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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ELECTRONIC FRONTIER FOUNDATION, Plaintiff, v. OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE and UNITED STATES DEPARTMENT OF JUSTICE Defendants,	No. 3:08-CV-1023 JSW **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

SUMMARY OF ARGUMENT

Plaintiff's motion for preliminary injunction should be denied. Plaintiff's motion seeks a preliminary injunction to require the defendants to complete processing of plaintiff's requests under the Freedom of Information Act ("FOIA") within ten days. The relief plaintiff seeks is inconsistent with the way FOIA requests are processed generally, and is also inconsistent with the plain language of the expedited processing provision of the FOIA. Defendants have granted plaintiff's request to expedite processing of the FOIA requests at issue. In accordance with the expedited processing provision of the FOIA, defendants are working diligently to release responsive records to plaintiff "as soon as practicable." 5 U.S.C. § 552(a)(6)(E)(iii). As explained in the declarations submitted herewith, defendants have moved plaintiff's request to the front of their respective processing queues and have made significant progress towards releasing responsive records to plaintiff.

In addition to lacking success on the merits, plaintiff has failed to meet its essential burden of identifying any irreparable harm that it might suffer if the requested relief is not granted. Plaintiff's claim that it will suffer irreparable harm if defendants do not complete processing of the requests within 10 days is entirely speculative, particularly given the likelihood that debate over amendments to the Foreign Intelligence Surveillance Act will continue for the foreseeable future because of the current legislative stalemate. Conversely, a preliminary injunction ordering defendants to finish processing plaintiff's FOIA requests within 10 days would impose undue burdens on defendants and injure their interests by creating a risk of inadvertent disclosure of records (some of which contain classified national security information) that are exempted from release under the FOIA. The proposed preliminary injunction in this case also has the potential to harm the public interest by complicating and disrupting the processing of other FOIA requests.

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INTRODUCTION

Plaintiff Electronic Frontier Foundation ("EFF" or "plaintiff") asks the Court to invoke its extraordinary powers to award temporary emergency relief by issuing a preliminary injunction to require the defendants in this case, the Office of the Director of National Intelligence ("ODNI") and the United States Department of Justice ("DOJ"), to complete processing of plaintiff's requests under the Freedom of Information Act ("FOIA") within ten days. Plaintiff's FOIA requests seek records regarding DOJ and ODNI's communications with members of Congress and telecommunications companies concerning proposed amendments to the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1801 *et seq.*, as amended. Plaintiff argues it will suffer irreparable harm if defendants do not produce all records responsive to plaintiff's FOIA requests before Congress acts to amend the FISA.

Plaintiff's motion should be denied. Plaintiff's request for relief by way of a preliminary injunction – which is not preliminary in any sense but rather is an attempt to use a procedural mechanism intended to provide emergency relief as a scheduling tool – is generally inappropriate in FOIA cases. Plaintiff also offers the Court no compelling reason that justifies granting the extraordinary relief it seeks.

Indeed, the relief plaintiff seeks is inconsistent with the way FOIA requests are processed generally, and is also inconsistent with the plain language of the expedited processing provision of the FOIA. Plaintiff attempts to invent a time limit by which defendants must complete their FOIA processing by citing to the provision of the FOIA that gives agencies twenty business days to make a determination about FOIA requests in the first instance. That provision, however, does not establish a mandatory time by which the agency must release responsive documents to plaintiff. Instead, the inability to respond within the 20-day period simply means that the requester may, before a response has been made, file suit and be found to have constructively exhausted administrative remedies.

In any event, defendants have already granted plaintiff's request to expedite processing of the FOIA requests at issue. Consistent with the expedited processing provision of the FOIA, defendants are working diligently to release responsive records to plaintiff "as soon as

practicable." 5 U.S.C. § 552(a)(6)(E)(iii). As explained in the attached declarations of ODNI and DOJ FOIA officials, defendants have moved plaintiff's request to the front of their respective processing queues ahead of many non-expedited requests. Further, the declarations establish that plaintiff's demand that processing be completed within ten days is not practicable.

Plaintiff's motion 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 grant of expedited processing by an agency 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. Instead, the FOIA provides that requests, which are granted expedition by an agency, 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. Defendants, having granted plaintiff's request for expedited treatment, are working to complete the processing of plaintiff's requests as soon as practicable and, as explained in detail in the attached declarations, have taken appropriate steps to that end.

In addition to lacking success on the merits, plaintiff has failed to meet its essential burden of identifying any irreparable harm that it might suffer if the requested relief is not granted. Plaintiff's claim that it will suffer irreparable harm if defendants do not complete processing of the requests according to plaintiff's proposed 10 day schedule is entirely speculative, particularly given the likelihood that debate over the FISA amendments will continue for the foreseeable future because of the current legislative stalemate. Plaintiff inappropriately seeks to use the preliminary injunction provisions of Federal Rule of Civil Procedure 65, which are intended to provide a shield against imminent and irreparable injury while a court considers the merits of a dispute, to accelerate artificially the merits proceedings in this case. The injunction proposed by plaintiff does not seek to maintain the status quo; rather plaintiff's proposed injunction seeks a version of ultimate relief – the immediate disclosure of non-exempt, responsive documents. Awarding plaintiff the ultimate relief it seeks by way of a

preliminary injunction at this early stage of these proceedings, before defendant is even required to answer plaintiff's complaint, is without an appropriate basis in law.

For these reasons, as discussed further below, plaintiff's motion for preliminary injunction should be denied. In lieu of plaintiff's unreasonable production schedule, defendants should be permitted to continue processing plaintiff's FOIA requests in accordance with the schedules proposed in the attached declarations. To ensure that the Court and plaintiff are appropriately advised of defendants' efforts to process plaintiff's requests, defendants propose to submit a status report to the Court in thirty days.

BACKGROUND

1. Statutory and Regulatory Framework

Agencies ordinarily process FOIA requests for agency records on a first-in, first-out basis. *See Exner v. Federal Bureau of Investigation,* 542 F.2d 1121, 1123 (9th Cir. 1976). In 1996, Congress amended the FOIA to provide for "expedited processing" of certain categories of requests. *See* Electronic Freedom of Information Amendments of 1996 ("EFOIA"), Pub. L. No. 104-231, § 8 (codified at 5 U.S.C. § 552(a)(6)(E)). If a request for expedited processing is granted, the request moves immediately to the front of the agency's processing queue, ahead of previously filed requests. *American Civil Liberties Union of Northern California v. Department of Justice*, 2005 WL 588354 at *1 (N.D. Cal. Mar. 11, 2005).

