IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELECTRONIC FRONTIER FOUNDATION, Plaintiff-Appellee, v. OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE and DEPARTMENT OF JUSTICE, Defendants-Appellants.	No. 09-17235 (D.C. Nos. 08-1023 & 08-2997 (N.D. Cal.)

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3
FOR STAY PENDING APPEAL AND
IMMEDIATE ADMINISTRATIVE STAY

(ACTION REQUIRED BY OCTOBER 16, 2009)

9th Cir. Rule 27-3 Certificate

1) The telephone numbers and office addresses of the attorneys for the parties are as follows:

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2) As explained in the body of the motion, the district court ordered the federal government to disclose documents being withheld under Exemptions 3, 5, and 6 of the Freedom of Information Act on October 9, 2009. On October 7, the district court denied a motion for a temporary stay to allow the Solicitor General time to decide whether to appeal. On October 13, the district court denied a renewed motion for a temporary stay, and held that it would deny a motion for a full stay pending appeal. The Solicitor General has determined that an appeal will be taken with regard to two categories of documents. She has further undertaken to complete the consultation process as to the remaining categories by November 8, 2009, and to notify the Court immediately of her decision. The district court entered a temporary administrative stay that expires at 4:00 p.m. on October 16. The government is now asking this Court to enter a stay pending appeal, and to extend the district court's administrative stay if this motion remains under submission on October 16.

3) Counsel for the plaintiff have been notified of the filing of this motion and are being served with the filing by CM/ECF and electronic mail.

/s/ *Scott R. McIntosh*

Scott R. McIntosh
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INTRODUCTION

This case involves a district court order that compels the disclosure of information protected by Exemption 3 of FOIA and the National Security Act, and also requires disclosure of confidential communications within and between the Executive Branch and Congress regarding proposed revisions to the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801 *et seq*. One week ago, the Office of the Director of National Intelligence (ODNI) and the Department of Justice (DOJ) moved in this Court for a temporary emergency stay of the disclosure order to give the Solicitor General sufficient time to decide whether to appeal and, if so, on which issues and which categories of documents. This Court denied the motion without prejudice to renewal following presentation of the request to the district court. On October 13, the district court denied the government a temporary stay, further held that it would deny a motion by the government for a stay pending appeal, and granted an administrative stay until 4:00 p.m. on Friday, October 16.

The government now moves in this Court for a stay pending appeal. The Solicitor General's consultations regarding appeal are not complete, but she has decided to pursue appeal with respect to two important categories of documents, both of which the district court ordered to be disclosed without ever deciding the basis for withholding under the exemptions invoked. Absent a stay, the confidentiality of thsoe withheld documents will be irretrievably lost and this Court will be deprived

of its ability to review the disclosure order. As discussed further below, the Solicitor General is continuing to engage in consultations and deliberations regarding the remaining categories of documents, and she has undertaken to complete that process by November 8. As to these documents, the government requests a stay until that date to give her time to make that decision. The government will promptly disclose any documents as to which the Solicitor General decides not to appeal. If the Court has not completed its consideration of this stay motion by 4:00 p.m. on Friday, October 16, the government asks the Court to extend the district court's administrative stay pending disposition of the motion.

STATEMENT

1. In April 2007, acting on behalf of the President, the Executive Branch submitted draft legislation to Congress to amend the Foreign Intelligence Surveillance Act. The proposed legislation was intended to update FISA to take account of changes in telecommunications technology since FISA's enactment in 1978. In addition, the proposal sought to provide immunity in appropriate circumstances for telecommunications companies that were being sued for alleged participation in certain post-9/11 intelligence gathering activities.

In August 2007, Congress enacted the Protect America Act of 2007 (PAA), which incorporated some but not all of the changes sought by the Executive Branch. The PAA was designed as a temporary measure, and it expired by its own terms in

February 2008. Thereafter, in July 2008, Congress passed and the President signed the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008 (FISA Amendments Act). Among other things, the Act provides that "a civil action may not lie or be maintained in a Federal or State court against any person for providing assistance to an element of the intelligence community * * * if the Attorney General certifies" that the alleged assistance falls within specified statutory categories or that the person did not provide the alleged assistance. 50 U.S.C. § 1885a.

Before the FISA Amendments Act was enacted, the Executive Branch and Congress engaged in ongoing discussions and negotiations to seek mutually acceptable revisions to FISA, including the enactment of appropriate legislation to protect telecommunications companies from suit for their intelligence gathering assistance. Some discussions were public, but others were conducted through confidential exchanges between the Branches. Numerous email messages regarding proposed statutory amendments were exchanged within the Executive Branch and between the Executive Branch and Congress as part of this collaborative lawmaking effort. The Executive Branch also engaged in discussions with representatives of telecommunications companies regarding statutory immunity. At the time, the United States had intervened in the pending suits against telecommunications companies and was aligned with the companies in that body of litigation.

2. In December 2007 and April 2008, plaintiff Electronic Frontier Foundation

(EFF) submitted FOIA requests to ODNI and five DOJ components. The requests sought, *inter alia*, agency records regarding "briefings, discussions, or other exchanges" that ODNI and DOJ had had with Congressional staff or with "representatives or agents of telecommunications companies" concerning amendments to FISA, including discussions relating to company immunity.

The agencies disclosed certain responsive records, but withheld a number of records under several FOIA exemptions. The agencies withheld information that could reveal which telecommunications companies had participated in discussions regarding the legislative proposals, including the identities of the individuals who represented the companies in the discussions. The identities of the companies' representatives were withheld under Exemption 3, which protects information "specifically exempted from disclosure by statute"; the agencies relied on several nondisclosure statutes, including 50 U.S.C. § 403-1(i)(1), which requires the Director of National Intelligence to protect intelligence sources and methods from unauthorized disclosure. The agencies also invoked Exemption 6, which protects information about individuals whose disclosure "would constitute a clearly unwarranted invasion of personal privacy."

The agencies also withheld email messages and other records of communications regarding the legislative negotiations that were exchanged between DOJ or ODNI and Congressional staff. The agencies withheld similar communi-

cations regarding the negotiations that were exchanged within and between the agencies themselves, between the agencies and the White House, and between the White House and Congress. The agencies also withheld records of communications on the same subject with representatives of telecommunications companies.

