processing of the remaining 51,000 pages that have not yet been identified as either responsive or nonresponsive. Second Hardy Decl. ¶ 19. The FBI anticipates that the initial step of isolating responsive documents will be complete within three months, after which the FBI will be able to provide an estimate of the time required to complete the review and processing of all the documents identified as responsive. Second Hardy Decl. ¶ 14. Furthermore, the FBI is prepared to file status reports at 120-day intervals to provide the Court and EFF with updated information on the continued progress of the review and processing of the documents.

A number of circumstances prevent the FBI from completing processing on a schedule dictated by EFF. First, as detailed in earlier filings, the FBI's Record/Information Dissemination Section faces a number of temporary resource and staffing limitations, some of which are related to FBI's long-term efforts to increase its processing capacity. Second Hardy Decl. ¶ 20. Second, despite its recent progress in reducing its FOIA processing backlog, the FBI remains burdened by a large FOIA processing workload and has recently had to shift processing resources to meet several court-imposed deadlines for processing. Second Hardy Decl. ¶ 21; see also Mot. for Open America Stay Ex. 1 (Decl. of David M. Hardy) ¶¶ 15–19. Indeed, the FBI has recently had to direct much of its processing capacity to meeting court-imposed schedules for accelerated processing of two other FOIA requests filed by EFF. Second Hardy Decl. ¶ 21–22. In Electronic Frontier Foundation v. Department of Justice, No. 07-cv-656 (D.D.C.), which concerns an EFF request related to the FBI's use of National Security Letters, the FBI has identified 100,000 pages of potentially responsive documents, and the FBI has been ordered to process 2500 pages each month. Second Hardy Decl. ¶ 22. In Electronic Frontier Foundation v. Department of Justice, No. 06-cv-1708 (D.D.C.), which concerns an EFF request related to the DCS 3000 system, the FBI has been ordered to process 800 pages each month. Second Hardy

Decl. ¶ 22.

ARGUMENT

I. Standards for Issuance of a Preliminary Injunction

Preliminary injunctive relief is an extraordinary remedy, and the power to issue such an injunction "should be sparingly exercised." Dorfmann v. Boozer, 414 F.2d 1168, 1173 (D.C. Cir. 1969) (quotation marks omitted). For a plaintiff to prevail on a motion for preliminary relief, it must demonstrate: (1) a substantial likelihood of success on the merits; (2) that it would suffer irreparable injury if the injunction is not granted; (3) that an injunction would not substantially injure other interested (nonmoving) parties; and (4) that the public interest would be furthered by the injunction. CityFed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 746 (D.C. Cir. 1995); see also, e.g., Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 842–43 (D.C. Cir. 1977); Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958). The court must find that these four factors together justify the drastic intervention of a preliminary injunction. See CityFed Fin. Corp., 58 F.3d at 747.

II. Preliminary relief is generally not appropriate in FOIA cases.

Preliminary injunctive relief is generally not appropriate in FOIA cases, for a number of reasons.[3] Indeed, EFF itself "recognizes that preliminary injunctive relief is not the norm in

[3]This Court has repeatedly denied requests for such relief. See, e.g., Al-Fayed v. CIA, 2000 WL 34342564 at *6 (D.D.C. 2000) (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 Watch v. U.S. Dep't of Justice, slip op., No. 00-1396 (D.D.C., June 27, 2000) (attached as Ex. 2) (denying plaintiff's emergency motion for expedited treatment seeking to compel defendant to respond to plaintiff's FOIA request); Assassination Archives & Research Ctr., Inc. v. CIA, No. 88-2600, 1988 U.S. Dist. LEXIS 18606 at *1 (D.D.C., Sept. 29, 1988) (rejecting motion for preliminary injunction asking the Court to order expedited processing of a FOIA request). The Court has granted preliminary injunctive relief in some FOIA cases, see, e.g., Elec. Privacy Info. Ctr. v. Dep't of Justice, 416 F. Supp. 2d 30, 35 (D.D.C. 2006) (finding preliminary injunction analysis

FOIA cases." Mem. in Supp. of Pl.'s Mot. for Prelim. Inj. at 11.

