

1 TONY WEST  
 Assistant Attorney General  
 2 ELIZABETH J. SHAPIRO  
 Deputy Branch Director  
 3 JOEL McELVAIN, State Bar No. 257736  
 Senior Counsel  
 4 U.S. Department of Justice  
 Civil Division, Federal Programs Branch  
 5 450 Golden Gate Ave., Room 7-5395  
 San Francisco, CA 94102  
 6 Telephone: (415) 436-6645  
 Fax: (415) 436-6632  
 7 Email: Joel.McElvain@usdoj.gov

8 Attorneys for the Defendants

9 IN THE UNITED STATES DISTRICT COURT  
 10 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 OAKLAND DIVISION

11 ELECTRONIC FRONTIER FOUNDATION,	)	Case No. 4:09-cv-03351-SBA
	)	
12 Plaintiff,	)	<b>Notice of Motion, and Motion</b>
	)	<b>for Stay of Proceedings with</b>
13 v.	)	<b>Respect to FBI</b>
	)	
14 CENTRAL INTELLIGENCE AGENCY, <i>et al.</i> ,	)	Date: December 1, 2009
	)	Time: 1:00 p.m.
15 Defendants.	)	Courtroom 1, 4th Floor

16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**

**Page**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Notice of motion ..... 1

Memorandum of law ..... 2

I. Background ..... 2

    A. The FBI’s FOIA request processing sytem ..... 2

    B. The plaintiff’s FOIA requests, and the FBI’s processing of those requests to date ..... 6

    C. The circumstances justifying a stay ..... 8

II. Argument ..... 14

    A. Legal standard for a stay of proceedings ..... 14

    B. The FBI is entitled to an Open America stay ..... 17

        1. The FBI is operating under exceptional circumstances ..... 17

        2. The FBI is exercising due diligence in processing the plaintiff’s requests and is making reasonable progress in reducing its backlog of pending requests ..... 19

III. Conclusion ..... 23

**TABLE OF AUTHORITIES****Page****Cases:**

4	<i>Appleton v. FDA</i> , 254 F. Supp. 2d 6 (D.D.C. 2003) .....	16
5	<i>Cecola v. FBI</i> , 1995 WL 549066 (N.D. Ill. 1995) .....	19
6	<i>Ctr. for Public Integrity v. U.S. Dep't of State</i> , 2006 WL 1073066 (D.D.C. 2006) .....	16
7	<i>Exner v. FBI</i> , 542 F.2d 1121 (9th Cir. 1976) .....	16, 22
8	<i>Edmonds v. FBI</i> , 2002 WL 32539613 (D.D.C. 2002) .....	16, 19
9	<i>Fiduccia v. U.S. Dep't of Justice</i> , 185 F.3d 1035 (9th Cir. 1999) .....	16
10	<i>Fox v. U.S. Dep't of Justice</i> , 1994 WL 923072 (C.D. Cal. 1994) .....	17, 22
11	<i>Guzzino v. FBI</i> , 1997 WL 22886 (D.D.C. 1997) .....	19
12	<i>Haddon v. Freeh</i> , 31 F. Supp. 2d 16 (D.D.C. 1998) .....	19
13	<i>Jiminez v. FBI</i> , 938 F. Supp. 21 (D.D.C. 1996) .....	19, 22
14	<i>Judicial Watch of Fla., Inc. v. U.S. Dep't of Justice</i> , 102 F. Supp. 2d 6 (D.D.C. 2000) .....	17
15	<i>Kuffel v. U.S. Bureau of Prisons</i> , 882 F. Supp. 1116 (D.D.C. 1995) .....	22
16	<i>Lisee v. CIA</i> , 741 F. Supp. 988 (D.D.C. 1990) .....	22
17	<i>Oglesby v. U.S. Dep't of the Army</i> , 920 F.2d 57 (D.C. Cir. 1990) .....	15
18	<i>Open America v. Watergate Special Prosecution Task Force</i> , 547 F.2d 605 (D.C. Cir. 1976) .....	15, 16, 21
19	<i>Piper v. U.S. Dep't of Justice</i> , 339 F. Supp. 2d 13 (D.D.C. 2004) .....	17
20	<i>Pray v. FBI</i> , 1995 WL 764149 (S.D.N.Y. 1995) .....	21
21	<i>Rabin v. U.S. Dep't of State</i> , 980 F. Supp. 116 (E.D.N.Y. 1997) .....	17, 22
22	<i>Schweihs v. FBI</i> , 933 F. Supp. 719 (N.D. Ill. 1996) .....	19
23	<i>Summers v. Dep't of Justice</i> , 925 F.2d 450 (D.C. Cir. 1991) .....	17
24	<i>Wilderness Soc'y v. U.S. Dep't of the Interior</i> , 2005 WL 3276256 (D.D.C. 2005) .....	12
25	<i>Williams v. FBI</i> , 2000 WL 1763680 (D.D.C. 2000) .....	17

**Statutes:**

19	5 U.S.C. § 552(a)(6)(A)(i) .....	14, 16
20	5 U.S.C. § 552(a)(6)(C)(i) .....	1, 14, 15
21	5 U.S.C. § 552(a)(6)(C)(ii) .....	16
22	5 U.S.C. § 552(a)(6)(D)(I) .....	4

**Regulations:**

23	28 C.F.R. § 16.3(a) .....	10
24	28 C.F.R. § 16.5(a) .....	4
25	28 C.F.R. § 16.5(b) .....	4
26	28 C.F.R. § 16.5(d) .....	8
27	28 C.F.R. § 16.41(a) .....	10

**Miscellaneous:**

27	Executive Order 12958 .....	2, 4, 6
28	H.R. Rep. No. 104-795 (1996), reprinted in 1996 U.S.C.C.A.N. 3448 .....	15

1 **Notice of Motion**

2 PLEASE TAKE NOTICE that on December 1, 2009 at 1:00 p.m., the defendants will move  
3 this Court for a stay of proceedings with respect to the Federal Bureau of Investigation (“FBI”)  
4 pursuant to 5 U.S.C. § 552(a)(6)(C).<sup>1</sup> This motion is based on this notice, the following  
5 memorandum of law, the pleadings on file in this action, and the Declaration of David M. Hardy,  
6 which is attached. The undersigned counsel hereby certifies that he has conferred with counsel for  
7 the plaintiff, Nathan Cardozo, Esquire, who states that he opposes the relief requested in this motion.

8 The plaintiff, the Electronic Frontier Foundation, has submitted two requests to the FBI  
9 under the Freedom of Information Act (“FOIA”). Although the FBI is exercising due diligence in  
10 responding to plaintiff’s FOIA requests, exceptional circumstances prevent it from processing the  
11 requests immediately. Pursuant to 5 U.S.C. § 552(a)(6)(C), which provides for additional time under  
12 such circumstances, the defendants accordingly request that the Court stay proceedings with the FBI  
13 until that agency is able to complete processing of the plaintiff’s requests. In support of this motion,  
14 the defendants are providing the sworn declaration of David M. Hardy, Section Chief of the  
15 Record/Information Dissemination Section, Records Management Division, of the FBI. His  
16 declaration explains that the plaintiff’s requests seek a large volume of documents, that the requests  
17 are being processed in accordance with the FBI’s ordinary three queue, first-in, first-out policy, and  
18 that the FBI will require a stay of 18 months, at which point the plaintiff’s first request is anticipated  
19 to reach the top of its queue and will be ready to be processed. (Declaration of David M. Hardy  
20 [“Hardy Decl.”], attached as Exhibit 1).