These categories of records were withheld on the basis of Exemption 5, which protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The agencies contended that the emails within the Executive Branch, and between the Executive Branch and Congressional staff, which were exchanged in the process of inter-branch negotiations over the proposed legislation and assisted the Executive Branch's deliberations regarding those proposals, were within the scope of the deliberative process privilege and the Presidential communications privilege. The agencies contended that their communications with the telecommunications companies regarding the statutory immunity proposals were protected by the attorney work product and common-interest privileges, as well as by the deliberative process and Presidential communications privileges.

3. After the agencies processed EFF's requests and provided *Vaughn* indices identifying the withheld documents and the grounds for withholding, the agencies moved for summary judgment and EFF filed a cross-motion for summary judgment. On September 24, 2009, the district court issued a memorandum order (copy

attached) denying the agencies' motion and granting EFF's cross-motion.

The district court held that email messages between ODNI or DOJ and Congressional staff do not qualify as "intra-agency" documents and therefore are not protected by Exemption 5. Op. 7-8. The court reached the same conclusion with respect to the communications between the agencies and the telecommunications companies. *Id.* at 8-9. Having held that these documents do not satisfy the intra-agency requirement, the court added that it "need not address the parties' remaining contentions regarding privilege." *Id.* As noted above, the documents being withheld under Exemption 5 also include materials exchanged *within* the Executive Branch, which are uncontroversially intra-agency (or inter-agency) even under the district court's reasoning – for example, documents regarding the legislative negotiations that were exchanged within and between ODNI and DOJ. Nevertheless, the court erroneously included those documents as well in the disclosure order.

Turning to the withheld identities of the telecommunications company representatives, the court acknowledged that the identities were being withheld on the basis of Exemption 3, and noted that "documents over which Defendants claimed Exemptions 2 or 3 * * * are no longer at issue here as EFF's challenge [to withholding under those exemptions] has been abandoned." Op. at 9 & n.1. Nevertheless, the court required the identities to be disclosed. The court reasoned that the identities could not be withheld on the basis of Exemption 6, but failed to address the

agencies' independent basis for withholding under Exemption 3. *Id.* at 9-10.

4. The decision whether to appeal adverse judgments against the federal government is vested in the Solicitor General of the United States. See 28 U.S.C. § 516; 28 C.F.R. 0.20(b). Congress has provided the Solicitor General by statute with sixty days, rather than the thirty days provided for non-government litigation, to decide whether to appeal an adverse judgment. 28 U.S.C. § 2107(b); see also FRAP 4(a)(1)(B) (same). This additional time reflects Congressional recognition both of the frequent complexity of government litigation and the often-lengthy process involved in consulting with and obtaining the views of all interested government components within (and, where appropriate, outside) the Executive Branch.

On September 30, the government moved the district court to stay the disclosure order until November 23 to allow the Solicitor General the sixty-day period provided by Title 28 to decide whether to appeal. On October 6, the government filed a motion to amend the judgment under Rule 59(e), seeking to correct the district court's error in ordering disclosure of documents exchanged within and between the agencies without addressing whether the documents were privileged, and in ordering disclosure of the representatives' identities without resolving the Exemption 3 issue. On October 7, the district court issued an order (copy attached) denying the stay motion and denying the government relief under Rule 59(e).

On October 8, the appellants filed an emergency stay motion with this Court,

asking the Court to stay the disclosure order until November 8, and also filed a notice of appeal. As noted above, the Court denied the motion without prejudice to renewal following presentation to the district court, and the government immediately submitted the same motion to the district court.

The district court denied the stay motion on October 13 (order attached). The court stated that it "is still not persuaded that it should exercise its discretion to stay its directive that Defendants disclose the disputed documents pending a decision whether or not to appeal the Court's original Order." Order Denying Emergency Motion to Stay at 2. The court then went on to address whether the government would be entitled to a full stay pending appeal. *Id.* at 3-4. The court held that a stay pending appeal is not warranted because, in the court's view, the government is unlikely to prevail on appeal and the balance of hardships and the public interest favor disclosure of the documents even before the government can obtain appellate review of the disclosure order. *Id.* at 3-4. The court set forth its conclusions regarding stay pending appeal "[i]n order to obviate the need for the parties to appear once again before this Court before seeking the same redress on appeal." *Id.* at 4.

ARGUMENT

THIS COURT SHOULD GRANT A STAY PENDING APPEAL AND A STAY PENDING DECISION TO APPEAL

In its original emergency stay motion, the government asked this Court to stay

the district court's disclosure order until November 8, thirty days after the original disclosure deadline, to give the Solicitor General an adequate opportunity to consult and decide whether to appeal and, if so, which exemptions and categories of documents warrant appellate review. As explained in detail in that motion (at 12-15), that decisionmaking process is unusually complex in this case. The case involves the applicability of multiple FOIA exemptions and privileges to multiple categories of documents; it raises important and novel issues regarding the applicability of FOIA to confidential legislative negotiations between the Executive Branch and Congress; the issues implicate the interests of numerous parts of the Executive Branch, including not only defendant agencies and others but also the White House and the Office of Management and Budget; and the issues also implicate the institutional interests of Congress. All of these factors require a full opportunity for consultation and deliberation by the Solicitor General, an opportunity that the district court has twice refused to provide.

This deliberative process is still underway, and it cannot be concluded in a fully considered and informed fashion by the current disclosure deadline of October 16. Nevertheless, in the week since the original stay motion was filed, the Solicitor General has been able to reach a decision with respect to two important categories of documents: documents revealing the identities of telecommunications company representatives, which have been withheld under Exemptions 3 and 6, and delibera-

tive documents exchanged entirely within the Executive Branch, which are self-evidently intra-agency or inter-agency and have been withheld under Exemption 5. The Solicitor General has authorized the government to proceed with the present appeal with respect to these categories of documents. Accordingly, the government now moves to stay the disclosure order with respect to those documents pending appeal. The government also requests a stay with respect to the remaining categories of documents until November 8 to allow completion of the consultation process for the Solicitor General to decide whether the appeal will include those documents.