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

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

5 U.S.C. § 552(a)(6)(E)(v).[1] The requester bears the burden of showing that expedition is appropriate. *See Al-Fayed v. Central Intelligence Agency*, 254 F.3d 300, 305 n.4 (D.C. Cir. 2001). FOIA provides that "[a]n agency shall process as soon as practicable any request for records to which the agency has granted expedition." 5 U.S.C. § 552(a)(6)(E)(iii).

Both ODNI[2] and DOJ have issued regulations addressing their FOIA administration and compliance with EFOIA. *See* 32 C.F.R. § 1700.1 *et seq*. (ODNI regulations); 28 C.F.R. § 16.1 *et seq.* (DOJ regulations). ODNI's regulations provide that "[a]ll requests will be handled in the order received on a strictly 'first-in, first-out' basis." *See* 32 C.F.R. § 1700.12(a). The regulations also include a provision addressing expedited processing, which allows requests to "be taken out of order and given expedited processing treatment whenever it is determined that they involve:"

> (1) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or
>
> (2) An urgency to inform the public concerning an actual or alleged Federal Government activity, if made by a person primarily engaged in disseminating information.

32 C.F.R. § 1700.12 (c). If a request for expedition is granted by ODNI, "the request shall be given priority and shall be processed as soon as practicable" 32 C.F.R. § 1700.12(b).

Similarly, DOJ's regulations provide that FOIA requests shall be handled "according to their order of receipt." 28 C.F.R. § 16.5(a). In the event a FOIA request satisfies the criteria for

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[1] Both Congress and the D.C. Circuit have recognized that the expedition categories are to be "narrowly applied" because, "[g]iven the finite resources generally available for fulfilling FOIA requests, unduly generous use of the expedited processing procedure would unfairly disadvantage other requesters who do not qualify for its treatment." *Al-Fayed v. Central Intelligence Agency*, 254 F.3d 300, 310 (D.C. Cir. 2001) (quoting H.R. Rep. No. 104-795, *reprinted at* 1996 U.S.C.A.A.N. 3448, 3469 (Sept. 17, 1996)).

[2] The position of Director of National Intelligence was created by Congress in the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, §§ 1011(a) and 1097, 118 Stat. 3638, 3643-63, 3698-99 (2004). The DNI serves as the head of the United States Intelligence Community and as the principal advisor to the President, the National Security Council, and the Homeland Security Council, for intelligence-related matters related to national security. *See* 50 U.S.C. §§ 403(b)(1), (2).

expedited processing,[3] the request "will be taken out of order and given expedited treatment." *See* 28 C.F.R. § 16.5(d)(1). Further, the DOJ regulations specify that a granted request for expedition "shall be given priority and shall be processed as soon as practicable." 28 C.F.R. § 16.5(d)(4).

2. Factual Background.

By letters dated December 21, 2007, plaintiff submitted nearly identical FOIA requests to ODNI and five DOJ components: Office of the Attorney General ("OAG"), Office of Legal Policy ("OLP"), Office of Legislative Affairs ("OLA"), Office of Legal Counsel ("OLC"), and National Security Division ("NSD").[4] *See* Plaintiff's Memorandum, Exhibits K-N. Plaintiff's letters requested:

> all agency records from September 1, 2007 to the present concerning briefings, discussions, or other exchanges that [ODNI] Director McConnell or other ODNI officials [or in the case of the DOJ requests "Justice Department officials"] have had with 1) members of the Senate or House of Representatives and 2) representatives or agents of telecommunications companies concerning amendments to FISA, including any discussion of immunizing telecommunications companies or holding them otherwise unaccountable for their role in government surveillance activities. This request includes, but is not limited to, all email, appointment calendars, telephone message slips, or other records indicating that such briefings, discussions, or other exchanges took place.

See id. Plaintiff also sought expedited processing of their FOIA requests pursuant to the governing ODNI and DOJ FOIA regulations, 28 C.F.R. § 16.5(d); 32 C.F.R. § 1700.12, asserting that the public has a significant interest in the government's efforts to amend the FISA. *See* Plaintiff's Memorandum, Exhibits K-N.

In response, ODNI and all five DOJ components granted plaintiff's request for expedited processing. In December and January 2008, ODNI and the DOJ components sent plaintiff letters acknowledging receipt of the FOIA requests and informing plaintiff that the requests would be processed on an expedited basis. *See* Plaintiff's Memorandum, Exhibits O-S.

Plaintiff filed its complaint in this action under the FOIA on February 20, 2008, seeking

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[3] These factors are similar to the ODNI criteria discussed above. *See* 28 C.F.R. § 16.5(d)(1)(i-iv).

[4] DOJ handles its FOIA requests on a component-by-component basis (*e.g.*, FBI, DEA, ATF), s*ee* 28 C.F.R. § 16.3(a), whereas ODNI processes its request on an agency-wide basis.

expedited processing and release of the records described above. *See* Complaint For Injunctive Relief (dkt. no. 1). On February 29, 2008, plaintiff filed a motion for preliminary injunction (dkt. no. 6), requesting that the Court order defendants to complete processing of plaintiff's FOIA requests and to release all responsive records within ten days.

3. Defendants' Efforts To Process Plaintiff's FOIA Requests.

As explained more fully in the declarations submitted herewith, ODNI and the five DOJ components have been working diligently to process plaintiff's FOIA requests as soon as practicable.