21 The FBI acknowledges that it is asking the Court for a lengthy stay. This request, however,  
22 meets the standards established under 5 U.S.C. § 552(a)(6)(C), and a stay is warranted in light of  
23 the large number of potentially responsive documents and the FBI’s existing backlog. The FBI is  
24

---

25  
26 <sup>1</sup> The plaintiff has previously filed a motion for partial summary judgment regarding the  
27 timing of the defendants’ processing of the FOIA requests at issue in this action. That motion  
28 has been calendared for December 1, 2009. Counsel for the defendants has been advised by this  
Court’s calendar clerk that this motion may be calendared for the same date insofar as it  
addresses the same subject matter as the plaintiff’s motion.

1 processing plaintiff's requests in accordance with established policies that allow for the equitable  
2 and orderly processing of FOIA requests on a first-in, first-out basis. Although the FBI has a  
3 backlog of pending FOIA requests, it is making substantial efforts to reduce the backlog and has  
4 achieved significant reductions in backlog and processing time. Nevertheless, the volume of  
5 potentially responsive records in this case, the large number of pending requests that predate  
6 plaintiff's request, and the limited resources currently available to the FBI for the processing of  
7 FOIA requests constitute exceptional circumstances necessitating a stay so that the FBI may  
8 complete its review of the records.

### 9 Memorandum of Law

#### 10 **I. Background**

##### 11 **A. The FBI's FOIA Request Processing System**

12 The Record/Information Dissemination Section ("RIDS"), Records Management Division  
13 ("RMD"), of the FBI has the collective mission of effectively planning, developing, directing, and  
14 managing responses to requests for access to FBI records and information pursuant to FOIA; Privacy  
15 Act; Executive Order 12958, as amended; Presidential, Attorney General, and FBI policies and  
16 procedures; judicial decisions; and Presidential and Congressional directives. (Hardy Decl. ¶ 2.)  
17 RIDS also provides prepublication review of material written by current and/or former FBI  
18 employees concerning FBI matters as mandated by the FBI's employment agreement, executes the  
19 FBI's historic declassification program, and assists in managing discovery in large counterterrorism  
20 criminal trials. (*Id.* ¶ 22.)

21 In recent years, FOIA management at FBIHQ has continuously reengineered the process of  
22 responding to FOIA/Privacy Act requests in an effort to better serve the needs of requesters who  
23 seek information from the FBI. (*Id.* ¶ 21.) In 2002, reorganization of various divisions at FBIHQ  
24 resulted in the formation of the RMD, which now handles all FOIA/Privacy Act requests through  
25 RIDS. (*Id.*)

26 RIDS currently employs approximately 237 personnel, most of whom are Legal  
27 Administrative Specialists ("LAS"), and who are assigned among the 12 units within RIDS. (*Id.*)  
28

1 ¶ 22.) RIDS employees intake, review, process, and release information in response to FOIA and  
2 Privacy Act requests. (*Id.*) To accomplish this mission, RIDS consists of the following twelve units:  
3 one Service Request Unit (“SRU”), two Work Process Units (“WPU”), three Classification Units  
4 (“CU”), five FOIPA Units (“Disclosure Units”), and the Litigation Support Unit (“LSU”). (*Id.*)

5 The SRU contains the Negotiation Team, which works with individuals whose requests have  
6 generated a large volume of records to attempt to narrow the scope of responsive records and  
7 facilitate more rapid response. (*Id.* ¶ 22(a).) Since 1995, this team has been able to reduce the scope  
8 of FOIA/Privacy Act requests by over 13 million pages. (*Id.*) The SRU has a RIDS Public  
9 Information Official, who is responsible for assisting requesters with issues concerning their  
10 requests. (*Id.*) The Government Response Team (“GRT”), also a part of the SRU, provides timely  
11 feedback to other federal agencies and other DOJ components with regard to referrals of documents  
12 which are either FBI-originated or contain FBI-originated information. (*Id.*) Referred documents are  
13 sent to the FBI for consultation or for direct response to the requester. (*Id.*) Finally, the SRU handles  
14 administrative appeals and criminal discovery matters. (*Id.*)

15 The two WPUs are responsible for reviewing and sorting all correspondence and incoming  
16 requests for information from the public, Congress, Presidential Libraries, foreign governments,  
17 other federal and state agencies, and other FBI entities. (*Id.* ¶ 22(b).) The WPUs handle various  
18 initial tasks required to “perfect” a FOIA/Privacy Act request, including sending letters to  
19 acknowledge requests. (*Id.*) The WPUs also open new requests, assign FOIA/Privacy Act  
20 (“FOIPA”) Request Numbers, and enter the perfected requests into the FOIAPA Document  
21 Processing System (“FDPS”) tracking system. (*Id.*) The WPUs are responsible for preparing  
22 “perfected” requests for transfer to the FOIPA Disclosure Units. (*Id.*) A request is considered  
23 “perfected” when all administrative tasks have been completed and all potentially responsive  
24 documents have been scanned into FDPS. (*Id.*) Once a request has been perfected, it is placed in  
25 the backlog for assignment to a FOIPA Disclosure Unit for processing. (*Id.*) The WPUs conduct  
26 searches of the general indices for identifiable records, confirm responsive documents, stamp files  
27 for retention, address fee issues (other than fee waiver reviews), retrieve and forward files for  
28

1 scanning into FDPS, respond to status inquiries, and maintain requests prior to their transfer to the  
2 FOIPA Disclosure Units. (*Id.*)

3 After the WPU's perfect a request, it is sent to the "perfected backlog." (*Id.*) To ensure  
4 fairness to all requesters and to equitably administer the deluge of FOIA/Privacy Act requests  
5 received by the FBI, a request is assigned based on the date of receipt on a "first in/first out" basis  
6 from within each of three queues according to sound administrative practices. (*Id.*) See 28 C.F.R.  
7 § 16.5(a). The FBI uses a three-queue system as a way to fairly assign and process new requests.  
8 (*Id.*) The three-queue system established "multi-track" processing for requests, based on the amount  
9 of time and work involved in handling a particular request. (*Id.*) See 5 U.S.C. § 552(a)(6)(D)(I);  
10 28 C.F.R. § 16.5(b). The system nevertheless preserves the principle that, within the three queues,  
11 requests are still assigned and processed on a first-in/first out basis. (*Id.*) The placement of a  
12 request in one of the three queues depends on the total amount of material responsive to that request  
13 - 500 pages or less ("small queue"), 501 to 2,500 pages ("medium queue"), or more than 2,500 pages  
14 ("large queue"). (*Id.*) This standard operating procedure, coupled with the FBI's "first in/first out"  
15 policy, permits requests to be addressed in the order in which they are received, while obviating the  
16 inequities to other requesters whose interests relate only to a small number of documents. (*Id.*)  
17 Individuals whose requests have been placed in the large queue ordinarily are given the opportunity,  
18 through contact with SRU's Negotiation Team, to reduce the scope of their requests and accelerate  
19 assignment of their requests by relocating them to a more advantageous queue. (*Id.*)

20 The three Classification Units ("CUs") are responsible for complying with the  
21 classification/declassification review of FBI records under Executive Order 12958, as amended, and  
22 for conducting mandatory declassification review consistent with Executive Order 12958, as  
23 amended. (*Id.* ¶ 22(c).) The CUs review documents responsive to FOIA/Privacy Act requests,  
24 criminal and civil discovery requests, Congressional and Presidential mandates, Presidential Library  
25 requests, mandatory declassification requests, Office of Inspector General Reports, and other federal  
26 agency requests in order to determine whether such material should remain classified or be  
27