In deciding whether to grant a stay pending appeal, this Court weighs the moving party's likelihood of success on appeal, the likelihood of irreparable harm to the movant in the absence of a stay, the balance of equities between the parties, and the public interest. See, *e.g.*, *Humane Society of U.S.* v. *Gutierrez*, 558 F.3d 896, 896 (9th Cir. 2009); *Golden Gate Restaurant Ass'n* v. *City and County of San Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008). Contrary to the district court's view, the government readily qualifies for a stay pending appeal under this standard. The district court's disclosure order contains several significant errors, chief among them the court's insistence on ordering the disclosure of documents without addressing the exemptions and privileges that provide the basis for their withholding. Failure to stay the disclosure order will cause irreparable injury by forcing the disclosure of confidential documents as to which the Solicitor General has authorized appeal before

this Court has an opportunity to decide whether they are exempt from disclosure under FOIA, and by forcing disclosure of the remaining documents before completion of the necessary consultation with interested components of the Executive Branch. Finally, the balance of equities and the public interest tilt decisively in the government's favor. If the Solicitor General decides not to seek further review with respect to any of the withheld documents, the government will notify the Court immediately (and no later than November 8), and any documents no longer at issue will be disclosed.[1]

I. The Balance Of Harms and the Public Interest Strongly Favor a Stay

The district court's unwillingness to stay its disclosure order pending appeal was unwarranted. If the order is not stayed, the documents at issue will have to be released, the statutory and constitutional interests identified to the district court as underlying the confidentiality of those documents will be irretrievably lost, and this Court's ability to review the district court's decision with respect to all categories of

[1] When a party moves for a stay pending appeal in the court of appeals without previously having asked the district court for the same relief, FRAP 8(a) requires a showing that "moving first in the district court would be impracticable." As explained above, the district court here has just addressed the issue of a stay pending appeal *sua sponte* and has held squarely that it will not issue such a stay. The court did so specifically to eliminate any possible need for the government to return to that court with a motion for a stay pending appeal before seeking the same relief from this Court. Thus, moving for that relief with the district court would not only be "impracticable" but pointless.

documents ultimately embraced by the government's appeal will be lost as well. Courts routinely grant stays pending appeal in FOIA cases to avoid these harms, and there is no reason why this case should be treated differently.

A. When the government is ordered to disclose non-public information, the denial of a stay pending appeal effectively "force[s] the government to let the cat out of the bag, without any effective way of recapturing it if the district court's directive [were] ultimately found to be erroneous" by a reviewing court. *Irons* v. *FBI*, 811 F.2d 681, 683 (1st Cir 1987). In this case, EFF is seeking records revealing the identities of the telecommunications companies' representatives, which implicate fundamental governmental interest in preventing disclosure of intelligence sources and methods; confidential deliberative communications that are wholly internal to the Executive Branch, including the White House itself; confidential communications between the Executive Branch and Congress on sensitive policy issues regarding foreign intelligence gathering; and confidential communications on the same subject between the government and telecommunications companies. If these records are disclosed, their confidentiality cannot be recovered at a later point. See, *e.g.*, *Providence Journal Co.* v. *FBI*, 595 F.2d 889, 890 (1st Cir. 1979) (noting that the "confidentiality [of disclosed records] will be lost for all time").

Moreover, once the records subject to a FOIA request are released, a FOIA action seeking those records is rendered moot. Federal courts simply "have no further

statutory function to perform" under FOIA once "all requested records are surrendered." *Perry* v. *Block*, 684 F.2d 121, 125 (D.C. Cir. 1982) (*per curiam*); see *John Doe Agency* v. *John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in Chambers) (observing that "disclosure would moot that part of the Court of Appeals' decision requiring disclosure" under FOIA); *Bonner* v. *Department of State*, 928 F.2d 1148, 1152 (D.C. Cir. 1991) (R.B. Ginsburg, J.); see also *Papa* v. *United States*, 281 F.3d 1004, 1013 (9th Cir. 2002). Accordingly, "[f]ailure to grant a stay will entirely destroy [the government's] right[] to secure meaningful review" by rendering its appeal "moot." *Providence Journal*, 595 F.2d at 890. The need to preserve the government's right to appellate review is "perhaps the most compelling justification" for the grant of a stay in the FOIA context. *John Doe Agency*, 488 U.S. at 1309 (Marshall, J.) (internal quotation marks omitted).

For these reasons, stays pending appeal in FOIA cases are routinely granted by district courts and, if necessary, by courts of appeals. See, *e.g.*, *Senate of State of Cal.* v. *Mosbacher*, 968 F.2d 974 (9th Cir. 1992); *Minnis* v. *USDA*, 737 F.2d 784, 785 (9th Cir. 1984); *Neely* v. *FBI*, 208 F.3d 461, 463 (4th Cir. 2000); *Ferguson* v. *FBI*, 957 F.2d 1059, 1060 (2d Cir. 1992). Indeed, the Supreme Court itself has stayed FOIA disclosure orders pending appeal. See, *e.g.*, *HHS* v. *Alley*, 129 S. Ct. 1667 (2009).

B. The irreparable harm to the government (and to this Court's own review function) that would result from denial of a stay pending appeal far outweighs any

impact that such a stay might have on EFF. The district court's most recent order suggests that immediate disclosure is warranted because new legislative proposals have recently been introduced to repeal the telecommunications carrier immunity provision of FISA. But information about past legislative negotiations by a prior Administration over already-enacted legislation has limited significance for public consideration of new proposals in the current Congress. Moreover, Congress is free to take up proposals to repeal the immunity provision at any time, and if this Court ultimately affirms the district court's disclosure order in one or more respects, EFF will be free to make whatever use of the documents they wish. Finally, the Solicitor General will complete her deliberations regarding the remaining categories of documents no later than November 8, and if she decides not to appeal with respect to any of them, they will be released promptly thereafter.

II. There Is a Substantial Prospect of Success on the Appeal

A. As explained above, the Solicitor General has determined that the appeal will include at least two of the issues raised in the district court.

