IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF'S MOTION TO STAY PROCEEDINGS

For the reasons set forth below, plaintiff Electronic Frontier Foundation ("EFF") respectfully moves for a stay of proceedings in this Freedom of Information Act ("FOIA") case pending issuance of "new guidelines governing the FOIA" by the Attorney General, as directed by President Obama on January 21, 2009. Pursuant to LCvR 7(m), counsel for plaintiff has conferred with counsel for defendant Department of Justice ("DOJ") concerning this motion, and counsel for defendant has represented that DOJ opposes the motion.

Points and Authorities

EFF initiated this action on October 17, 2006, seeking the disclosure of records maintained by the Federal Bureau of Investigation ("FBI") concerning the Bureau's Investigative Data Warehouse ("IDW"), a "659 million-record database" described as "one of the most powerful data analysis tools available to law enforcement and counterterrorism [FBI] agents." *See* (First) Decl. of David M. Hardy ¶ 26 & Ex. A. (dkt. no. 7). On March 28, 2008, the Court issued an order granting DOJ's motion for a stay in order to allow the

FBI more time to complete its processing of EFF's FOIA requests. Order (Mar. 28, 2008) (dkt. no. 18). After providing several interim releases of records to EFF, defendant DOJ moved for summary judgment on January 23, 2009, asserting that it has completed the processing of EFF's FOIA requests and disclosed all responsive information that is not properly exempt from disclosure. Defendant's Motion for Summary Judgment (dkt. no. 25).

1. <u>The New Obama Administration FOIA Policy</u>

On January 21, 2009 – his first full day in office – President Obama issued a memorandum concerning the FOIA to the heads of all Executive Branch departments and agencies. President Barack Obama, Memorandum of January 21, 2009, Freedom of Information Act ("Obama FOIA Memo"), 74 Fed. Reg. 4683 (2009) (attached hereto as Exhibit A). The memorandum provides, *inter alia*, that:

> All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.

Id. The President also directed the Attorney General "to issue new guidelines governing the FOIA to the heads of executive departments and agencies, reaffirming the commitment to accountability and transparency, and to publish such guidelines in the Federal Register." *Id*.

The newly announced "presumption in favor of disclosure" is a stark departure from previous Executive Branch policy, which was articulated in a memorandum issued by former Attorney General John Ashcroft on October 12, 2001. As DOJ's Office of Information and Privacy explained at the time of its issuance,

> [i]n replacing the predecessor FOIA memorandum [issued by former Attorney General Janet Reno], the Ashcroft FOIA Memorandum establishe[d] a new "sound legal basis" standard governing the Department of Justice's decisions on whether to defend agency actions under the FOIA when they are challenged in court. This differ[ed] from the "foreseeable harm" standard that was employed under the predecessor memorandum.

U.S. Department of Justice, Office of Information and Privacy, *FOIA Post*, "New Attorney General FOIA Memorandum Issued," October 15, 2001 (attached hereto as Exhibit B). As such, the Obama Memo has already been perceived as a significant change in Executive Branch FOIA policy. *See*, *e.g.*, Associated Press, "Advocates Praise Obama Move on Disclosure," January 22, 2009 (attached hereto as Exhibit C) ("Obama's directive . . . effectively reverses Ashcroft's memo, restoring open records laws largely to how they were interpreted during the Clinton administration."); Andrew Noyes, National Journal's CongressDaily, "Obama's FOIA Directive Brings Praise, Bit Of Skepticism," January 22, 2009 (attached hereto as Exhibit D) ("The announcement was an about-face from a directive by former Attorney General John Ashcroft instructing agencies to withhold information by using exemptions if an argument could be made to do so.").[1] Of course, the full impact of the Obama Administration's new FOIA policy will not be known until the

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[1] As the Associated Press observed, the Obama Memo is

> . . . the latest in a three-decade-long pingpong game with FOIA policy.
>
> In the late 1970s, Carter's attorney general, Griffin Bell, issued guidance to err on the side of releasing information. Under Reagan, William French Smith came in and reversed that; he told them, "when in doubt withhold." Then under Clinton, Janet Reno reversed it again; she told agencies their presumption should be for release.
>
> But Bush Attorney General John Ashcroft went back the other way in October 2001, telling agencies he would defend any legal justification for withholding documents.

Exhibit C.

Attorney General issues "new guidelines governing the FOIA" as directed by the President.

2. Further Proceedings Should Be Stayed in the Interest of Judicial Economy

EFF respectfully submits that litigating the propriety of the FBI's decision to withhold portions of the requested information would be wasteful of judicial resources prior to the issuance of the forthcoming Attorney General guidelines on FOIA compliance in the new Administration. If, as the early commentary suggests, the Obama Memo "effectively reverses" the Bush Administration policies under which the withholding decisions at issue here were made, prudence dictates that the responsible agency officials should be permitted to reconsider those earlier determinations in light of the new guidelines, once they are issued.

This Court has consistently recognized that "[t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Feld Entm't, Inc. v. ASPCA*, 523 F. Supp. 2d 1, 2 (D.D.C. 2007), quoting *Landis v. North American Co.*, 299 U.S. 248, 254 (1936); *see also Am. Postal Workers Union v. U.S. Postal Serv.*, 422 F. Supp. 2d 240, 248 (D.D.C. 2006); *Hisler v. Gallaudet Univ.*, 344 F. Supp. 2d 29, 35 (D.D.C. 2004). Such forbearance is appropriate where, as here, there are pending administrative proceedings that may have a bearing on the disposition of the case. *See, e.g., Rohr Industries, Inc. v. Washington Metropolitan Area Transit Authority*, 720 F.2d 1319, 1325 (D.C. Cir. 1983); *Am. Postal Workers Union*, 422 F. Supp. 2d at 248-249; *Painters' Pension Trust Fund v. Manganaro Corp.* 693 F. Supp. 1222, 1224 (D.D.C. 1988) ("stays are not infrequently granted when simultaneously pending [administrative]

proceedings might illuminate or resolve matters also confronting courts") (citations omitted).

In the interest of judicial economy, the Court should stay further proceedings in this case pending the Attorney General's issuance of "new guidelines governing the FOIA" under the provisions of the Obama Memo. The Court should further direct that defendant DOJ file a report to the Court within 30 days of the issuance of such guidelines, stating whether, and to what extent, the new guidelines alter the government's position with respect to the material at issue in this litigation.

CONCLUSION

For the foregoing reasons, plaintiff's motion to stay proceedings should be granted. An appropriate proposed order accompanies this memorandum.

Respectfully submitted,

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