28

1 declassified. (*Id.*) In addition, the CUs review and prepare classified material for review by the  
2 Department of Justice Review Committee (“DRC”). (*Id.*)

3         The five FOIPA Disclosure Units perform the actual processing of records pursuant to the  
4 provisions of the FOIA and Privacy Act. (*Id.* ¶ 22(d).) Processing involves a page-by-page, line-by-  
5 line review of the responsive documents to determine which, if any, FOIA and Privacy Act  
6 exemptions may apply. (*Id.*) This includes redaction of the exempt material and notation of the  
7 applicable exemptions in the margins of each page or preparation of deleted page information sheets  
8 when pages are withheld in their entirety, which is now done electronically in FDPS. (*Id.*) During  
9 the course of their review, the Disclosure Units consult with other government agencies for their  
10 determinations as to the releasability of other agencies’ information contained within FBI records,  
11 or refer non-FBI documents to those originating agencies for processing and direct response to the  
12 requester. (*Id.*) The Disclosure Units ensure that FOIA and Privacy Act exemptions have been  
13 applied properly, no releasable material has been withheld, no material meriting protection has been  
14 released, all necessary classification reviews have been completed by transferring applicable cases  
15 to the CUs, and other government agency information or entire documents originating with other  
16 government agencies have been properly handled. (*Id.*)

17         The Litigation Support Unit (“LSU”) is responsible for providing legal support and  
18 administrative assistance to the FBI’s Office of the General Counsel and Chief Division Counsels  
19 and Assistant Division Counsels in the FBI’s field offices, in all FOIA/Privacy Act requests that  
20 result in federal litigation. (*Id.* ¶ 22(e).) The LSU coordinates the progress of the FBI’s response  
21 to a particular FOIA/Privacy Act request as it progresses through the units described above, the  
22 receipt of substantive litigation-related information from involved FBI Special Agents (“SAs”) in  
23 the field offices and the operational Divisions at FBIHQ, and the referral of documents to other DOJ  
24 components and government agencies. (*Id.*) The LSU prepares the administrative record, drafts  
25 both procedural and substantive declarations and court pleadings, codes documents processed by  
26 the Disclosure Units, and drafts detailed declarations justifying the assertion of all applicable  
27 FOIA/Privacy Act exemptions. (*Id.*)  
28



1 To promote administrative efficiency, Legal Administrative Specialists (LASs) work on  
2 more than one request at a time. (*Id.* ¶ 23). Certain cases may require that the usual processing be  
3 halted midstream. This can occur for a variety of reasons, including the resolution of a classification  
4 issue, the location of additional records, or consultation with other government agencies as to the  
5 nature and propriety of releasing certain information. (*Id.*) In the interest of efficiency, during this  
6 waiting period, the LAS may fully process other requests. (*Id.*) Large requests are often processed  
7 on parallel tracks with smaller requests in an attempt to ensure that one requester does not consume  
8 a disproportionate share of RIDS' resources. (*Id.*)

9 Consistent with standard administrative procedure, any records referred to the FBI from other  
10 DOJ components or other government agencies in response to a particular request are added to that  
11 pending FOIA/Privacy Act request. (*Id.* ¶ 24). This process is an equitable way for RIDS to  
12 maintain administrative control of FOIA/Privacy Act requests. (*Id.*) Under this system, the same  
13 LAS assigned to process a particular request will also handle the review of records referred by other  
14 DOJ components or government agencies. (*Id.*) By ensuring continuity in the processing of FOIA  
15 requests, this system is not only fair to all persons seeking information under the FOIA, but is also  
16 administratively efficient. (*Id.*)

17 **B. The Plaintiff's FOIA Requests, and the FBI's Processing of Those**  
18 **Requests to Date**

19 The plaintiff, through Marcia Hoffman, submitted a FOIA request to the FBI by a letter dated  
20 February 25, 2008. (Hardy Decl. ¶ 6.) The request sought "all reports submitted by the Federal  
21 Bureau of Investigation to the Intelligence Oversight Board ('IOB') pursuant to Section 2.4 of  
22 Executive Order 12863." (*Id.*, Ex. A.) The plaintiff specified that it was seeking "all such reports  
23 submitted to the IOB since January 1, 2001 that have not been released to EFF in response to  
24 previous FOIA requests." (*Id.*) The FBI acknowledged receipt of the request by a letter dated  
25 March 21, 2008, and assigned the request FOIPA number 111083-000. (*Id.* ¶ 7 & Ex. B.) The FBI  
26 has since sent several status updates to the plaintiff, informing it of the current status of the  
27 processing of its request. (*Id.* ¶¶ 8-11 & Exs. C-H.)  
28

1 The plaintiff, through Nathan Cardozo, submitted a second request to the FBI by a letter  
2 dated June 19, 2009. (*Id.* ¶ 12.) The request sought reports submitted to the IOB, reports submitted  
3 to the Director of National Intelligence, and certain requests, reports, reviews, and recommendations  
4 submitted by the IOB or the President’s Intelligence Advisory Board to the FBI. (*Id.*, Ex. I.) The  
5 FBI acknowledged receipt of the request by a letter dated June 23, 2009, and assigned the request  
6 FOIPA number 1132975-000. (*Id.* ¶ 13 & Ex. J.)

7 In response to the plaintiff’s February 25, 2008 request, the FBI conducted a search of the  
8 FBI Headquarters (“FBIHQ”) indices to the Central Records System (“CRS”) to identify all  
9 potentially responsive files indexed under the Intelligence Oversight Board, IOB, Intelligence  
10 Oversight Board Matters, IOB Matters, Presidential Oversight Board, PIAB, Presidential Oversight  
11 Board Matters and PIAB Matters. The FBI did not initially identify responsive records as a result  
12 of this search, and therefore sent plaintiff a “no record” response. (*Id.* ¶ 14.) RIDS next generated  
13 and sent two Electronic Communications (“ECs”), dated September 10, 2008 and April 17, 2009,  
14 respectively, to those offices at FBIHQ most likely to possess potentially responsive documents.  
15 (*Id.* ¶ 15.) The ECs requested each office to conduct a thorough search for any and all  
16 documentation in its possession that may be responsive to plaintiff’s FOIA requests. (*Id.*) The  
17 Office of General Counsel (“OGC”) identified numerous potentially responsive documents. (*Id.*)

18 In response to the plaintiff’s June 19, 2009 request, an EC dated July 7, 2009, was submitted  
19 to those offices at FBIHQ most likely to possess potentially responsive documents. (*Id.* ¶ 16.) This  
20 EC similarly requested that each office conduct a thorough search for any and all documentation in  
21 its possession that may be responsive to plaintiff’s FOIA requests. (*Id.*) In response to this EC, the  
22 National Security Law Branch (“NSLB”) in OGC identified numerous potentially responsive  
23 documents. (*Id.*)

24 In addition to its efforts to conduct a search via ECs, RIDS conducted a second search of the  
25 CRS and located two potentially responsive files. (*Id.* ¶ 17.) These files have been retrieved from  
26 their location and will be added to those documents located in response to the ECs. (*Id.*)  
27  
28

1 As a result of these search efforts, which are now complete, a total of approximately 81,000  
2 pages potentially responsive to the plaintiff's two requests have been located. (*Id.* ¶ 18.) The  
3 potentially responsive documents will be scanned into electronic format and the FBI anticipates both  
4 requests to be forwarded to the "perfected case" backlog for assignment to a FOIPA processing  
5 analyst on or about November 6, 2009. (*Id.*) Based on the page count of approximately 81,000  
6 pages, both of the plaintiff's requests will be in the large queue of the "perfected case" backlog.  
7 (*Id.*) The plaintiff has not requested expedited processing for either of its two requests. (*Id.*, Exs.  
8 A, I.) *See* 28 C.F.R. § 16.5(d).