1. The district court's disposition of the government's Exemption 3 withholding is likely to be reversed on appeal. As noted above, Exemption 3 exempts records that are "specifically exempted from disclosure by statute." Here, federal law requires the Director of National Intelligence to protect intelligence sources and

methods from unauthorized disclosure. See, *e.g.*, 50 U.S.C. § 403-1(i)(1). In this case, the government withheld information that would identify the telecommunications companies that communicated with ODNI and DOJ, including the identities of the company employees and agents involved in those communications, on the ground that disclosure of such information would assist our adversaries in drawing inferences about whether certain telecommunications companies may or may not have assisted the government in intelligence-gathering activities. The defendants explained in the district court that disclosure of the identities of those individuals and entities that may have assisted, or in the future may assist, the government with intelligence activities could impede the government's ability to gather intelligence information, and as demonstrated in multiple declarations (including one submitted by the Director of National Intelligence), this information is properly protected as intelligence sources and methods under Exemption 3. See McConnell decl. ¶¶ 23-27; Steele decl. ¶¶ 18-19; Brand decl. ¶¶ 27-29; Supplemental Hackett decl. ¶ 4 (Case No. 08-2997, docket entry # 48).

Despite this showing, the district court has ordered the agencies to make public the identity of the employees and agents who represented the companies in these communications. The court did *not* do so on the basis of a determination that Exemption 3 does not apply. Instead, it ruled only that the identities were not protected by Exemption 6, and ordered the disclosure of the information without ever

deciding the Exemption 3 issue at all. See Op. 9-10. Even if the court's Exemption 6 ruling were correct, which is doubtful, it was error for the district court to order disclosure of the identities of the companies' representatives, and thus the identities of the companies themselves, without even addressing Exemption 3.

2. With respect to Exemption 5, it is undisputed that the government's withholding includes documents that are inter-agency or intra-agency even under the district court's (and EFF's) view of the law. The district court's order covers not only communications between the agencies and Congress, but records of communications within and between *the agencies themselves*. Similarly, the order covers communications between the agencies and the White House, which are likewise covered by Exemption 5. See, *e.g.*, *Judicial Watch, Inc.* v. *Department of Energy*, 412 F.3d 125, 130-31 (D.C. Cir. 2005). Indeed, EFF itself conceded below that "some of the records in this case qualify as 'inter-agency or intra-agency memoranda' * * * ." Opposition to Defendants' Motion for Summary Judgment at 14 (Case No. 08-2997, docket # 43).

But having held that emails exchanged with Congress and with telecommunications companies are not intra-agency documents, the court proceeded to order disclosure of *all* of the Exemption 5 documents, including those exchanged entirely within the Executive Branch. Because those documents are intra-agency and inter-agency under Exemption 5, the court could not order their disclosure without

resolving the government's claims of privilege for those documents – something that the court explicitly declined to do.

In its October 13 order, the district court stated that its original decision "reviewed and explicitly rejected Defendants' contentions that any exemption under the FOIA or privilege barred disclosure of the disputed documents and information." Order Denying Emergency Motion to Stay at 3. That statement cannot be reconciled with the disclosure opinion itself. The opinion does not address the merits of the Exemption 3 withholding, much less "explicitly reject" the applicability of that exemption. See Op. at 9-10. Rather than resolving the Exemption 5 privileges for the documents that indisputably are intra- or inter-agency records, the opinion states that "the Court need not reach the applicability of the specific privileges Defendants have asserted." *Id.* at 9. Thus, the court did not actually resolve the Exemption 3 and Exemption 5 issues.

B. The Solicitor General has not yet decided whether the appeal will include two other categories of documents. The government here notes the arguments made in the district court with respect to those categories of documents. As stated earlier, further consultations are needed respecting whether to appeal the district court's ruling on these categories of documents.

1. The application of Exemption 5 to records of confidential negotiations

between the Executive Branch and Congress is a matter of first impression. In its submissions to the district court, the government explained that the agencies sought and received information and advice from Congressional staff about Congress's views on potential legislation and its receptivity to legislative options under consideration by the Executive Branch, and that that information was used by the agencies and others in the Executive Branch to make decisions about the Executive Branch's own legislative positions and proposals. The government argued that this confidential input played the same kind of role in the agencies' deliberations as did the input provided by members of Congress in *Ryan* v. *Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980), and former Presidents in *Public Citizen, Inc.* v. *Department of Justice*, 111 F.3d 168 (D.C. Cir. 1997).

The district court suggested that the Supreme Court's decision in *Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001), precludes treating communications from Congressional staff in this case as intra-agency. Op. 7-8. In *Klamath*, the Court declined to treat communications between a federal agency and Indian tribes regarding water rights as intra-agency because, unlike outside consultants, the tribes had independent financial interests in the subject matter of the communications, and those interests were adverse to other claimants. See 532 U.S. at 11-15. But the government's argument in the district court was that the collaborative relationship between Congress and the Executive Branch in the

development of legislation is different from the relationship between the agency and the tribes in *Klamath*, because in providing the agencies with information and views about legislative options for use in the development of the Executive Branch's own legislative position, Congress was participating in a common effort with the Executive Branch to advance the public interest.

2. The district court also held that the communications between the agencies and telecommunications companies regarding proposed immunity provisions do not qualify as intra-agency documents. The court declined to analogize the telecommunications companies to outside consultants. Op. 8-9. The government stressed to the district court, however, that the agencies were not relying on the outside-consultant cases with respect to the telecommunications companies. Instead, the agencies had argued that those communications qualified as intra-agency because the agencies and the companies were communicating about their common interests in the ongoing litigation against the companies for their alleged assistance in post-9/11 surveillance. See, *e.g.*, *Hunton & Williams, LLP* v. *Department of Justice*, 2008 WL 906783 at *5 (E.D. Va. Mar. 31, 2008) (holding that if documents exchanged with non-government entity satisfy the requirements of the common-interest privilege, that creates an intra-agency or inter-agency relationship for purposes of Exemption 5). The district court's Exemption 5 analysis did not address this reasoning.

CONCLUSION

For the foregoing reasons, the disclosure order should be stayed in full pending appeal, and the district court's administrative stay should be extended pending disposition of this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2009, I have filed and served the foregoing EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR STAY PENDING APPEAL AND IMMEDIATE ADMINISTRATIVE STAY by causing copies to be filed electronically with the Clerk of the Court and with causing copies to be served electronically on:

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6 IN THE UNITED STATES DISTRICT COURT
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FOR THE NORTHERN DISTRICT OF CALIFORNIA
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9 ELECTRONIC FRONTIER FOUNDATION, 10 Plaintiff, 11 v. 12 OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE and 13 DEPARTMENT OF JUSTICE, 14 Defendants. _____________________________/	No. C 08-01023 JSW **ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT**

15
16 Now before the Court are the parties' consolidated cross-motions for summary
17 judgment. Having considered the parties' pleadings, the relevant legal authority, and having
18 had the benefit of oral argument, the Court hereby DENIES Defendants' motion for summary
19 judgment and GRANTS Plaintiff's cross-motion for summary judgment.