FOIA establishes its own specialized procedural framework controlling the processing of FOIA requests and procedures for FOIA litigation. See, e.g., 5 U.S.C. § 552(a)(3)(A) (providing that a FOIA request must reasonably describe the records sought and must be filed in accordance with published rules and procedures); id. § 552(a)(4)(C) (requiring responsive filing within thirty days of service of a complaint); id. § 552(a)(6)(C) (providing for stay of litigation when agency is faced with exceptional circumstances). Courts should not casually sidestep this statutory framework through issuance of preliminary relief, especially in cases that present no emergency in a conventional sense. Cf. Electronic Frontier Foundation v. Department of Justice, No. 07-cv-0656 (JDB) at 3–4 (June 15, 2007) (attached as Ex. B to Pl.'s Mot. for Prelim. Inj.) (imposing an accelerated production schedule on the defendant, but noting, "[c]ertainly, the vehicle of a preliminary injunction motion is an imperfect means to address what is, in essence, a scheduling issue. Moreover, the possibility of overuse, or even abuse, of preliminary injunction requests in the FOIA scheduling context is obvious.").

In addition, the traditional purpose of a preliminary injunction is to preserve the status quo so that the court can issue a meaningful decision on the merits. Accordingly, this Court has stated that a plaintiff must meet a higher standard to secure mandatory injunctive relief that "would alter, rather than preserve, the status quo by commanding some positive act." Nat'l Conf. on Ministry to the Armed Forces v. James, 278 F. Supp. 2d 37, 43 (D.D.C. 2003) (quoting Columbia Hospital for Women Foundation, Inc. v. Bank of Tokyo-Mitsubishi Ltd., 15 F. Supp.

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appropriate); NRDC v. Dep't of Energy, 191 F. Supp. 2d 41, 43–44 (D.D.C. 2002) (granting expedited motion for release of responsive records), but as explained below, even if preliminary injunctive relief is warranted in some FOIA cases, the circumstances of this case do not warrant such relief.

2d 1, 4 (D.D.C. 1997)). An order compelling accelerated processing of a FOIA request would not merely preserve the status quo but would force specific action by the defendants.

Similarly, because preliminary injunctive relief is not intended to provide plaintiffs with a means to bypass the litigation process and achieve rapid victory, "a preliminary injunction should not work to give a party essentially the full relief he seeks on the merits." Dorfmann v. Boozer, 414 F.2d 1168, 1173 n.13 (D.C. Cir. 1969). The FBI already recognizes that EFF has submitted valid FOIA requests for documents and is entitled to release of nonexempt documents; at the moment, the only dispute in this litigation relates to the timing of the FBI's processing and release of documents. A grant of the preliminary injunction that EFF requests would give EFF a complete victory by precluding consideration of the defendant's motion for an Open America stay.[4]

There is also no indication in this case of undue delay in the processing of plaintiff's requests. To the contrary, the FBI has gathered potentially responsive documents and has continued diligently reviewing and processing the documents. See Second Hardy Decl. ¶¶ 12–19.

III. EFF fails to show a likelihood of success on the merits, because the expedited processing provisions of FOIA and the associated Department of Justice regulations do not prescribe any specific timeline for processing of FOIA requests granted expedited treatment, and the FBI is working to complete processing "as soon as practicable."

EFF has not demonstrated a likelihood of success on the merits, because the agency's grant of expedited treatment does not by itself justify a court order fixing a compressed schedule

[4]EFF argues that a preliminary injunction would not afford EFF with complete victory, because EFF might later challenge, and the Court might later examine, the adequacy of the FBI's production of documents. See Mem. in Supp. of Pl.'s Mot. for Prelim. Inj. at 15 n.5. But the only matters currently at issue in this litigation relate to the timing of the FBI's response.

for the processing of the FOIA requests. The FOIA only requires an agency to complete processing of an expedited request "as soon as practicable," and it specifically provides that a court may grant additional time to process a FOIA request when an agency demonstrates exceptional circumstances justifying such a stay.

EFF acknowledges that preliminary injunctive relief should not be granted routinely in FOIA cases, but it asserts that this case is exceptional because the Department of Justice has granted expedited treatment to the plaintiff's FOIA requests and because the 20-day statutory period for responding to FOIA requests has expired. See Mem. in Supp. of Pl.'s Mot. for Prelim. Inj. at 11. This interpretation is based on a misunderstanding of the meaning and implications of expedited processing.

The expedited processing provisions of FOIA do not dictate a specific, compressed schedule for the processing of expedited requests; rather, the statute directs an agency to "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); see also 28 C.F.R. § 16.5(d)(1)(4) ("If a request for expedited treatment is granted, the request shall be given priority and shall be processed as soon as practicable."). Requests granted expedited treatment are placed ahead of other requests that have not been granted expedited treatment, but a grant of expedited treatment is not an assurance of immediate processing. Multiple requests may be granted expedited treatment at any given time, and there is no direct limit or check on the number of requests or the proportion of total requests granted expedited processing.