9 Based on the date of the plaintiff's first request – February 25, 2008 – there are  
10 approximately ten requests (consisting of a total of approximately 59,100 pages) pending ahead of  
11 the plaintiff's request in the large queue. (*Id.* ¶ 19.) The FBI anticipates that the earliest that the  
12 plaintiff's request will be assigned to a RIDS Disclosure Unit for processing is in approximately 18  
13 months – on or about May 6, 2011 – which is the estimated time it will take for this request to rise  
14 to the top of the "large queue." (*Id.*) Once the request is assigned for processing, the FBI will be  
15 able to review, process and release non-exempt pages on a rolling basis, and at this time anticipates  
16 that it will require a total of an additional approximately 36 months to complete processing of all  
17 documents responsive to this request, until on or about May 6, 2014. (*Id.*)

18 Based on the date of the plaintiff's second request – June 19, 2009 – there are  
19 approximately 106 requests (consisting of a total of approximately 732,000 pages) pending ahead  
20 of that request in the large queue. (*Id.* ¶ 20.) The FBI anticipates that the earliest plaintiff's request  
21 will be assigned to a RIDS Disclosure Unit for processing is in approximately 24 months – on or  
22 about November 5, 2011 – which is the estimated time it will take for this second request to rise to  
23 the top of the "large queue." (*Id.*) Once the request is assigned for processing, the FBI will be able  
24 to review, process and release non-exempt pages on a rolling basis, and at this time anticipates that  
25 it will require a total of approximately 18 months to complete processing of all documents  
26 responsive to this request -- until on or about May 4, 2013. (*Id.*)  
27  
28

### 1 C. The Circumstances Justifying a Stay

2 The number of FOIA and Privacy Act requests received by the FBI increased dramatically  
3 beginning in the early 1980s. (Hardy Decl. ¶ 25.) RIDS's predecessor, the Freedom of Information  
4 and Privacy Acts Section, began processing requests in 1975. (*Id.*) Initially overwhelmed by the  
5 number of requests, by 1981 the FBI had achieved a steady backlog between 4,000-7,000 requests.  
6 (*Id.*) Beginning in 1985, the unavailability of additional employees and a steady, large stream of  
7 new requests increased the backlog substantially until in 1996 there were in excess of 16,000  
8 requests. (*Id.*) In 1996, the median time for a pending request was in excess of three years. (*Id.*)

9 During the years that the backlog continued to grow, the FBI repeatedly sought additional  
10 funding for the creation of new FOIA/Privacy Act positions. (*Id.* ¶ 26.) For example, Congress  
11 appropriated funds in the 1997 fiscal year budget providing for 129 additional employees, and in the  
12 1998 fiscal year budget providing for 239 additional employees. (*Id.*) In 2002, RIDS moved to  
13 paperless processing through its FOIPA Document Processing System ("FDPS"). (*Id.*) The FDPS  
14 allows the user to scan FBI files, documents, and correspondence, and enables the user to process  
15 pages electronically rather than manually. (*Id.*) RIDS is now using this system to process virtually  
16 all of its FOIA/Privacy Act requests. (*Id.*) The new process required the FBI to redistribute some  
17 of its FOIPA personnel to other sections within RMD in order to support the scanning and archival  
18 services necessary for automated processing. (*Id.*) Despite an additional reduction of RIDS  
19 personnel to support the war on terrorism following September 11, 2001, the new efficiencies  
20 allowed the FBI to make great strides in reducing further its FOIA/Privacy Act backlog. (*Id.*) For  
21 example, requests at RIDS in various stages of processing between December 31, 1996 and  
22 December 31, 2006, dropped from 16,244 to 1,672, resulting in a reduction of 14,572 requests. (*Id.*)  
23 The median time for a pending request dropped from 1,160 days on December 31, 1996, to 156 days  
24 on December 31, 2006. (*Id.*)

25 During 2006, there was an increase in requests, up from an average of 911 per month in 2005  
26 to an average of 1,277 per month. (*Id.* ¶ 27.) Despite this increase, the FBI met or surpassed its  
27 primary goal of reducing the time required to process requests. (*Id.*) The median time for  
28

1 processing small queue requests (less than 500 pages) decreased by 10% and the median time for  
2 processing medium queue requests (501 pages-2500 pages) decreased by 16%. (*Id.*) However, the  
3 median time for the processing of large queue requests (over 2500 pages) increased by 22%. (*Id.*)  
4 This increase was due to a concerted effort to reduce the backlog of the older, larger cases. (*Id.*)  
5 This effort resulted in the number of pending large queue requests decreasing from 122 to 51. (*Id.*)

6 During 2007 to 2008, the FBI continued towards its primary goal of reducing the time  
7 required to process requests. (*Id.* ¶ 28) By December, 2008, the median time for a pending request  
8 at the FBI was 82 days. (*Id.*) In 2009, the dynamics of processing requests changed substantially.  
9 (*Id.*) On March 19, 2009 the Attorney General provided new guidelines for processing FOIA  
10 requests. (*Id.*) Included in the guidelines was direction that agencies streamline the process for  
11 requesters. (*Id.*) In consultation with the Department of Justice, the FBI determined that it should  
12 no longer adhere to the requirements set forth in 28 C.F.R. Sections 16.3(a) and 16.41(a), the “field  
13 office rule” in order to comply with the new guidelines. (*Id.*) This new policy had an immediate  
14 impact on the number of pages required to be processed by the FBI. (*Id.*) The number of responsive  
15 requests rose 20 percent. (*Id.*) The size of each request increased by 30 percent. (*Id.*) By August,  
16 2009 the increase in the number of pending pages exceeded the total number of pages processed in  
17 2008. (*Id.*)

18 The FBI immediately responded to the dramatic increase of new work. (*Id.* ¶ 29.) In  
19 September 2009 the FBI converted 33 employees at two operational service centers to perform FOIA  
20 redaction reviews. (*Id.*) In addition, in October 2009, the FBI hired 30 contractor employees to  
21 perform WPU functions, thereby freeing additional FBI LASs to perform FOIA review and  
22 processing work. (*Id.*) Both contractors and FBI employees are currently undergoing training. (*Id.*)  
23 By March 2010, the FBI anticipates that these individuals will have sufficient training and  
24 experience to assist in reducing the pending backlog at FBI. (*Id.*)

25 RIDS has taken all possible steps -- using available technologies -- to aid in the streamlining  
26 and reduction of the FOIA/Privacy Act backlog. (*Id.* ¶ 30.) These include the use of direct on-line  
27 computer searches to locate responsive records, the use of forms which eliminate delays associated  
28

1 with word processing, the formation of specific teams to target backlog issues, the development of  
2 alternative methods to handle consultations with other government agencies, and the formation of  
3 the RIDS FOIPA Litigation Support Unit (“LSU”), which handles all FOIA/Privacy Act litigation.  
4 (*Id.*) RIDS has a FOIPA Process Board and an Information Technology Change Management Board  
5 to improve existing processes, including the use of information technology enhancements to the  
6 existing automated processing system. (*Id.*) These boards provide a systematic methodology to  
7 implement continuous process improvement for the future. (*Id.*)