20 **BACKGROUND**

21 On August 5, 2007, President Bush signed into law the Protect America Act of 2007,
22 which amended the Foreign Intelligence Surveillance Act ("FISA") to expand the government's
23 authority to gather intelligence with the help of domestic communications service providers,
24 and to protect telecommunications companies from future legal liability for their role in the
25 surveillance activity. Pub. L. No. 110-55, 121 Stat. 552.
26 The Protect America Act was set to expire in February 2008 without further
27 congressional action. President Bush indicated that the Administration would push for more
28 extensive, and likely retroactive, legal immunity for the telecommunications companies. The

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1 House of Representatives passed the RESTORE Act of 2007, which would not protect
2 telecommunications carriers from civil liability. H.R. 3773 (as passed by House). On February
3 21, 2008, however, the Senate passed a version of legislation to amend FISA, which purports to
4 require dismissal of any state or federal lawsuit against a telecommunications carrier for
5 facilitating government surveillance, if the Attorney General certifies to the court that the
6 company was assisting in certain intelligence activity authorized by the President. H.R. 3773,
7 FISA Amendments Act of 2008 (amendment as agreed to by Senate).

8 This action arises under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.
9 Plaintiff, the non-profit Electronic Frontier Foundation ("Plaintiff" or "EFF"), seeks the
10 production of a number of withheld documents from the Office of the Director of National
11 Intelligence ("ODNI") and the Department of Justice ("DOJ") concerning efforts of the
12 agencies and the telecommunication industry to push for changes to federal surveillance law,
13 especially to ensure that telecommunications carriers are not held liable for their participation in
14 recent governmental surveillance efforts.

15 On December 21, 2007, EFF faxed two letter to ODNI and DOJ's Offices of the
16 Attorney General, Legislative Affairs, Legal Policy, Legal Counsel, and National Security
17 Division, requested under FOIA all records from September 1, 2007 to December 21, 2007
18 concerning "briefing, discussion, or other exchanges" that agency officials

19 have had with 1) members of the Senate or House of Representatives and 2)
20 representatives or agents of telecommunications companies concerning amendment to FISA, including any discussion of immunizing
21 telecommunications companies or holding them otherwise unaccountable for their role in government surveillance activities. This request includes, but it not
22 limited to, all email, appointment calendars, telephone message slips, or other records indicating that such briefings, discussion, or other exchanges took place.

23 (Complaint in 08-01023 JSW at ¶¶ 18-19.)

24 In letters sent by facsimile on April 24, 2008, to the same set of agencies, EFF requested
25 under the FOIA all records:

26 A. from December 21, 2007 to the present concerning briefings, discussions,
27 or other exchanges any [agency] has had with representatives or agents of telecommunications companies concerning amendments to FISA,
28 including any discussion of immunizing telecommunications companies or holding them otherwise unaccountable for their role in government surveillance activities;

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B. from December 21, 2007 to the present concerning briefings, discussions, or other communications from any [agency] official to any member of the Senate or House of Representatives or their staffs;

C. from December 21, 2007 to the present concerning *any* communications, discussion, or other exchanges regardless of subject that any [agency] official has had with Charlie Black, Wayne Berman, Dan Coats, Tom Donilon, Jamie Gorelick or Brad Berenson; and

D. from January 1, 2007 to the present that are responsive to the categories above, and have not yet been produced in response to previous EFF FOIA requests.

(Amended Complaint in 08-02997 JSW at ¶¶ 34-35.)

In each of the letters, EFF formally requested that the processing of these requests be expedited because they sought information about which there is an "urgency to inform the public about an actual or alleged [f]ederal [g]overnment activity," and were "made by a person primarily engaged in disseminating information." 5 U.S.C. § 552(a)(6)(E)(v)(II), 32 C.F.R. § 1700.12(c)(2) and 28 C.F.R. § 16.5(d)(1)(ii).

When the agencies failed to respond timely to these expedited requests, EFF filed suit on February 20, 2008 and June 17, 2008, respectively, in the two cases before this Court, seeking the immediate release of all improperly withheld documents. The issues in the two cases are identical, with the requests for similar documents in sequential time periods, and have been coordinated for purposes of resolution of the legal questions presented. Plaintiff contends that complete production is critical because the information requested is directly relevant to understanding the agencies' roles in lobbying on behalf of telecommunications providers for legislation designed to compel the dismissal of lawsuits against the telecommunications companies, more than 40 of which are currently consolidated and pending before this district. *In re NSA Telecommunications Records Litigation* (MDL Docket No. 06-1791 VRW).

After this Court granted a preliminary injunction requiring disclosure, Defendants produced a number of documents, some with redactions, as well as a *Vaughn* index and declarations attesting to the exemptions under which the agencies have refused full production. After the start of the new administration under President Obama and his declaration of the importance of transparency in government, Defendants produced a small set of additional documents. Now, upon reviewing the production of released documents and the explanations for Defendants' withholdings, EFF determined not to challenge the adequacy of the agencies'

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searches or the withholding of any material under Exemptions 1, 2, 3, or 7(E). (*See* Opp. Br. at 8.) EFF does not challenge the withholding of identifying information about any government of private sector individuals with the exception of those involved with telecommunications companies. Therefore, the only disputed materials remaining relate to the unclassified communications between and among executive agencies, Congress, the White House, and telecommunications companies concerning amendments to FISA, and the identities of individuals associated with the carriers within those communications.

In their motion for summary judgment, Defendants contend that their withholdings of records between ODNI or DOJ officials and Members of Congress or their staffs concerning amendments to FISA are appropriate pursuant to Exemption 5 as "inter-agency or intra-agency memorandums or letters." Defendants also argue that the withheld documents form part of the agency's deliberative process and fall under the presidential communications privilege and the common interests or attorney work product doctrine. Defendants also contend that they have properly withheld identifying information regarding individuals and entities who contacted the government in an effort to protect the telecommunications companies from liability. The Court shall address each argument in turn.