DOJ – National Security Division. After granting plaintiff's request for expedited processing, NSD immediately moved plaintiff's request ahead of fourteen other pending FOIA requests received prior to plaintiff's request. *See* Declaration of GayLa Sessoms ¶ 5 (attached as Exhibit 1) ("Sessoms Decl."). A search for responsive documents was then initiated within the NSD offices reasonably likely to maintain records responsive to plaintiff's request. *Id.* ¶ 6. Notifications and follow up reminders were sent to all NSD employees (approx. 50 people) reasonably likely to maintain documents responsive to plaintiff's requests instructing them to search their files for responsive records. *Id.* Because NSD's employees work on significant mission-related matters pertaining to the national security of the United States, these officials and employees were required to stop this critical work in order to perform the necessary searches and each of them did so as soon as was practicable. *Id.* Searches were conducted by employees in multiple offices within the NSD as well as by NSD's FOIA Program Analyst, FOIA Coordinator and Records Officer. *Id.* ¶¶ 7-9. NSD completed its search for responsive records during the week of March 10 and identified roughly two boxes of material that may be responsive to plaintiff's request. *Id.* ¶ 10. NSD's FOIA staff is currently reviewing this material to 1) ensure that it is responsive to plaintiff's request; 2) eliminate any duplicates; 3) identify all third agency documents that require referral and/or consult; and 4) identify all classified records. *Id.* NSD anticipates completing its review this week and will notify plaintiff of the exact volume of responsive records no later than Friday, March 21, 2008. *Id.* Once the universe of responsive documents is determined, NSD will immediately begin the review of this material for the

application of any FOIA exemptions. *Id.* This review will initially focus on unclassified records that do not require consultation or referral to other agencies. *Id.* ¶ 12. NSD will complete its review of this category of records and provide an interim release of records to plaintiff no later than April 11, 2008. *Id.* With respect to responsive records that require referral and consult with other agencies as well as any classified records, the NSD is not in a position at this time to provide an estimated date of production given the numerous considerations and additional burdens that must be taken into account before releasing such records. *Id.* ¶¶ 11-13. NSD is committed to processing these records as soon as practicable and is willing to provide the Court with a status report every 30 days to update the Court on the NSD's progress. *Id.* ¶ 13.

DOJ – Office of Legal Counsel. As soon as OLC made the decision to expedite plaintiff's request, it was given priority status and moved to the front of the OLC request queue. *See* Declaration of Paul Colborn ¶ 4 (attached as exhibit 2) ("Colborn Decl."). Plaintiff's request is one of two expedited requests currently in the queue, and it has priority over the other expedited request. *Id.* As such, it is being processed ahead of one expedited and nineteen non-expedited FOIA requests currently pending. *Id.*

OLC initiated a search for records responsive by performing keyword search of the electronic files of all OLC attorneys most likely to have responsive records. *Id.* ¶ 5. This search protocol is a time-intensive process that requires information technology personnel to copy all electronic files into a searchable format. *Id.* The keyword searches inevitably result in more documents than are actually responsive to plaintiff's FOIA request. *Id.* Accordingly, the small OLC staff and its attorneys must review these documents for duplicate and non-responsive material while balancing their other competing work assignments, including urgent requests for legal advice from Executive Branch agencies. *Id.* ¶ 6. The review of material in this case was made more difficult by a litigation-related deadline in another FOIA case that required OLC to devote the entire month of February toward review of over 15,000 pages of material. *Id.* ¶ 7 Notwithstanding these obstacles, OLC worked diligently over the last few weeks on plaintiff's request and has now completed its search for responsive documents. *Id.* ¶ 8. OLC has identified more than 5,000 documents totaling more than 10,000 pages of potentially responsive material.

Id. ¶¶ 8-9. OLC has culled this initial group to approximately 2,000 pages of material and is in the process of reviewing this material more closely to determine responsiveness, to eliminate duplicates, to assess which, if any, FOIA exemptions may apply, and to identify which documents, if any, should be referred to other agencies for consultations. *Id.* ¶ 9. OLC anticipates completing this review and issuing at least an interim response to plaintiff by no later than March 25, 2008. *Id.* Based on a preliminary assessment of the documents, the interim response will likely address many materials responsive to plaintiff's request. *Id.* OLC has, however, identified a number of documents requiring consultations with other agencies; consequently, a final OLC response will take more time. *Id.* Additionally, OLC has identified a small number of classified documents for potential responsiveness. *Id.* The potential existence of responsive classified material could contribute significantly to the time required complexities attendant to processing plaintiff's request. *Id.* Allowing enough time for the agencies to review and provide OLC their views, as well as to conduct any necessary review of any classified information, OLC anticipates issuing a final response to plaintiff's request by April 22, 2008. *Id.*

DOJ – Offices of Legislative Affairs, Legal Policy, and Attorney General. FOIA requests submitted to the senior leadership offices of the Department of Justice, including OLA, OLP, and OAG, are handled by the Department's Office of Information and Privacy ("OIP"). *See* Declaration of Melanie Pustay ¶ 1 (attached as Exhibit 3) ("Pustay Decl.). As soon as plaintiff's request was approved for expedited processing, it was moved ahead of other FOIA requests received at an earlier date in OIP's FOIA queue. *Id.* ¶ 5. Immediately thereafter, record searches were initiated in OLA, OLC, and OAG by informing individual staff members to search all appropriate electronic and paper files for records responsive to plaintiff's request. *Id.* ¶ 6. The officials in these offices typically conduct the searches themselves by hand searching large paper files as well as electronic searches of a vast number of e-mail files. *Id.* While the officials in these offices make every effort to respond to FOIA requests in a timely fashion, it is not always possible for senior DOJ officials to stop their pressing day-to-day duties in order to immediately perform a search for records responsive to a FOIA request. *Id.* These officials performed the necessary searches as soon as it was practicable to do so. *Id.*

All three offices have completed exhaustive searches for records responsive to plaintiff's request. *See id.* ¶¶ 7-22 (describing steps taken to search for records). OLA located approximately 1,500 pages of material, OLP located 233 pages of material, and OAG located 913 pages of material. *Id.* ¶ 23. OIP is currently reviewing these documents and it is anticipated that adjustments to these page counts will be made as duplicate and non-responsive material is identified. *Id.* The records located all require further review, including consultations with multiple DOJ components and other Executive Branch agencies, before a response can be provided. *Id.* ¶ 24. Such consultations are required by Department of Justice regulation 28 C.F.R. § 16.4(c)(1), and are appropriate because other components within the Department and other Executive Branch agencies have an interest in the documents. *Id.* Further, because none of the documents originated with OIP, disclosure determinations necessarily must be made in consultation with the originating offices. *Id.* Many of these consultations will need to be conducted in stages, as certain offices need to know the views of other offices in order to make their disclosure determinations. *Id.* Until these steps are completed, OIP cannot complete the processing of the documents and make a final response to plaintiff. *Id.* Additionally, OIP has located classified material, which adds significantly to the complexities attendant to processing plaintiff's FOIA request. *Id.* ¶ 25.