8           Currently, the FBI is taking two steps to update its technology and facilities that will in the  
9 future reduce dramatically the amount of time it takes the FBI to respond to FOIA and Privacy Act  
10 requests: (a) development of the electronic investigative case file (the Sentinel Project); and (b)  
11 establishment of an FBI Central Records Complex. (*Id.* ¶ 31.) The Sentinel Project is an on-going,  
12 multi-year project that will result in the elimination of paper investigative case files. (*Id.*) With an  
13 embedded Records Management Application (“RMA”), FBI employees will be able to search for  
14 and retrieve these records electronically. (*Id.*) Concurrently, the FBI has begun the process of  
15 designing and building a new, state-of-the art Central Records Complex (“CRC”) in Frederick  
16 County, Virginia. (*Id.*) This initiative will consolidate all closed FBI paper records from more than  
17 265 different storage locations to one central site. (*Id.*) When requested, paper records will be  
18 scanned and forwarded electronically. (*Id.*) These initiatives will significantly improve RIDS’s  
19 search and record retrieval capabilities by increasing search accuracy, by decreasing search time,  
20 by reducing lost files and missing serials, and by eliminating the manual movement of files. (*Id.*)  
21 RIDS expects these initiatives, after they are fully implemented, to reduce by 40% the time required  
22 to process a FOIA/Privacy Act request. (*Id.*) RIDS has moved to an interim facility in Frederick  
23 County, Virginia, to recruit and train new employees in anticipation of the construction of the CRC.  
24 (*Id.*) While this move is essential to future FBI FOIA/Privacy Act operations, it has created  
25 significant strains on the FBI’s FOIA/Privacy Act resources. (*Id.*)

26           Three significant factors have further impacted the FBI’s ability to process recently located  
27 records: (a) the physical relocation of the Section’s personnel and resources from FBIHQ to the  
28

1 interim facility in Frederick County, Virginia, which has had a significant impact on the section;  
2 (b) numerous competing litigation and administrative deadlines; and (c) addressing pending  
3 administrative appeals. (*Id.* ¶ 32.)

4 RIDS began relocation of its operations from FBIHQ to Winchester, Virginia in February  
5 2006 by establishing an advance team to prepare for the eventual relocation of RIDS in incremental  
6 stages. (*Id.* ¶ 33.) Beginning in the summer of 2006, RIDS began relocating its functions to the  
7 interim facility (“ICRC”). (*Id.*) This transition continued until October of 2008, when all units  
8 completed their relocation to Frederick County, Virginia. (*Id.*) As a direct result of this relocation,  
9 numerous seasoned RIDS employees chose to retire or find other employment rather than relocate  
10 to Winchester. (*Id.*) Only 76 out of 211 employees who had worked at FBIHQ now remain within  
11 the section. (*Id.*) Over 60 percent of the section has less than five years experience. (*Id.*) As a  
12 result of the FBI’s aggressive and intensive recruitment and hiring effort in the Frederick County,  
13 Virginia area, RIDS has been able to bring on-board 161 new employees, 54 of whom have less than  
14 one year of experience with FOIA. (*Id.*)

15 The new RIDS employees who have less than one year of experience are in various stages  
16 of professional development, but none are yet operating as experienced employees. (*Id.* ¶ 34.) It  
17 takes an average of three years to adequately train a new employee in the FOIA/Privacy Act process  
18 to be able to work independently in a productive, efficient, and effective manner. (*Id.*) Accordingly,  
19 RIDS has only a limited number of experienced employees processing FOIA/Privacy Act requests  
20 at this time. (*Id.*)

21 Simultaneously with the resource drain caused by RIDS’ relocation to Winchester, Virginia,  
22 the FBI has been faced with a significant FOIA litigation workload. (*Id.* ¶ 35.) Several pending  
23 litigations are document-intensive and have required the devotion of significant resources in order  
24 to comply with agreed-upon litigation deadlines. (*Id.*) For example, in *Rosenfeld v. U.S.*  
25 *Department of Justice and U.S. Federal Bureau of Investigation*, Civ. A. No. 07-3240-MHP (N.D.  
26 Cal.), the FBI has just completed the re-processing of approximately 8,000 pages and is awaiting  
27 response from plaintiff regarding this material. (*Id.* ¶ 36.) In addition, the FBI is currently  
28

1 reprocessing several large cross-references and searching for additional records. (*Id.*) In order to  
2 comply with these demands, several components of RIDS have realigned its personnel resources and  
3 have made a substantial commitment of resources to address these issues. (*Id.*)

4 In *ACLU v. Department of Defense, et al.*, Civ A. No. 08-1003 (D.D.C.), the FBI, in an  
5 agreement reached with ACLU, has agreed to produce all FBI documents provided to the Inspector  
6 General's Office ("IG") that were used in the IG report referencing the treatment of the detainees.  
7 (*Id.* ¶ 37.) The FBI has located and scanned approximately 14,300 pages of responsive documents  
8 into its processing system. (*Id.*) The FBI is currently making monthly releases to the plaintiff. (*Id.*)  
9 The FBI reasonably anticipates that LSU/RIDS employee resources will once again be strained to  
10 meet this agreement. (*Id.*)

11 In *New York Civil Liberties Union v. United States Department of Justice*, Civ. A. No. 08-  
12 CV-5674 (S.D.N.Y.), the FBI has agreed to review an additional approximately 51,000 pages of  
13 interviews in order to produce a sample of 200 interviews. (*Id.* ¶ 38.) These pages were spread  
14 across the country and located in each of the FBI's 56 field offices. (*Id.*) These pages are to be  
15 processed and released by November 27, 2009. (*Id.*) To meet this commitment, LSU and other  
16 components of RIDS once again shifted the already strained LSU/RIDS employee resources. (*Id.*)

17 In *Kisseloff v. Federal Bureau of Investigation, et al.*, Civ. A. No. 08-cv-391 (D.D.C.), the  
18 FBI is working to reach an agreement with plaintiff to produce the documents originally requested  
19 by the plaintiff. (*Id.* ¶ 39.) The FBI has offered to produce approximately 48,200 pages of  
20 responsive material. (*Id.*) As of this date, the FBI is waiting for a response to this counter-offer.  
21 (*Id.*) This number could increase if this offer is not accepted by the plaintiff. (*Id.*) The FBI  
22 reasonably anticipates that LSU/RIDS employee resources will once again be strained to meet this  
23 agreement. (*Id.*)

24 In *Forensic Justice Project, et al. v. Federal Bureau of Investigation, et al.*, No. 06-cv-1001  
25 (D.D.C.), the FBI has located and scanned in approximately 206,452 pages of responsive documents.  
26 (*Id.* ¶ 40.) As of October 22, 2009, the FBI has released approximately 62,185 pages to the plaintiff,  
27 consistent with the agreement reached between the parties in that litigation. (*Id.*) Currently, 31  
28



1 Disclosure Unit LASs are processing and releasing documents in this case on a rolling basis. (*Id.*)  
2 RIDS' employee resources will continue to be diverted in order to comply with the schedule  
3 contemplated in that case. (*Id.*)

4 In addition to the numerous pending litigations, the same RIDS personnel who are addressing  
5 litigation deadlines have also had to address a high volume of administrative requests and appeals.  
6 (*Id.* ¶ 41.) Over the past seven years, the FBI has received, on average, 1,043 FOIA/Privacy Act  
7 requests per month. (*Id.*) In FY 2009, the FBI received a total of 13,511 FOIA/Privacy Act  
8 requests. (*Id.*) There are approximately 1,144,907 pages of responsive documents currently being  
9 processed by the FOIPA Disclosure Units and an additional 796,867 pages of responsive documents  
10 in the "perfected" backlog awaiting assignment to a FOIPA Disclosure Unit for processing. (*Id.*)