A Senate Judiciary Committee report explained the expedited processing provisions as follows:

> Once . . . the request for expedited access is granted, the agency must then proceed to process that request "as soon as practicable." No specific number of

> days for compliance is imposed by the bill since, depending upon the complexity of the request, the time needed for compliance may vary. The goal is not to get the request for expedited access processed within a specific time frame, but to give the request priority for processing more quickly than otherwise would occur.

Electronic Freedom of Information Improvement Act of 1995, S. Rep. No. 104-272 at 18 (1996), available at 1996 WL 262861. Accordingly, this Court has recognized that when expedited treatment is warranted, the statute requires that documents be released "as soon as practicable." See, e.g., ACLU v. Dep't of Justice, 321 F. Supp. 2d 24, 38 (D.D.C. 2004) (reversing agency's denial of expedited processing and ordering the agency to "process plaintiffs' request . . . consistent with 5 U.S.C. § 552(a)(6)(E)(iii) and 28 C.F.R. § 16.5(d)(1)(4) ('as soon as practicable')").

Indeed, in its letter requesting expedited treatment from the Office of Public Affairs, EFF did not suggest that it believed that expedited treatment would entitle EFF to have its requests processed according to any specific schedule. EFF simply requested "expedited processing" as contemplated by FOIA and the applicable DOJ regulations. Request for Expedited FOIA Processing (letter from David L. Sobel, Senior Counsel, Electronic Frontier Foundation, to Tasia Scolinos, Director of Public Affairs, Office of Public Affairs, Department of Justice) (attached as Ex. 1 to Pl.'s Opp'n to Def.'s Mot. for Open America Stay).

Nevertheless, EFF now contends that the Department of Justice's grant of expedited processing requires the agency to complete processing within 20 days of the date of each request, and failure to meet that deadline justifies entry of a preliminary injunction. Mem. in Supp. of Pl.'s Mot. for Prelim. Inj. at 7. EFF relies primarily on Electronic Privacy Information Center v. Department of Justice (EPIC), 416 F. Supp. 2d 30 (D.D.C. 2006), modified, No. 06-0096 (D.D.C. Mar. 24, 2006). As discussed above, EPIC is in tension with the FOIA statutory and regulatory framework and the general principles governing issuance of preliminary relief. Cf.

Apotex, Inc. v. FDA, 393 F.3d 210, 218 (D.C. Cir. 2004) (district court decisions are not binding in later district court cases). Moreover, the decision in EPIC was later modified to permit the defendant more time to produce the documents. See EPIC, No. 06-0096 (D.D.C. Mar. 24, 2006).

In addition, the circumstances of EPIC were very different from the circumstances of this case. In the first place, in EPIC, the grant of expedited treatment included a finding that the requester had demonstrated an "urgency to inform the public" about government activities. EPIC, 416 F. Supp. 2d at 41 (the Department of Justice's finding of "urgency to inform the public" militated in favor of a finding of irreparable harm). In this case, however, EFF has not made or even attempted to make a showing of compelling need or "urgency to inform the public" under the statutory expedited processing provisions of FOIA, 5 U.S.C. § 552(a)(6)(E)(i)(I), (v) (expedited processing in cases of "compelling need," including "urgency to inform the public"), or the regulation implementing the "urgency to inform the public" standard, 28 C.F.R. § 16.5(d)(1)(ii). Instead, EFF's request for expedited processing was based exclusively on the special media-related standard that the Department of Justice established by regulation. See 5 U.S.C. § 552(a)(6)(E)(i)(II) (expedited processing "in other cases determined by the agency"); 28 C.F.R. § 16.5(d)(1)(iv) (expedited processing based on exceptional media interest).

In addition, while FOIA generally requires agencies to process requests within 20 days, 5 U.S.C. § 552(a)(6)(A), that statutory deadline is subject to an important proviso: a court may grant a stay if the agency demonstrates exceptional circumstances justifying a stay and due diligence in processing the request. Id. § 552(a)(6)(C); Open Am. v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976). In EPIC, the court determined that the agency's failure to meet the 20-day deadline justified a preliminary injunction because the agency had not even attempted to show that exceptional circumstances justified such a stay of

proceedings, known as an Open America stay. EPIC, 416 F. Supp. 2d at 38 ("DOJ has neither met the twenty-day deadline, nor has it suggested that exceptional circumstances exist to extend that deadline." (emphasis added)). In this case, however, the defendant has filed a motion for an Open America stay supported by abundant evidence of exceptional circumstances justifying a stay.