ANALYSIS

A. Legal Standards Applicable to Motions for Summary Judgment.

Summary judgment is proper when the pleadings, discovery, and affidavits show that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment bears the burden of identifying those portions of the pleadings, discovery, and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party meets its initial burden, the nonmoving party must go beyond the pleadings and, by its own affidavits or discovery, "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). On an issue for which the opposing party will have the burden of proof at trial, the moving party need only point out "that there is an absence of evidence to support the nonmoving party's case." *Id.* Inferences drawn

from the facts must be viewed in the light most favorable to the party opposing the motion. *Masson v. New Yorker Magazine*, 501 U.S. 496, 520 (1991).

Summary judgment is the procedural vehicle by which most FOIA cases are resolved. *Harrison v. Executive Office for U.S. Attorneys*, 377 F. Supp. 2d 141, 145 (D.D.C. 2005). As is mostly the case in this type of proceeding, "there is rarely any factual dispute ... only a legal dispute over how the law is to be applied to the documents at issue." *Schiffer v. FBI*, 78 F.3d 1405, 1409 (9th Cir. 1996). Ultimately, the threshold issue on a motion for summary judgment is whether the agency's explanations are "full and specific enough to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding." *Weiner v. FBI*, 943 F.2d 972, 977 (9th Cir. 1991) (citing *King v. U.S. Dep't of Justice*, 830 F.2d 210, 218 (D.C. Cir. 1987)).

B. Standards Under FOIA.

FOIA was enacted to create a "judicially enforceable public right to secure government documents." *EPA v. Mink*, 410 U.S. 73, 80 (1973). "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *Hanson v. U.S. Agency for International Development*, 372 F.3d 286, 290 (4th Cir. 2004). Accordingly, nearly every document of a federal agency is available to the public unless it falls within one of the Act's nine enumerated exemptions. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975). Given FOIA's goal of broad disclosure, the exemptions are "narrowly construed." *FBI v. Abramson*, 456 U.S. 615, 636 (1982); *see also Assembly of the State of Cal. v. U.S. Dep't of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992) (the exemptions are to be "interpreted narrowly"). The nine exemptions are narrowly construed so as not to frustrate FOIA's underlying policy of disclosure and non-secrecy. *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001). Moreover, if only a portion of a record is exempt from disclosure, the agency must disclose the non-exempt portion if it is "reasonably segregable." 5 U.S.C. § 552(b).

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Exemption 5 prevents the disclosure of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); *see also Sears, Roebuck*, 421 U.S. at 148-49 (noting that "Exemption 5 withholds from a member of the public documents which a private party could not discover in litigation with the agency," and therefore, "it is reasonable to construe Exemption 5 to exempt those documents ... normally privileged in the civil discovery context.") A document qualifies under Exemption 5 if (1) its source is a government agency, meaning the communication must be "inter-agency or intra-agency" and (2) the document "fall[s] within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Klamath*, 532 U.S. at 9. Specifically, Exemption 5 has been interpreted to incorporate the attorney-client privilege, the deliberative process privilege, and the presidential communications privilege. *See Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 321 (D.C. Cir. 2006).

The district court reviews *de novo* the agency's response to a FOIA request, and the agency bears the burden of showing that a FOIA exemption applies to any withheld documents. 5 U.S.C. § 552(a)(4)(B). The agency may meet its burden by submitting affidavits, declarations, and *Vaughn* indices "identifying each document withheld, the statutory exemption claimed, and a particularized explanation of how disclosure of the particular document would damage the interest protected by the claimed exemption." *Weiner*, 943 F.2d at 977. Summary judgment may be granted solely based on these materials when they describe "the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record not by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). "Specificity is the defining requirement" of these explanatory materials. *Wiener*, 943 F.2d at 979 (citing *King*, 830 F.2d at 219). Summary judgment may not be granted if the agency's justifications are "conclusory, merely reciting statutory language, or ... too vague or sweeping." *King*, 830 F.2d at 224.

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1 **C. Defendants Have Improperly Withheld Documents Under Exemption 5.**

2 The parties agree that the "the bulk of the records at issue in this case consists of
3 confidential email messages exchanged between ODNI or DOJ officials and congressional staff
4 in which the parties to the emails discussed, analyzed and negotiated possible amendments to
5 FISA." (Opp. Br. at 2; Reply at 2.) The FOIA defines "agency" as "any executive department,
6 military department, Government corporation, Government controlled corporation, or other
7 establishment in the executive branch (including Executive Office of the President), or any
8 independent regulatory agency." 5 U.S.C. § 552(f). Neither Congress nor private corporations
9 fall within the statutory definition of "agency." *See also Dow Jones & Co. v. Dep't of Justice*,
10 908 F.2d 1006, 1009 (D.C. Cir. 1990) (holding that "Congress simply is not an agency [within
11 the statutory definition].") In addition, the legislative history of Exemption 5 demonstrates that
12 the term "Executive Office of the President" within the statutory definition of "agency" does
13 not include the "President's immediate personal staff or units in the Executive Office whose
14 sole function is to advise and assist the President." H.R. Rep. No. 93-1380, at 232 (1974); *see*
15 *also Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980)
16 (holding that "FOIA does not render "Executive Office of the President" an agency subject to
17 the Act."). The Court also finds that Exemption 5 does not extend to communications that have
18 been shared with government bodies or private corporations outside an Executive branch
19 agency because these entities are not considered "agencies" within the meaning of FOIA.

20 Defendants appear to contend that communications between agency officials and non-
21 agency officials where the agency has solicited the communication in an effort to facilitate its
22 own deliberative process, may still fall within the inter-agency or intra-agency exemption. In
23 this regard, Defendants contend that the withheld records meet the threshold requirement of
24 Exemption 5 because they have been received by an agency, to assist it in the performance of its
25 own functions, from a person acting in a governmentally-conferred capacity other than on
26 behalf of another agency – e.g., in a capacity as employee or consultant to the agency, or as
27 employee or officer of another governmental unit (not an agency) that is authorized or required
28 to provide advice to the agency. (*See* Opp. Br. at 3, citing *Klamath*, 532 U.S. at 9-10.)