11 RIDS personnel also work closely with the staff of the U.S. Department of Justice, Office  
12 of Information Policy ("OIP") to review and assist with OIP's responses and determinations  
13 regarding pending appeals. (*Id.* ¶ 42.) During 2006, the FBI received a total of 1,015 administrative  
14 appeals. (*Id.*) As of September 30, 2009, the FBI and OIP had managed to reduce the backlog of  
15 pending administrative appeals to 126. (*Id.*) While this number represents a significant decrease,  
16 it has required a diversion of personnel resources and has been achieved at the expense of an  
17 additional drain on the FBI's FOIA resources. (*Id.*) Inevitably, the time spent by RIDS personnel  
18 assisting OIP in addressing these administrative appeals reduces the amount of time that they are  
19 able to devote for regular processing duties related to litigation as well as other pending FOIA  
20 requests. (*Id.*)

## 21 **II. Argument**

### 22 **A. Legal Standard for a Stay of Proceedings**

23 An agency receiving a FOIA request generally must determine whether to comply with the  
24 request within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i). Once the initial twenty days has passed  
25 without an agency determination on the request, the FOIA requester "shall be deemed to have  
26 exhausted his administrative remedies," 5 U.S.C. § 552(a)(6)(C)(i), and the requestor can file suit  
27 in federal court. The Court may, however, "allow the agency additional time to complete its review  
28

1 of the records” upon a showing that “exceptional circumstances exist and that the agency is  
 2 exercising due diligence in responding to the request.” *Id.* This provision “was designed and  
 3 inserted specifically as a safety valve for [FOIA].” *Open America v. Watergate Special Prosecution*  
 4 *Force*, 547 F.2d 605, 610 (D.C. Cir. 1976).

5 Effective October 2, 1997, as part of the Electronic Freedom of Information Act  
 6 Amendments of 1996, Congress amended 5 U.S.C. § 552(a)(6)(C)(i) by adding the following two  
 7 subsections:

8 (ii) For purposes of [5 U.S.C. § 552(a)(6)(C)], the term “exceptional  
 9 circumstances” does not include a delay that results from a predictable agency  
 10 workload of requests under this section, unless the agency demonstrates reasonable  
 progress in reducing its backlog of pending requests.

11 (iii) Refusal by a person to reasonably modify the scope of a request or arrange  
 12 an alternative time frame for processing the request (or a modified request) under  
 13 clause (ii) after being given an opportunity to do so by the agency to whom the  
 person made the request shall be considered as a factor in determining whether  
 exceptional circumstances exist for purposes of this subparagraph.

14 5 U.S.C. § 552(a)(6)(C)(ii), (iii).<sup>2</sup>

15 The leading case construing § 552(a)(6)(C) is *Open America v. Watergate Special*  
 16 *Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976). In that case, which involved a FOIA request  
 17 directed to the FBI, the Court of Appeals for the D.C. Circuit held that an agency is entitled to  
 18 additional time to process a FOIA request under § 552(a)(6)(C) when it:

19 is deluged with a volume of requests for information vastly in excess of that  
 20 anticipated by Congress, when the existing resources are inadequate to deal with the  
 21 volume of such requests within the time limits of subsection (6)(A), and when the  
 22 agency can show that it “is exercising due diligence” in processing the requests.  
 23

---

24 <sup>2</sup> The 1996 Amendments to FOIA upheld the decision in *Open America v. Watergate*  
 25 *Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976), affirmed the proposition that stays  
 26 should be granted to agencies faced with a large volume of FOIA requests, and clarified that  
 27 even a “predictable agency workload of requests” constituted “exceptional circumstances” when  
 28 an agency could demonstrate that it was making progress in reducing its backlog. *See, e.g.*, H.R.  
 Rep. No. 104-795, at 24, *reprinted in* 1996 U.S.C.C.A.N. 3448, 3467 (noting that the FOIA  
 Amendments were “consistent” with the holding in *Open America*).

1 *Id.* at 616 (quoting 5 U.S.C. § 552(a)(6)(C)).<sup>3</sup> See also *Oglesby v. U.S. Dep't of the Army*, 920 F.2d  
2 57, 64 (D.C. Cir. 1990) (“Frequently, if the agency is working diligently, but exceptional  
3 circumstances have prevented it from responding on time, the court will refrain from ruling on the  
4 request itself and allow the agency to complete its determination.”). The Ninth Circuit has adopted  
5 the holding of *Open America*, while recognizing that one factor in the stay analysis will be whether  
6 a party in litigation demonstrates a need for expedition of its request. See *Exner v. FBI*, 542 F.2d  
7 1121, 1123 (9th Cir. 1976); see also *Fiduccia v. U.S. Dep't of Justice*, 185 F.3d 1035, 1040-41 (9th  
8 Cir. 1999).

9 “[E]xceptional circumstances” therefore include “any delays encountered in responding to  
10 a request as long as the agencies are making good-faith efforts and exercising due diligence in  
11 processing requests on a first-in, first out basis.” *Appleton v. FDA*, 254 F. Supp. 2d 6, 8-9 (D.D.C.  
12 2003). In addition, “exceptional circumstances” include delays encountered when an agency is  
13 “deluged with a volume of requests for information vastly in excess of that anticipated by Congress,  
14 when the existing resources are inadequate to deal with the volume of such requests within the time  
15 limits of . . . [5 U.S.C. § 552(a)(6)(A)], and when the agency can show that it is ‘exercising due  
16 diligence’” in processing the requests. *Edmonds v. FBI*, 2002 WL 32539613 at \*1 (D.D.C. Dec. 3,  
17 2002) (quoting *Open America*, 547 F.2d at 616).<sup>4</sup> “It also has been recognized, based on . . .  
18 legislative history, that other circumstances in addition to FOIA request backlogs may be a basis for  
19 finding exceptional circumstances, including ‘resources being devoted to the declassification of  
20 classified material of public interest, and the number of requests for records by courts or  
21 administrative tribunals.’” *Ctr. for Pub. Integrity v. U.S. Dep't of State*, 2006 WL 1073066 at \*2  
22

---

23  
24 <sup>3</sup> In the *Open America* decision, the D.C. Circuit found “exceptional circumstances”  
25 where the FBI had a backlog of “only” 5,137 requests. See *Open America*, 547 F.2d at 609, 613.

26 <sup>4</sup> “Exceptional circumstances” permitting the granting of additional time do not include  
27 delays resulting from a “predictable workload” of FOIA requests, “unless the agency  
28 demonstrates reasonable progress in reducing its backlog of pending requests.” 5 U.S.C.  
§ 552(a)(6)(C)(ii).

1 (D.D.C. 2006) (quoting *Wilderness Soc’y v. U.S. Dep’t of the Interior*, 2005 WL 3276256 at \*6  
2 (D.D.C. 2005).

3 Thus, exceptional circumstances have been construed to exist and a stay pursuant to FOIA  
4 and the *Open America* doctrine may be granted: “(1) when an agency is burdened with an  
5 unanticipated number of FOIA requests; *and* (2) when agency resources are inadequate to process  
6 the requests within time limits set forth in the statute; *and* (3) when the agency shows that it is  
7 exercising ‘due diligence’ in processing the requests; *and* (4) the agency shows ‘reasonable  
8 progress’ in reducing its backlog of requests.” *Williams v. FBI*, 2000 WL 1763680, \*2 (D.D.C.  
9 2000); *see also Summers v. Dep’t of Justice*, 925 F.2d 450, 452 n.2 (D.C. Cir. 1991) (noting first  
10 three factors).