OIP is making every effort to process plaintiff's requests as soon as practicable. *Id.* ¶ 26. OIP anticipates providing plaintiff with an interim response of records by April 14, 2008. *Id.* ¶ 27. Further, OIP anticipates providing a final response on May 23, 2007, assuming consultations have been finalized. *Id.* ¶ 29. In the meantime, OIP is willing to provide the court with status reports every thirty days regarding its progress. *Id.* ¶ 26.

ODNI. Once ODNI approved plaintiff's request for expedited processing, plaintiff's FOIA request was given priority status and moved to the front of ODNI's FOIA queue. *See* Declaration of John Hackett ¶ 5 (attached as Exhibit 4) ("Hackett Decl."). Plaintiff's request is currently being processed ahead of 49 pending FOIA requests. *Id.* Further, ODNI performed searches in a variety of offices reasonably likely to have responsive material. *Id.* ¶ 6. The ODNI employees who were asked to search for responsive records work on important matters related to

the national security of the United States and they were required to stop this critical work in order to perform the necessary searches. *Id.* ¶ 7. As records were located, ODNI conducted a continual analysis and review of the documents. *Id.* This process included the identification of duplicative and non-responsive material, creation of "working" copies of the documents, document indexes as needed, and an assessment of necessary consultations and/or referrals with those entities maintaining equity in the documents, and the application of any FOIA exemptions to the material. *Id.*

ODNI has completed all necessary searches for records responsive to plaintiff's request. *Id.* ¶ 7. ODNI has identified approximately 185 pages of unclassified material and approximately 80 pages of classified material responsive to plaintiff's request. *Id.* ¶ 8. Some of the records that ODNI has identified contain information that is so highly classified that it is in a classification compartment that is extremely sensitive. *Id.* ¶ 11. Only a small number of ODNI officials are able to access this material and it must be handled under special security procedures. *Id.* ODNI is actively working through these issues but the existence of these classified records contributes to the complexity of processing plaintiff's FOIA request. *Id.* Further, approximately 255 pages of responsive material has been forwarded to other government agencies for consultation and response back to ODNI regarding the applicability of any FOIA exemptions. *Id.* ¶ 9. These agencies have been advised of this litigation and have informed ODNI that consultations are expected to be completed in three weeks. *Id.* ¶ 12. ODNI anticipates being able to complete the processing of all the responsive records in this case and provide a final response to plaintiff within three weeks of receiving the other agencies responses to its consultations. *Id.* ODNI is also willing to provide the court with a status report in thirty days to update its progress. *Id.*

ARGUMENT

"A preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, pp. 129-130 (2d ed.1995)). In determining

whether to grant a preliminary injunction, courts in the Ninth Circuit traditionally consider "(1) the likelihood of the moving party's success on the merits; (2) the possibility of irreparable injury to the moving party if the relief is not granted; (3) the extent to which the balance of hardships favors the respective parties; and (4) in certain cases, whether the public interest will be advanced by granting the preliminary relief." *Miller v. California Pacific Medical Center*, 19 F.3d 449, 456 (9th Cir. 1994) (en banc). The moving party must demonstrate either "(1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) the existence of serious questions going to the merits, the balance of hardships tipping sharply in its favor, and at least a fair chance of success on the merits." *Id.* (internal quotation omitted); *see also Taylor v. Westly*, 488 F.3d 1197, 1200 (9th Cir. 2007). "Under either formulation of the test, the party seeking the injunction must demonstrate that it will be exposed to some significant risk of irreparable injury." *Associated General Contractors of Calif. v. Coalition for Economic Equity*, 950 F.2d 1401, 1410 (9th Cir. 1991).

1. Preliminary injunctions are generally not appropriate in FOIA cases.

Plaintiff's request for a preliminary injunction here is even more extraordinary than in the usual case because plaintiff seeks such relief based on claims made under the FOIA where, for a variety of reasons, such motions are generally inappropriate. A number of courts have denied requests for preliminary injunctive relief for claims brought under the FOIA, including a recent motion filed by plaintiff in a separate FOIA case seeking similar relief against the Department of Justice. *See Electronic Frontier Foundation v. Dep't of Justice*, slip op. at 10, 06-CV-1773 (RBW) (Sept. 27, 2007) (attached as Exhibit 5) ("[T]he Court agrees with the defendant's position that EFF misconstrues the purpose and implications of the FOIA's expedited processing provisions."). *See also Judicial Watch, Inc. v. U.S. Dept. of Homeland Sec.*, 514 F. Supp. 2d 7, 11 (D.D.C. 2007) (denying motion for preliminary injunction to compel immediate disclosure of records); *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); *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). Notably, plaintiff concedes that a "preliminary injunction is not the norm in FOIA cases."[5] *See* Plaintiff's Memorandum at 13.

FOIA already 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). Moreover, Congress has specifically recognized that litigation involving FOIA claims is to be accelerated. *See* 5 U.S.C. § 552(a)(4)(C) (providing that government defendants have 30 days in which to answer a FOIA complaint as opposed to the ordinary 60 days provided by Fed. R. Civ. P. 12). Plaintiff, consequently, should not be permitted to circumvent this explicit statutory framework through a request for preliminary relief. *Cf. Electronic Frontier Foundation v. Department of Justice*, slip op. at 3-4, 07-CV-0656 (JDB) at 3-4 (June 15, 2007) (attached as Exhibit T to Plaintiff's Memorandum) (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.").