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1 However, in order for the exemption to apply in these circumstances, the records submitted by
2 outside consultants must serve essentially the same role in an agency's process of deliberation
3 as documents prepared by agency personnel might have. *Klamath*, 523 U.S. at 10. However,
4 "the fact about the consultant that is constant in the typical cases is that the consultant does not
5 represent an interest of its own, or the interest of any other client, when it advises the agency
6 that hires it. Its only obligation are to truth and its sense of what good judgment calls for, and in
7 those respects the consultant functions just as an employee would be expected to do." *Id.* at 10-
8 11; *see also Dow Jones & Co.*, 908 F.2d at 1009 ("as long as the documents are created for the
9 purpose of aiding the *agency's* deliberative process ... they will be deemed intra-agency
10 documents even when created by non-agency personnel") (emphasis in original); *Ryan v. Dep't
11 of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980) (holding that documents are properly withheld
12 under Exemption 5 where agency records are submitted by outside consultant as part of the
13 agency's deliberative process and were solicited by the agency). To the extent the withheld
14 materials reflect communications between ODNI and DOJ and members of Congress in an
15 effort to facilitate *Congress'* own deliberative process to craft legislation to reform FISA, these
16 communications do not fall under the exemption as there is no evidence that they were used in
17 an effort to aid any agency in its *own* deliberative process.

18 Similarly, the Court finds that any withheld communications between representatives of
19 the telecommunications companies and government officials also fail to meet the threshold
20 requirement necessary to claim Exemption 5 protection. Here, the telecommunications
21 companies communicated with the government to ensure that Congress would pass legislation
22 to grant them immunity from legal liability for their participation in the surveillance. Those
23 documents are not protected from disclosure because the companies communicated with the
24 government agencies "with their own ... interests in mind," rather than the agency's interests.
25 *See Klamath*, 532 U.S. at 11. The Court finds that the threshold requirement to fall within the
26 ambit of Exemption 5 is not met under these circumstances. The documents do not constitute
27 inter- or intra-agency memorandums or letters under 5 U.S.C. § 552(b)(5). As they fail to meet
28 the threshold burden of demonstrating protection from disclosure, Defendants may not withhold

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those documents from disclosure that were exchanged between ODNI and DOJ officials and congressional staff or those documents regarding communications between representatives of the telecommunications companies and government officials.

Although the Court is not persuaded by Defendants' further arguments on the applicability of the presidential communications privilege, the deliberative process privilege, the common interest privilege, or the attorney work product doctrine, the Court need not address the parties' remaining contentions regarding privilege because the Court finds that Defendants have failed to meet their burden to establish the threshold requirement for exemption. Because the test for exemption is conjunctive, the Court need not reach the applicability of the specific privileges Defendants have asserted. *See, e.g., National Institute of Military Justice v. Dep't of Defense*, 2008 WL 1990366, *1 (D.C. Cir. 2008) (finding that many courts overlook the first step in the exemption analysis); *Klamath*, 532 U.S. at 9, 12 (holding that "the first condition of Exemption 5 is no less important than the second; the communication must be 'inter-agency or intra-agency'" and "[t]here is no textual justification for draining the first condition of independent vitality.")

D. Defendants Have Improperly Withheld Information Under Exemption 6.

EFF contends that the Defendants improperly withheld records or portions of records reflecting the identities of the carrier employees and their agents pursuant to Exemption 6. Defendants argue that the identities of telecommunications companies' employees and agents were also withheld pursuant to Exemption 3, which EFF no longer challenges.[1] Regardless, Defendants contend that Exemption 6 allows an agency to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The analysis proceeds in two stages: the first stage is fairly minimal and only requires that the information is related to personnel, medical or "similar" information. If so, the Court must determine whether the disclosure would constitute a "a clearly unwarranted invasion of personal privacy" by balancing the public interest in

[1] The Court finds that documents over which Defendants claimed Exemptions 2 or 3, but not Exemption 5 are no longer at issue here as EFF's challenge has been abandoned.

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disclosure against the privacy interests of the individuals. *See Washington Post Co. v. U.S. Dep't of Health and Human Services*, 690 F.2d 252, 260 (D.C. Cir. 1982). In performing the balance, courts must keep in mind Congress' "dominant objective" to provide full disclosure of agency records. *Dep't of the Air Force v. Rose*, 425 U.S. 352, 372 (1976).

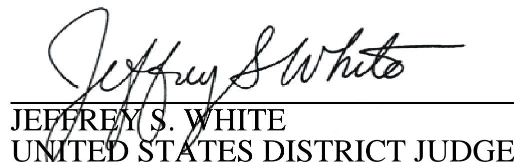
The Court finds that there is some, although not substantial, privacy interest in the withheld documents indicating the identities of the private individuals and entities who communicated with the ODNI and DOJ in connection with the FISA amendments. However, in the balance, the Court finds that the public interest in an informed citizenry weighs in favor of disclosure. There is a strong public interest in disclosure of the identity of the individuals who contacted the government in an effort to expand the government's authority to gather intelligence and to protect telecommunications companies from legal liability for their role in governmental surveillance activity.

CONCLUSION

Accordingly, the Court DENIES Defendants' motion for summary judgment and GRANTS Plaintiff's cross-motion for summary judgment. The Court orders that the improperly withheld documents shall be disclosed by no later than October 9, 2009.[2]

IT IS SO ORDERED.

Dated: September 24, 2009



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UNITED STATES DISTRICT JUDGE

[2] On his first day in office, President Obama issued a memorandum to the heads of all executive branch departments and agencies regarding the breadth of FOIA. *Memorandum for Heads of Executive Departments and Agencies*, 74 Fed. Reg. 4683 (Jan. 21, 2009). It provides, in pertinent part: "[a]ll agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles enshrined in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decision involving FOIA." *Id.* In addition, President Obama directed the Attorney General to issue new guidelines governing FOIA, in an effort to reaffirm "the commitment to accountability and transparency." *Id.* The Court finds its holding is consistent with the President's directive.

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ELECTRONIC FRONTIER FOUNDATION,

Plaintiff,

v.

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE and DEPARTMENT OF JUSTICE,

Defendants.