As the defendant has explained in previous filings, a grant of expedited treatment does not preclude the court from issuing such an Open America stay. See Def.'s Reply Mem. in Supp. of Mot. for Open America Stay at 8–9. The provisions governing stays of litigation based on exceptional circumstances appear in § 552(a)(6)(C), and the provisions governing expedited treatment appear in a separate subsection, § 552(a)(6)(E). Neither provision absolutely takes precedence over the other. An Open America stay may still be warranted based on exceptional circumstances faced by the agency, even when the agency has determined that the request warrants expedited treatment and therefore should be placed ahead of other requests.[5]

The obstacles that make it impracticable to process EFF's requests on EFF's desired schedule relate to the amount and intensity of work that FOIA processing entails and the limitations of and burdens on the FBI's processing capacity—not to any failure to respect the grant of expedited treatment. The FBI has appropriately implemented the grant of expedited treatment by processing EFF's requests ahead of other FOIA requests that were received earlier. A grant of expedited treatment does not eliminate any of the time-consuming and labor-intensive steps required to complete processing: the review of potentially responsive documents to isolate

[5]Indeed, the district court in EPIC, after issuing the preliminary injunction, later modified that injunction to impose deadlines that reflected the time needed by the agency to process and release the documents. See EPIC, No. 06-0096 (D.D.C. Mar. 24, 2006) (order granting in part and denying in part motion for relief from order and modifying the relief ordered) (attached as Ex. 3).

the documents falling within the scope of the plaintiff's FOIA requests; the scanning of the documents into the electronic FOIPA Document Processing System (FDPS); the classification and declassification review; the review to determine whether documents are exempt from disclosure; and the review of the documents proposed to be released by the appropriate FBI Divisions and offices. The FBI has already made considerable progress in isolating 750 pages of documents out of 21,000 pages reviewed so far, and it expects to release a portion of those documents by September 28, 2007. The FBI expects that within three months, it will have isolated all the documents responsive to EFF's request and will be able to provide an estimate of the time required to complete processing and release of all responsive, nonexempt documents. The FBI is prepared to file periodic status reports to keep the Court and the plaintiff apprised of further progress in the processing of EFF's FOIA requests. However, it is simply not practicable for the FBI to complete the process according to the schedule that EFF desires.

Accordingly, the agency's grant of expedited treatment does not by itself entitle EFF to a court order imposing a schedule for processing.

IV. EFF's claim of irreparable harm is insufficient because it is based only on speculation about the value of the information to be released and the impact of a delay in the release of that information.

EFF also has not established that the preliminary injunction it requests is necessary to prevent irreparable harm. EFF speculates that denial of a preliminary injunction could work irreparable harm if the information it seeks were of significant value now but would be useless if produced later. This is nothing more than speculation, and it is not enough to support issuance of a preliminary injunction.

A plaintiff seeking a preliminary injunction must show that such relief is necessary to prevent imminent, irreparable harm that is both "certain and great." Wisc. Gas Co. v. FERC,

758 F.2d 669, 674 (D.C. Cir. 1985); see also Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 297–98 (D.C. Cir. 2006). In this case, the focus of the irreparable harm inquiry is whether EFF will suffer harm if the requested documents are not released on the schedule that EFF requests but are instead released as soon as practicable given FBI's processing capacity.

Neither of the two cases EFF has cited, Payne Enterprises v. United States, 837 F.2d 486 (D.C. Cir. 1988), and EPIC, 416 F. Supp. 2d at 30, held that a delay in processing always amounts to irreparable harm in FOIA cases.[6] The court in each case merely found that delay amounted to irreparable harm based on the specific circumstances of the case. See Payne Enters., 837 F.2d at 490 (noting that delays in compliance were "frustrating, costly, and detrimental to Payne's business" because Payne's clients needed up-to-date information to prepare bids for government contracts); EPIC, 416 F. Supp. 2d at 40–41 ("[T]ime is necessarily of the essence in cases like this . . . ." (emphasis added)).