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. *See King v. Saddleback Junior College Dist.*, 425 F.2d 426, 427 (9th Cir. 1970). That purpose is not served in this case because plaintiff seeks "mandatory preliminary relief" – that is, an order compelling accelerated processing that would not merely preserve the status quo but would force specific action by defendants to grant the ultimate relief to which plaintiff thinks it is entitled. Accordingly, the Ninth Circuit has held that such relief is "subject to heightened scrutiny and should not be issued unless the facts and law clearly favor the moving party." *Dahl v. HEM Pharmaceuticals Corp.*, 7 F.3d 1399, 1403

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[5] Although preliminary injunctive relief has been granted (rarely, and arguably erroneously) in FOIA cases, *see, e.g., Elec. Privacy Info. Ctr. v. Dep't of Justice*, 416 F. Supp. 2d 30, 35 (D.D.C. 2006), the circumstances of this case do not warrant such relief.

(9th Cir. 1993). Further, 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 it seeks on the merits. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 397 (1981) ("[I]t is generally inappropriate for a federal court at the preliminary injunction stage to give a final judgment on the merits.").

For these reasons, plaintiff has not met the exacting standard required for the relief it seeks, and plaintiff's motion should be denied because it is inappropriate for FOIA claims.

2. Plaintiff has failed to demonstrate a likelihood of success on the merits because the FOIA's expedited processing provisions do not require that processing be completed within a time certain.

Plaintiff's allegation that defendants have violated the FOIA is predicated on the mistaken assumption that the expedited processing provision of the FOIA requires an agency to complete its processing within a specific period of time. The statute, however, does not require agencies to process expedited requests within a specific time limit. Instead, the statute explicitly directs agencies to "process *as soon as practicable* any request for records to which [they have] granted expedited processing." 5 U.S.C. § 552(a)(6)(E)(iii) (emphasis added); *see also* 32 C.F.R. § 1700.12(b); 28 C.F.R. § 16.5(d)(4) (stating that ODNI and DOJ expedited FOIA requests "shall be processed as soon as practicable."). As the Senate Report accompanying the FOIA amendments that inserted the expedited processing procedures explains, the intent of the expedited processing provision was to give certain requests priority, not to require that such requests be processed within ten days or any other specific period of time:

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

S. Rep. 104-272, 1996 WL 262861, *17 (May 15, 1996); *see also* H. R. Rep. No. 104-795, *reprinted at* 1996 U.S.C.A.A.N. 3448, 3461 (Sept. 17, 1996) ("certain categories of requesters would receive priority treatment of their requests . . . ."). Thus, FOIA's expedited processing provision is an ordering mechanism, allowing certain FOIA requesters to jump to the head of the line and avoid the ordinary "first in, first out" processing queue. *See ACLU*, 2005 WL 588354 at

*1 ("If a request for expedited processing is granted, the request moves to the front of the processing queue, ahead of previously filed requests."). Once a request is at the front of the line, however, "practicability" is the standard that governs how quickly any particular request can be processed. *See 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')").

Plaintiff's motion ignores the plain language of the statute and Congress's clear legislative intent. Instead, plaintiff attempts to invent a time limit applicable to expedited requests by citing 5 U.S.C. § 552(a)(6)(A)(i), which it characterizes as the "20-working-day deadline imposed by the FOIA for processing a nonexpedited request." *See* Plaintiff's Memorandum at 15. That provision, however, has no bearing on when expedited processing must be completed. *See American Civil Liberties Union v. DOD*, 339 F. Supp. 2d 501, 503 (S.D.N.Y. 2004) ("While it would appear that expedited processing would necessarily require compliance in fewer than 20 days, Congress provided that the executive was to 'process as soon as practicable' any expedited request."). An agency's inability to respond to a FOIA request within the 20-day period simply means that the requester may, before a response has been made, file suit and be found to have constructively exhausted administrative remedies. *See The Nation Magazine v. Dep't of State*, 805 F. Supp. 68, 72 (D.D.C. 1992). The provision does not, in any event, purport to establish an "outside" time limit on what is "practicable" in responding to an expedited request, nor does it mandate that an agency fully process all requests within 20 days. *See, e.g.*, *Gerstein v. C.I.A.*, 2006 WL 3462658 *8 (N.D. Cal. Nov. 29, 2006) ("FOIA does not set forth a specific deadline by which expedited processing must be concluded."). Indeed, even when expedited processing has been granted, courts have recognized that FOIA processing can take longer than 20 days. *See Leadership Conference on Civil Rights v. Gonzalez*, 2005 WL 3360884 at *11 (D.D.C. Dec. 9, 2005) (ordering government to "expedite processing plaintiff's FOIA requests and produce the requested records to plaintiffs as soon as practicable, but no later than September 28, 2006, two years from the date on which the complaint was initially filed");

see also Judicial Watch v. Rossotti, 285 F. Supp. 2d 17, 26 (D.D.C. 2003) ("Certainly, it took longer than twenty days to respond to Judicial Watch's FOIA requests, but that is explained by the nature of these requests, the many offices to which they were directed, the number of FOIA requests [the agencies] regularly receive, and the treatment of FOIA requests on a first in/first out basis."). As such, the 20-day requirement can hardly be found to establish a mandatory deadline as to the "practicability" of responding to expedited requests.

The practicability standard makes logical sense in the FOIA context because the time required to process a FOIA request varies according to a number factors, including the requests's size, scope, detail, the number of offices with responsive documents, other agencies or components that must be consulted or to which documents might have to be referred for additional review, and FOIA exemption issues. *See generally* Sessoms Decl.; Colborn Decl.; Pustay Decl.; Hackett Decl. *See also* 28 C.F.R. § 16.4 (describing FOIA consultation and referral procedures); 28 C.F.R. § 16.7 (describing FOIA classified information review procedures). Further, the existence of classified materials, which are present in this case, contributes significantly to the complexities attendant to processing a FOIA request. *See* Sessoms Decl. ¶ 11; Colborn Decl. 9; Pustay Decl. ¶ 25; Hackett Decl. ¶ 10. Responsive documents that may contain classified information must undergo an additional, and time-sensitive, review to ensure that all documents are appropriately classified in accordance with Executive Order 12958, as amended. *See id.* Such review also includes a page-by-page and line-by-line review of the documents to determine which, if any, FOIA exemptions may apply. *See id.* In light of the sensitive nature of classified information, potentially responsive material must then be reviewed by any appropriate entities with equities in the documents to ensure that no processing errors have been made and that no improper disclosures are made. *See id.* As Congress has recognized, review of classified national security information may require additional time. *See* H. R. Rep. No. 104-795, 1996 U.S.C.A.A.N. at 3466 ("In underscoring the requirement that agencies respond to requests in a timely manner, the Committee does not intend to weaken the interests protected by the FOIA exemptions. Agencies processing some requests may need additional time to adequately review requested material to protect these exemption

interests. For example, processing some requests may require additional time to properly screen material against the inadvertent disclosure of material covered by the national security exemption").