11 Courts have frequently issued orders extending the time to respond to FOIA requests,  
12 including orders granting stays of several years in length or otherwise permitting agencies several  
13 years to process documents under exceptional circumstances. *See, e.g., Fox v. U.S. Dep’t of Justice*,  
14 1994 WL 923072, at \*2 (C.D. Cal. 1994) (FBI showed need for stay of five years); *Piper v. U.S.*  
15 *Dep’t of Justice*, 339 F. Supp. 2d 13, 16 (D.D.C. 2004) (FBI showed need for stay of two years);  
16 *Williams v. FBI*, 2000 WL 1763680, at \*3 (FBI showed need for stay of two and a half years);  
17 *Judicial Watch of Fla., Inc. v. U.S. Dep’t of Justice*, 102 F. Supp. 2d 6, 9 & n.1 (D.D.C. 2000) (FBI  
18 showed need for stay of three years); *Rabin v. U.S. Dep’t of State*, 980 F. Supp. 116, 123-24  
19 (E.D.N.Y. 1997) (State Department showed need for stay of three years).

20 As shown below, because the FBI can demonstrate both exceptional circumstances and due  
21 diligence in handling the plaintiff’s requests, as well as reasonable progress in reducing its backlog,  
22 the Court should stay the proceedings with respect to the FBI until May 2011, when the FBI  
23 anticipates that the plaintiff’s first request will rise to the top of the “large queue.” The FBI is  
24 hopeful that the time required to process the plaintiff’s requests will be reduced once processing  
25 begins. The FBI is prepared to submit a status report within 120 days of the entry of the stay, and  
26 at 120-day intervals thereafter, to advise the Court and the plaintiff of the status of the plaintiff’s  
27  
28

1 request and provide any available revised estimates of the time required for each of the plaintiff's  
2 requests to rise to the top of the large queue, and for processing to be completed for those requests.

3 **B. The FBI is Entitled to an Open America Stay**

4 **1. The FBI is Operating Under Exceptional Circumstances**

5 In recent years, the FBI has seen a marked increase in the number of FOIA requests that it  
6 receives. (Hardy Decl. ¶ 27.) In addition, FBI's change of policy in 2009 regarding the scoping of  
7 requests has resulted in an increase in the number of pages in pending requests that exceeded the  
8 total number of pages that it processed in 2008. (*Id.* ¶ 28.) The FBI accordingly now faces a  
9 backlog of 1,144,907 pages of responsive documents that are currently being processed by FOIPA  
10 Disclosure Units and an additional 796,867 pages of responsive documents in the "perfected"  
11 backlog awaiting assignment to a FOIPA Disclosure Unit for processing. (*Id.* ¶ 41.)

12 The FBI has taken all possible steps to aid in the streamlining and reduction of the  
13 FOIA/Privacy Act backlog, including, in particular, the use of direct on-line computer searches to  
14 locate responsive records, the use of forms which eliminate delays associated with word processing,  
15 the formation of specific teams to target backlog issues, and the formation of the RIDA FOIPA  
16 Litigation Support Unit. (*Id.* ¶ 30.) The FBI further is developing the electronic investigative case  
17 file (the Sentinel Project), and establishing an FBI Central Records Complex in Frederick, Virginia.  
18 (*Id.* ¶ 31.) The FBI expects these initiatives, after they are fully implemented, to reduce processing  
19 times by 40 percent. (*Id.*) Unfortunately, however, in the short term, there has been an impact on  
20 available FBI FOIA processing resources.

21 While RIDS has transferred its unit functions to an interim site in Frederick, Virginia, many  
22 of the employees in those units, who are among the most senior and experienced in their areas of  
23 expertise, have opted to retire or find other jobs rather than relocate. (*Id.* ¶ 33.) The FBI has  
24 engaged in aggressive recruitment and hiring efforts in the Frederick County, Virginia area to fill  
25 these positions. (*Id.*) The new RIDS employees are in various stages of professional development,  
26 but none are yet operating as experienced employees; it takes an average of three years to adequately  
27 train a new employee in the FOIA/PA process to be able to work independently in a productive,  
28

1 efficient, and effective manner. (*Id.* ¶ 34.) Accordingly, RIDS has only a limited number of  
2 experienced employees processing FOIA/PA requests at this time. (*Id.*)

3 Simultaneously with this reduction in personnel, RIDS has experienced a significant  
4 demands from its its FOIA litigation workload, including several urgent and competing federal  
5 district court litigation deadlines that have impacted the FBI's ability to process recently located  
6 records. (*Id.* ¶¶ 35-40.) The efforts by RIDS to meet these competing litigation deadlines take  
7 resources away from other pending FOIA requests. Finally, the backlog in RIDS is exacerbated by  
8 the high volume of administrative appeals that require review and response by the RIDS personnel.  
9 (*Id.* ¶¶ 41-42.) The number of appeals remains another significant drain on resources, because  
10 inevitably the time spent by RIDS personnel handling these appeals reduces the amount of time for  
11 regular processing duties. (*Id.*)

12 For all of these reasons, the FBI faces "exceptional circumstances" in reducing its FOIA  
13 backlog warranting an *Open America* stay. Other courts have granted stays several years in duration  
14 when warranted under the circumstances. *See, e.g., Edmonds*, 2002 WL 32539613, at \*2 (FOIA  
15 staff's time spent on "administrative appeals, litigation and large projects" contributed to finding of  
16 exceptional circumstances); *Jimenez v. FBI*, 938 F. Supp. 21, 31 (D.D.C. 1996) (four-year stay  
17 granted to process 700 pages); *Haddon v. Freeh*, 31 F. Supp. 2d 16, 19 (D.D.C. 1998) (noting that  
18 court had granted stay until January 1998 on request submitted to FBI nearly four years before);  
19 *Guzzino v. FBI*, 1997 WL 22886, \*2 (D.D.C. 1997) (granting stay of more than four years because  
20 "[t]he FBI has shown that even though it is exercising due diligence, because of inadequate  
21 resources it is unable to respond to plaintiff's request within the statutory [] limit."); *Schweih's v.*  
22 *FBI*, 933 F. Supp. 719, 721-22 (N.D. Ill. 1996) (finding exceptional circumstances justified over four  
23 years from date of request to process plaintiff's FOIA request); *Cecola v. FBI*, 1995 WL 549066,  
24 at \*2 (N.D. Ill. 1995) (finding that exceptional circumstances justified more than six years from date  
25 of request to process 1500 pages and dismissing action without prejudice).  
26  
27  
28

1                   **2. The FBI is Exercising Due Diligence in Processing Plaintiff's**  
2                   **Requests and is Making Reasonable Progress in Reducing its**  
3                   **Backlog of Pending Requests**

4                   In addition to having demonstrated “exceptional circumstances,” the FBI is exercising due  
5 diligence in responding to plaintiff’s FOIA request and has made reasonable progress in reducing  
6 its backlog despite the tremendous burdens on its resources.