EFF's claim that "time is of the essence," Mem. in Supp. of Pl.'s Mot. for Prelim. Inj. at 7, 9, is nothing more than speculation and rhetoric. EFF has not shown that the documents it has requested contain crucial information that will be valuable to EFF. Presumably, the very reason EFF has requested the documents is because EFF does not know what the documents contain. Even assuming the documents contain valuable information, portions of those documents could well be withheld from disclosure pursuant to FOIA exemptions. See The Nation Magazine v. Dep't of State, 805 F. Supp. 68, 74 (D.D.C. 1992) (finding that the plaintiffs failed to show irreparable harm because "[e]ven if this Court were to direct the speed up of the processing of

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[6]The other cases EFF relies on are from other circuits and, more importantly, are not FOIA cases. See United States v. BNS, Inc., 858 F.2d 456 (9th Cir. 1988) (examining the grant of a preliminary injunction preventing consummation of a hostile takeover); Martin-Marietta Corp. v. Bendix Corp., 690 F.2d 558 (6th Cir. 1982) (examining the denial of a preliminary injunction against enforcement of Michigan state securities laws).

their requests, [the plaintiffs] have not shown at this time that they are entitled to release of the documents they seek."). And even if some of the requested documents turn out to be both valuable to EFF and subject to disclosure under FOIA, EFF has not shown that delays in the processing of the FOIA requests will significantly diminish the value of the information. Indeed, EFF's requests appear to target material whose value, if any, would remain intact over time: documentation of "categories of individuals" covered by the IDW, "categories of records" contained in the IDW, or "criteria for inclusion of information in the IDW"; records concerning FBI determinations regarding the applicability of the Privacy Act of 1974 or federal records requirements; records concerning data management procedures; privacy impact statements; and results of audits. It is difficult to imagine why the value of such information to EFF would diminish substantially, or at all, before the FBI is able to complete processing of the requests.

EFF's chain of conjecture does not amount to a "certain," "great," and irreparable harm justifying the drastic remedy of preliminary injunctive relief, Wisc. Gas Co., 758 F.2d at 674.

V. An order requiring the FBI to process EFF's FOIA requests at a rate beyond its current sustainable capacity would harm other FOIA requesters.

Issuance of a preliminary injunction would also harm third parties not before the court, namely, other parties who have made FOIA requests. An order forcing the FBI to produce documents at a rate beyond its present sustainable capacity—especially when the FBI is already working beyond that capacity—would work lasting harm to the FBI's processing efforts, harm that would persist even after the FBI completed processing of the EFF's requests. Cf. The Nation Magazine v. Dep't of State, 805 F. Supp. 68, 74 (D.D.C. 1992) (finding that a temporary restraining order would likely harm third parties in light of the defendants' limited FOIA processing resources and the court's load of cases seeking judicial review of FOIA activities).

The FBI has already provided abundant factual information about its FOIA processing

efforts and the various strains and limitations on its FOIA processing capacity. EFF has not disputed the accuracy of any of that information, nor has it suggested any ways in which the FBI could speed up processing with its current available resources in a manner that is sustainable over time and is consistent with the FOIA statutory and regulatory framework. All that EFF has offered are general assertions that the FBI's efforts have been inadequate and that the documents should be produced faster. Such assertions are not enough to establish that an order would not harm other parties.

VI. An order requiring the FBI to accelerate processing of the plaintiff's FOIA requests would not serve the public interest.

EFF argues that a preliminary injunction would serve the public interest because it would do nothing more than require the FBI to release documents in accordance with its statutory and regulatory duties. But the FBI has already acknowledged that EFF is entitled to the release of the documents it has requested, subject to any applicable FOIA exemptions, and the FBI is working assiduously to process EFF's FOIA requests. So the issue is not whether the release of the documents would serve the public interest; such a release will occur even if the Court denies a preliminary injunction. Rather, EFF must specifically show that ordering the FBI to accelerate the processing of its FOIA requests would serve the public interest.

EFF has not shown that such an order will serve the public interest. As explained above, EFF's claim that the requested information is both extremely valuable and extremely perishable is based on nothing more than speculation. See supra section IV. And as explained above, an order compelling the FBI to further accelerate processing would harm the public interest by forcing the FBI to work beyond its current sustainable capacity and thereby disrupting the FBI's processing efforts over the long term. Cf. The Nation Magazine v. Dep't of State, 805 F. Supp. 68, 74 (D.D.C. 1992) (finding that a temporary restraining order would harm the public interest

by disrupting the "orderly, fair, and efficient administration of the FOIA").

CONCLUSION

For the reasons above, EFF's motion for a preliminary injunction should be denied.

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Respectfully submitted,

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