Moreover, documents subject to other exemptions, *see generally* 5 U.S.C. § 552(b), must similarly be identified and, where necessary, redacted, and documents generated by other agencies or authorities must be referred for review back to those same agencies or authorities. *See* Sessoms Decl. ¶ 10-13; Colborn Decl. ¶ 8-9; Pustay Decl. ¶ 23-30; Hackett Decl. ¶ 9-13. The attached declarations establish that defendants have made significant progress on these complex tasks. Plaintiff offers no reason to believe that the agency is not performing these tasks as soon as practicable, and thus fails to meet its burden of demonstrating, "by a clear showing," *Mazurek*, 520 U.S. at 972, that a preliminary injunction is warranted at this juncture.

The obstacles that make it impracticable to process plaintiff's requests on its desired schedule relate to the amount and intensity of work that FOIA processing entails and the limitations of and burdens on defendants's processing capacity—not to any failure with respect to the grant of expedited treatment. As discussed above, defendants have appropriately implemented the grant of expedited treatment by moving plaintiff's requests to the front of their respective FOIA queues ahead of other FOIA requests. *See* Sessoms Decl. ¶ 5; Colborn Decl. ¶ 4; Pustay Decl. ¶ 5; Hackett Decl. ¶ 5. However, 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 the documents falling within the scope of the plaintiff's FOIA requests; the review of documents for classified information; the review to determine whether documents are exempt from disclosure; and appropriate conferral with entities that have equities in the documents. As detailed more fully in the declarations, defendants have already made considerable progress on plaintiff's requests with several components anticipating an interim release of records within the next several weeks.

In addition to the factual basis supporting the denial of relief, the cases that plaintiff cites in support of its claim that "courts have imposed specific processing deadlines on agencies, requiring the prompt delivery of non-exempt records to FOIA requesters," *see* Plaintiff's

Memorandum at 23, are inapposite. Many of the cases cited by plaintiff allowed the government far more time to complete processing the FOIA requests at issue than plaintiff demands in this case. *See, e.g., Judicial Watch v. Dept. of Energy*, 191 F. Supp. 2d 138 (D.D.C. 2002) (ordering that responsive non-exempt documents be produced within approximately a year of filing of the complaint), *Natural Resources Defense Council v. DOE*, 191 F. Supp. 2d 41 (D.D.C. 2002) (ordering responsive non-exempt documents to be filed within approximately one year of the date the FOIA request was made to agency and within approximately 4 months of filing complaint); *American Civil Liberties Union*, 339 F. Supp. 2d at 505 (ordering the identification or production of responsive documents within approximately one year of submitting FOIA request and three months of filing of complaint); *Electronic Privacy Info. Center v. DOJ*, Civ. No. 05-845, 2005 U.S. Dist. LEXIS 40318, at * 5-6 (D.D.C., Nov. 16, 2005) (ordering processing and release of documents on a rolling basis until processing complete). These cases are thus wholly unlike this one, where plaintiff seeks "preliminary" relief demanding processing at an artificial pace despite the fact that defendants are not even required at this time to answer plaintiff's complaint.

Although plaintiff relies heavily upon the decision in *Electronic Privacy Information Center ("EPIC") v. Dep't of Justice*, 416 F. Supp. 2d 30 (D.D.C. 2006), in which a preliminary injunction was granted in the FOIA expedited processing context requiring the agency to produce or identify all responsive documents within 20 days, as discussed above, *EPIC* is in tension with the FOIA statutory and regulatory framework and the general principles governing issuance of preliminary relief. Moreover, plaintiff fails to note that the preliminary injunction entered in that case was later modified upon reconsideration, following a factual submission by the government regarding its processing capacity. *See EPIC*, slip op., No. 06-0096 (D.D.C. Mar. 24, 2006) (Kennedy, J.) (attached as Exhibit 6) (granting in part the government's expedited motion for relief from the February 16, 2006 Order, extending the deadline for several DOJ components to process plaintiff's FOIA request by 60 days or 120 days, respectively). Defendants respectfully submit that the *EPIC* decision was incorrectly decided and contend that the FOIA's 20 day administrative exhaustion requirement has no bearing on the date by which

an agency must produce records responsive to an expedited request.[6] In any event, even assuming this Court adopts the *EPIC* framework, the *EPIC* court's decision was greatly influenced by its view that the agency did not "present[] evidence that processing EPIC's FOIA requests within the next twenty days would be impracticable." *Id.* at 39-40. Indeed, the *EPIC* court emphasized that "[t]he presumption of agency delay raised by failing to respond to an expedited request within twenty days is certainly rebuttable if the agency presents credible evidence that disclosure within such time period is truly not practicable." *Id.* at 39. In this case defendants have overcome the presumption of agency delay with detailed declarations explaining their efforts to process plaintiff's FOIA requests and the reasons why plaintiff's request for immediate relief is unreasonable and not practicable.

For similar reasons, plaintiff's reliance on *Gerstein v. C.I.A.*, 2006 WL 3462658 (N.D. Cal. Nov. 29, 2006), is misplaced. In that case, the court granted the FOIA plaintiff's motion for expedited processing after the agency denied the plaintiff's request at the administrative level. After analyzing and reversing the agency's decision, the court went on to discuss the time line for processing responsive documents, noting that "FOIA does not set forth a specific deadline by which expedited processing must be concluded." *Id.* at *8. The court, however, granted plaintiff's request to produce responsive documents within 30 days of the court's ruling because the defendant did "not respond to this request and, in particular, [did] not contend that it is not 'practicable' for them to process [plaintiff's] FOIA request within 30 days." *Id*. *Gerstein* is distinguishable for several reasons. First, the FOIA request in *Gerstein* had been pending "for more than eight months" without production of any responsive documents whereas the requests in this case have been pending roughly three months. *Id.* Second, unlike the defendant in *Gerstein*, defendants have produced detailed declarations explaining that they are working diligently to process plaintiff's requests as soon as practicable.[7] *See Electronic Frontier*

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[6] This Court, of course, is not required to adopt the *EPIC* analysis. *See Starbuck v. City and County of San Francisco*, 556 F.2d 450, 457 n.13 (9th Cir. 1977) (one district court judge is not required to follow the decision of another).