7                   Each year the FBI receives thousands of FOIPA requests. (Hardy Decl. ¶¶ 41.) Due to this  
8 continual influx, and to the appeals and litigation arising from it, the FBI faces a backlog of nearly  
9 two million pages of documents to be processed in response to pending requests. (*Id.*) The FBI,  
10 however, has demonstrated its commitment to reducing the backlog of information requests that  
11 confront it and has achieved significant reductions. (*Id.* ¶¶ 25-34.) Moreover, the FBI has taken all  
12 available steps to implement even greater reductions and to achieve a more streamlined processing  
13 of FOIA requests in the future. (*Id.*)

14                   In the past, the FBI repeatedly sought additional funding for the creation of new FOIPA  
15 positions. (*Id.* ¶ 26.) For example, Congress appropriated funds in the 1997 fiscal year budget  
16 providing for 129 additional employees, and in the 1998 fiscal year budget providing for 239  
17 additional employees. (*Id.*) In 2002, RIDS moved to paperless processing through its FOIPA  
18 Document Processing System (“FDPS”). (*Id.*) The FDPS allows the user to scan FBI files,  
19 documents, and correspondence, and enables the user to process pages electronically rather than  
20 manually. (*Id.*) RIDS is now using this system to process virtually all of its FOIA/Privacy Act  
21 requests. (*Id.*) The new process required the FBI to redistribute some of its FOIPA personnel to  
22 other sections within the RMD in order to support the scanning and archival services necessary for  
23 automated processing. (*Id.*) Despite an additional reduction of RIDS personnel following  
24 September 11, 2001, the new efficiencies stemming from FDPS allowed the FBI to make great  
25 strides in reducing its FOIA/Privacy Act backlog. (*Id.*) For example, the backlog of requests in  
26 RIDS in various stages of processing between December 31, 1996 and December 31, 2006, dropped  
27 from 16,244 to 1,672, resulting in a reduction of 14,572 requests. (*Id.*) The median processing time  
28

1 for a pending request dropped from 1,160 days on December 31, 1996, to 156 days on December  
2 31, 2006. (*Id.*)

3 During 2006 there was an increase in requests, up from an average of 911 per month in 2005  
4 to an average of 1,277 per month. (*Id.* ¶ 27.) Despite this increase, the FBI met or surpassed its  
5 primary goal of reducing the time required to process requests. (*Id.*) In this regard, the median time  
6 for processing small requests (less than 500 pages) decreased by 10%; the median time for medium  
7 requests (501 pages -2500 pages) decreased by 16%. (*Id.*) However, the median time for the  
8 processing of large queue requests (over 2500 pages) increased by 22 %. (*Id.*) This increase was  
9 due to a concerted effort to reduce the backlog of the older, larger cases. (*Id.*) This effort, however,  
10 resulted in the number of pending large queue requests decreasing from 122 to 51. (*Id.*)

11 As described above, the FBI has continued to take additional steps to further reduce the  
12 backlog and reduce processing time, including development of the electronic investigative case file  
13 (the Sentinel Project) and the establishment of an FBI Central Records Complex in Frederick,  
14 Virginia. (*Id.* ¶¶ 29-31.) Although the implementation stage of these projects has strained FBI  
15 resources, ultimately the FBI expects these initiatives, after they are fully implemented, to reduce  
16 current processing times by 40%. (*Id.* ¶ 31); *see Pray v. FBI*, 1995 WL 764149, \*2 (S.D.N.Y. 1995)  
17 (considering improved technology as a factor in establishing due diligence).

18 Accordingly, the FBI has demonstrated that it has made reasonable progress in reducing its  
19 backlog, despite the tremendous burdens on its resources. Indeed, the reduction in the backlog of  
20 requests from 16,244 on December 31, 1996, to 1,672 as of December 31, 2006, as well as the drop  
21 in median processing time for a pending request from 1,160 days in December of 2006 to 156 days  
22 as of December 2006, provide concrete evidence of “reasonable progress” for purposes of 5 U.S.C.  
23 § 552(a)(6)(C)(ii).

24 Moreover, the FOIPA Section’s current three-queue, first-in, first-out system is an  
25 improvement on the two-track, first-in, first-out system that has been expressly recognized as  
26 supporting the due diligence requirement. *See Open America*, 547 F.2d at 616. As explained above,  
27

28



1 the move to a three-tiered system has greatly increased the efficiency and fairness with which the  
2 FBI processes the thousands of FOIA requests it receives each year.

3 The FBI has likewise exercised due diligence in responding to the plaintiff's FOIA requests.  
4 The FBI has identified approximately 81,000 pages of documents potentially responsive to the  
5 plaintiff's requests. (*Id.* ¶ 18.) The FBI is in the process of scanning the documents and will place  
6 the plaintiff's requests, pursuant to standard procedures, in the large queue of the perfected-case  
7 backlog, where they will be reviewed on a first-in, first-out basis. (*Id.* ¶¶ 19-20.) Given the volume  
8 of potentially responsive documents, and the fact that processing involves a page-by-page, line-by-  
9 line review of the responsive documents to determine what, if any, FOIA and/or Privacy Act  
10 exemptions may apply, it is not surprising that it will take the FBI months to process these  
11 documents. (*Id.* ¶¶ 19-20.) *See, e.g., Jimenez*, 938 F. Supp. at 24, 31-32 (permitting a total of more  
12 than five years from the date of the request, for processing of a request that produced an estimated  
13 700 pages of responsive records); *Fox v. U.S. Dep't of Justice*, 1994 WL 923072 (C.D. Cal. 1994)  
14 (granting FBI motion for stay until 1999 to process 300 pages of documents responsive to a request  
15 filed in July 1993).<sup>5</sup>

16 Thus, because the FBI is making a good faith effort and exercising due diligence in  
17 processing requests on a first-in first-out basis, its request for a stay should be granted. *See Exner*  
18 *v. FBI*, 542 F.2d 1121, 1123 (9th Cir. 1976) (upholding FBI's use of a first-in, first-out system); *see*  
19 *also Kuffel v. U.S. Bureau of Prisons*, 882 F. Supp. 1116, 1127 (D.D.C. 1995); *Rabin*, 980 F. Supp.  
20 at 123 (finding that the "defendant State Department has shown the . . . 'due diligence' that courts  
21 have required . . . The Department presently faces an overwhelming backlog of requests for  
22 information, processes them in the approximate order received unless there is an urgent need for the  
23 information and appears to be attempting to comply with requests."); *Lisee v. CIA*, 741 F. Supp. 988,  
24

---

25  
26  
27 <sup>5</sup> In these prior cases, the courts granted stays lasting for several years to permit the FBI  
28 to process hundreds of pages of documents. The present case, by contrast, involves a request that  
requires the review of many times that amount of material.

1 989 (D.D.C. 1990) (holding that agencies' processing of FOIA requests on a first-in, first-out basis  
2 satisfied the "exceptional circumstance" and "due diligence" requirements for stay).

3 **III. Conclusion**

4 For the foregoing reasons, the defendants respectfully request that the Court grant this  
5 motion, and stay proceedings in this case with respect to the requests submitted to FBI.

6 Dated: October 27, 2009

Respectfully submitted,

7 TONY WEST  
8 Assistant Attorney General

9 ELIZABETH J. SHAPIRO  
10 Deputy Branch Director

11 /s/ Joel McElvain  
12 JOEL McELVAIN  
13 Senior Counsel  
14 United States Department of Justice  
15 Civil Division, Federal Programs Branch  
16 450 Golden Gate Ave., Room 7-5395  
17 San Francisco, CA 94102  
18 Telephone: (415) 436-6645  
19 Fax: (415) 436-6632  
20 Email: Joel.McElvain@usdoj.gov

21 Attorneys for the Defendants  
22  
23  
24  
25  
26  
27  
28

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2009, I electronically filed the foregoing document with the Clerk of the Court, using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter who are registered on the CM/ECF system.

/s/ Joel McElvain  
JOEL McELVAIN

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28