[7] In the interest of simplicity and clarity, defendants note that the arguments above apply equally to the court's second decision in *Gerstein*. *See Gerstein v. C.I.A.*, 2006 WL 3462659

Foundation v. Dep't of Justice, slip op., 06-CV-1773 (RBW) (attached as Exhibit 3) at 5 (denying motion for preliminary injunction seeking expedited processing in FOIA case based on, *inter alia*, the fact that "defendant has demonstrated that it is processing plaintiff's FOIA request as soon as practicable.").

The court's decision in *Electronic Frontier Foundation v. ODNI*, 2007 WL 4208311 (N.D. Cal. Nov. 27, 2007), is also distinguishable from the present context. That court's decision to grant in part plaintiff's preliminary injunction motion was predicated in part on the fact that congressional legislation was set to expire in several weeks. *Id.* at *7. Here, plaintiff has not identified a similar event that would turn a purported delay in processing plaintiff's FOIA request into an irreparable injury. As noted above, it appears the legislative and public debate regarding the FISA – a debate that has been ongoing for several years – will continue for the foreseeable future. Moreover, even applying the *Electronic Frontier Foundation* court's analytical framework to this case,[8] the central question identified by that court was: "Whether defendant is actually processing the [FOIA] request 'as soon as practicable.'" *Id.* at *4. The attached declarations establish that defendants are, in fact, processing plaintiff's FOIA request as soon as practicable.

For the reasons explained above, there is no appropriate legal or factual basis for the Court to order defendants to meet plaintiff's proposed processing schedule, particularly where no such requirement is found in the FOIA statute and, indeed, such a requirement is at odds with the statute.

3. Plaintiff has not established a significant risk of irreparable injury.

In addition to failing to demonstrate a likelihood of success on the merits, plaintiff also has not established that the preliminary injunction it requests is necessary to prevent irreparable harm. The focus of the harm inquiry in this case is whether plaintiff will suffer irreparable injury

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(N.D. Cal. Nov. 29, 2006). Although both *Gerstein* decisions contained substantially similar analysis of the legal issues discussed above, they arise in slightly different procedural contexts, which explain the court's separate opinions.

[8] *ODNI* relied largely upon the analysis in *EPIC*. As explained above, defendants contend that the *EPIC* analysis is inconsistent with the terms of the FOIA.

if its FOIA requests are not processed on the schedule that plaintiff requests but instead are processed according to the time frame that Congress has established, "as soon as practicable." Plaintiff speculates that the denial of emergency relief in this case could impose irreparable harm because the records plaintiff seeks from defendants are only of value now – that is, before Congress votes on permanent amendments to the FISA – but the records will be useless if it is produced after Congress amends the FISA. Plaintiff's argument is pure speculation, and it is not sufficient to support issuance of a preliminary injunction. *See Caribbean Marine Services Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) ("Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction.").

As an initial matter, plaintiff's delay in bringing this matter to the court's attention belies their claim of emergency. Plaintiff does not explain why it waited nearly two months to file the preliminary injunction motion. According to plaintiff's legal theory, which defendants dispute for the reasons stated above, the agencies should have finished processing the FOIA requests within 20 working days of receipt. Accordingly, plaintiff could have filed the preliminary injunction motion two months ago in early January 2008. "By sleeping on its rights a plaintiff demonstrates the lack of need for speedy action." *See Lydo Enters. v. City of Las Vegas*, 745 F.2d 1211, 1213-14 (9th Cir. 1984) ("We would be loath to withhold relief solely on that ground, but we do give that fact consideration in measuring the claim of urgency.").

In any event, plaintiff has not established that release of agency records according to a schedule guided by the "as soon as practicable" standard will diminish their value to the public, let alone impose irreparable injury to plaintiff. *See Al-Fayed v. C.I.A.*, 2000 WL 34342564 at *5 (D.D.C. Sept. 20, 2000) (denying preliminary injunction for expedited processing based in part on plaintiff's failure to explain why "information will not retain its value if procured through the normal FOIA channels."). The public and legislative debate regarding proposed amendments to the FISA has been ongoing for nearly three years, *see, e.g.*, Implementation of the USA Patriot Act: Sections of the Act that Address the Foreign Intelligence Surveillance Act (FISA), 109th Cong. (April 26 & 28, 2005), Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary of the House of Representatives. More

recent media reports indicate that the "gulf between the administration and House Democratic leaders is now so wide" on the FISA amendments "that the issue may not be resolved until a new president takes office next year." *See* Jonathan Weisman, *House Passes A Surveillance Bill Not To Bush's Liking*, Washington Post, March 15, 2008, at A2. Thus, contrary to plaintiff's claim that time is of the essence, there appears to be no concrete event on the horizon that would suddenly diminish the value of the records plaintiff seeks or cause the public interest in the FISA debate to evaporate. Even assuming that congressional debates over national issues "cannot be restarted or wound back," *see* Gerstein, 2007 WL 3462659 at *4, it appears quite likely that the FISA debate will continue for the foreseeable future. Given this state of affairs, plaintiff will not suffer any irreparable harm if defendants process the FOIA requests according to the schedules proposed in the attached declarations.

There is also no appropriate legal or factual basis to tether release of agency records in a FOIA case to Congress's legislative calendar, particularly given that the FOIA provides that expedited processing shall proceed "as soon as practicable." Indeed, courts have denied similar requests to condition FOIA processing deadlines upon upcoming national presidential elections. *See The Nation Magazine*, 805 F. Supp. at 73-74 (denying motion for temporary restraining order in FOIA case seeking release of records about presidential candidate prior to 1992 election); *Assassination Archives and Research Center, Inc. v. C.I.A.*, 720 F. Supp. 217, 218-19 (D.D.C. 1988) (refusing to order CIA to expedite a FOIA request for documents about George Bush even though the 1988 presidential election was imminent and the plaintiff argued that the information should be disseminated to the public before voters cast their ballots). A contrary decision would improperly convert any request for records relating to pending legislation into an emergency requiring immediate release of documents prior to a vote on the legislation, without any consideration of the equities and burdens on the government agency processing the documents and in direct contravention of the terms of the FOIA statue. Further, such a holding would likely lead to exactly the type of "overuse, or even abuse" of the preliminary injunction mechanism in the FOIA context identified by the Court in *Electronic Frontier Foundation v. Department of Justice*, slip op. at 3-4, 07-CV-0656 (JDB) at 3-4 (June 15, 2007) (attached as

Exhibit T to Plaintiff's Memorandum). A preliminary injunction, which the Supreme Court has described as an "extraordinary and drastic remedy," *Mazurek*, 520 U.S. at 972, should not be issued routinely in the common situation in which a government agency grants a request for expedited FOIA processing and Congress is considering legislation about the subject of the FOIA request. If this view prevailed, anyone who sought to have their FOIA request processed on an expedited basis would automatically have a claim of irreparable injury regardless of whether any real harm existed. This is not the proper standard to be applied in the issuance of a preliminary injunction, and it is not the result contemplated by Congress when it authorized a limited exception for expedited processing. Instead, Congress deferred to the necessity for ensuring adequate time for appropriate agency processing, and mandated only that expedited requests be processed "as soon as practicable." Thus, while the purported urgency of plaintiff's request may be a factor in determining whether a request for expedited treatment will be granted by the agency, *see* 5 U.S.C. § 552(a)(6)(E)(v)(ii), it is not a factor in determining the speed by which an agency is required to complete processing of the request, nor does it mean that plaintiff will suffer any irreparable harm by adhering to the terms of the FOIA statute.

4. An order requiring defendants to accelerate processing of plaintiff's FOIA requests would impose undue burdens on defendants and not serve the public interest.

In contrast to plaintiff's speculative claims of harm, a preliminary injunction ordering defendants to finish processing plaintiff's FOIA requests within ten days would impose undue burdens on defendants and injure their interests. Indeed, the balance of harms tips decidedly in favor of denying plaintiff's motion for preliminary injunction. As explained in the attached declarations, imposing a 10 day production deadline on defendants is simply not practicable. *See* Sessoms Decl. ¶ 12; Colborn Decl. ¶ 10; Pustay Decl. ¶ 30; Hackett Decl. ¶ 13. Any such requirement would harm defendants by not allowing them sufficient time to finish consultations with other agencies that have equities in the records subject to plaintiff's request. *See Sussman v. U.S. Marshals Service*, 494 F.3d 1106, 1118 (D.C. Cir. 2007) ("FOIA explicitly permits consultation with another agency having a substantial interest in the determination of the request.") (internal quotations and ellipses omitted). Further, an unreasonably accelerated

production deadline increases the risk of inadvertent disclosure of records that are exempted from release under the FOIA. Given the presence of classified national security information in these records, defendants stand to suffer significant harm if such records are disclosed before defendants conduct an appropriate review of these records.

The proposed preliminary injunction in this case also has the potential to harm the public interest by complicating and disrupting the processing of other FOIA requests.[9] *See The Nation Magazine*, 805 F. Supp. at 74 (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). Expedition already disadvantages normal FOIA requesters by placing them farther back in an agency's processing queue. Imposing artificial deadlines beyond an agency's capabilities through the use of preliminary injunctions would only hinder the average FOIA requestor even further by favoring the most litigious FOIA requesters. *See Long v. Department of Homeland Security*, 436 F. Supp. 2d 38, 45 (D.D.C. 2006) (placing plaintiffs' request ahead of others that are awaiting responses to their requests would injure others who made their requests before the plaintiff or who have presented more meritorious applications for expedited processing). The public interest, therefore, is not well served by permitting FOIA requesters to avoid the plain terms of the FOIA, nor is it served by forcing government agencies to accelerate FOIA processing based on nothing more than speculative claims that the requested information is time sensitive and potentially perishable due to pending legislation in Congress.

Plaintiff's motion ignores these realities, and, as a result, threatens to compromise the delicate balancing of the public interest that Congress undertook in enacting FOIA between the

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[9] Plaintiff'own interest in its FOIA request to further its private lobbying efforts in support of collateral litigation should not be equated with the public interest. *See* Ellen Nakashima, *A Story of Surveillance*, Washington Post, Nov. 7, 2007, at D1 ("lawyers for the Electronic Frontier Foundation, which filed [a class action lawsuit against various telecommunications companies] . . . are urging key U.S. senators to oppose a pending White House-endorsed immunity provision that would effectively wipe out the lawsuits."). *See also Massey v. FBI*, 3 F.3d 620, 625 (2d Cir. 1993) ("[T]he mere possibility that information may aid an individual in the pursuit of litigation does not give rise to a public interest.").

general interest in disclosure of government information and the necessity of ensuring that certain types of documents, the disclosure of which would cause harm, were not to be disclosed. *See* 5 U.S.C. §522(b). Congress specifically noted that even with respect to expedited requests, in certain cases, depending on the subject matter of the request, additional time would be required to ensure that the public's interest in preventing the public disclosure of these exempted documents was not compromised. *See* H. R. Rep. No. 104-795, 1996 U.S.C.A.A.N. at 3466, *quoted supra*. As Congress acknowledged, those concerns are only heightened in a case such as this one, where the request involves classified information, and defendants have independent obligations under federal statutes, regulations, and Executive Orders to ensure that no unwarranted disclosure occurs. *See, e.g.*, 50 U.S.C. § 403-1(i)(1) (requiring the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure"). Ordering defendants to disclose records according plaintiff's unreasonable time frame and other than "as soon as practicable," as dictated by the FOIA, causes significant harm to this predetermined balancing of competing public interests.

CONCLUSION

For the foregoing reasons, plaintiff's motion for preliminary injunction should be denied. A proposed order is attached hereto.

Dated: March 18, 2008

Respectfully submitted,

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