No. C 08-01023 JSW
No. C 08-02997 JSW

ORDER DENYING MOTION FOR LIMITED STAY PENDING APPEAL DETERMINATION BY SOLICITOR GENERAL AND DENYING MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION

_______________________________________/

Now before the Court is the motion filed by Defendants for a 60-day stay pending a determination by the Solicitor General whether or not to appeal the decision by this Court granting Plaintiff's motion for summary judgment and denying Defendants' motion for summary judgment dated September 24, 2009 ("Order"). The Court finds the motion suitable for resolution without oral argument. Therefore, the hearing set for October 9, 2009 is HEREBY VACATED. *See* N.D. Civ. L.R. 7-1(b). Also before the Court is Defendants' motion for leave to file a motion for reconsideration.

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1 Having considered the parties' pleadings and the relevant legal authority, the Court
2 DENIES Defendants' motion for a limited stay. Although Federal Rule of Appellate Procedure
3 4(a)(1)(B) permits the Government up to 60 days to determine whether to file an appeal, the
4 Court is not persuaded that it should exercise its discretion to stay its own order pending
5 "necessary consultations and deliberations to determine whether to appeal" the Court's Order.
6 (Reply at 2.) The disputed documents were the subject of an order granting preliminary
7 injunction dated April 2008, a subsequent delay in order for Defendants to re-evaluate their
8 position subject to the reformed regulations of the Obama Administration, and the matter has
9 been submitted on the parties' cross-motions long enough for the Defendants to consider their
10 options regarding a possible appeal in the event their motion was denied.

11 A motion for a stay pending appeal would be premature and is not properly before the
12 Court. *See* Fed. R. Civ. P. 62(c). The Court makes no finding as to whether a stay pending
13 appeal would be appropriate. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (holding that
14 the factors regulating the issuance of a stay pending appeal are: "(1) whether the stay applicant
15 has made a strong showing that he is likely to proceed on the merits; (1) whether the applicant
16 will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially
17 injure the other parties interested in the proceeding; and (4) where the public interest lies.")
18 Should Defendants decide to appeal the Court's Order and to seek a stay from this Court, they
19 will have to meet this high burden.

20 Defendants have also filed a motion for leave to file a motion for reconsideration of the
21 Order. A motion for reconsideration may be made on one of three grounds: (1) a material
22 difference in fact or law exists from that which was presented to the Court, which, in the
23 exercise of reasonable diligence, the party applying for reconsideration did not know at the time
24 of the order; (2) the emergence of new material facts or a change of law; or (3) a manifest
25 failure by the Court to consider material facts or dispositive legal arguments presented before
26 entry of the order. N.D. Civ. L.R. 7-9(b)(1)-(3). In addition, the moving party may not reargue
27 any written or oral argument previously asserted to the Court. N.D. Civ. L.R. 7-9(c).
28

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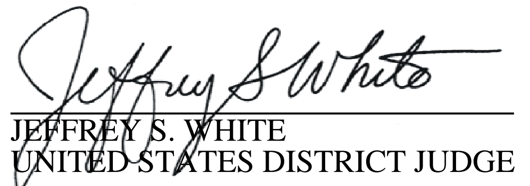
There is no material difference or emergence of new law or fact since issuance of the Order and the Court has considered the dispositive legal arguments advanced by Defendants in their original papers. The Court concludes that, upon review of the proffered motion for reconsideration, Defendants reargue points previously asserted to the Court and, in essence, merely express their disagreement with the Court's decision. For these reasons, Defendants' motion for leave to file a motion for reconsideration is DENIED.

IT IS SO ORDERED.

Dated: October 7, 2009



JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California

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6 IN THE UNITED STATES DISTRICT COURT
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FOR THE NORTHERN DISTRICT OF CALIFORNIA
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9 ELECTRONIC FRONTIER FOUNDATION,
10 Plaintiff, No. C 08-01023 JSW
No. C 08-02997 JSW
11 v.
12 OFFICE OF THE DIRECTOR OF
NATIONAL INTELLIGENCE and
13 DEPARTMENT OF JUSTICE,
Defendants.
14 ______________________________________/
15

ORDER DENYING EMERGENCY MOTION TO STAY

16 On September 24, 2009, this Court issued an order granting Plaintiff's motion for
17 summary judgment and denying Defendants' motion for summary judgment ("the Order").
18 (Docket no. 90.) The Court found that Defendants had improperly withheld documents
19 requested by Plaintiff under the Freedom of Information Act ("FOIA"). The documents
20 concerned efforts of various governmental agencies and the telecommunication industry to push
21 for amendments to the Foreign Intelligence Surveillance Act ("FISA") in order to provide
22 immunity from suit for the industry's participation in governmental warrantless surveillance
23 efforts. The Court required disclosure of the improperly withheld documents by no later than
24 October 9, 2009.
25 On September 30, 2009, Defendants filed a motion for a 60-day stay pending a
26 determination by the Solicitor General whether or not to appeal the Order by this Court.
27 (Docket no. 91.) On October 6, 2009, Defendants filed a motion for leave to file a motion for
28 reconsideration of portions of the Court's Order. (Docket no. 93.) After briefing was submitted

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on the motion for a temporary stay, on October 7, 2009, this Court denied Defendants' motion for a temporary stay based on the fact that the Court was not persuaded it should exercise its discretion to stay its own order pending the determination by the Solicitor General whether or not to appeal the Order. (Docket no. 97.) As no appeal had yet been filed, the Court found that a motion to stay pending appeal pursuant to Federal Rule of Civil Procedure 62(c) would have been premature and was not properly before the Court. (*Id.* at 2:11-12.) The Court also denied Defendants' motion for leave to file a motion for reconsideration because the Court concluded that Defendants merely reargued points already asserted and rejected by this Court in its original Order.

On October 8, 2009, this Court received notice that Defendants had filed a notice of appeal before the Ninth Circuit Court of Appeals of this Court's Order denying Defendants' motion for summary judgment and granting Plaintiff's cross motion as well as this Court's order denying Defendants' motion for a limited stay pending appeal determination and denying Defendants' motion for leave to file a motion for reconsideration. (Docket nos. 98, 99.)

On October 9, 2009, the date the disputed documents were due to be disclosed, Defendants filed an emergency motion before the Ninth Circuit Court of Appeals for a temporary stay pending decision of the Solicitor General regarding appeal of the Order of this Court. Defendants specifically appealed the decision of this Court not to grant a temporary 60-day stay pending the decision by the Solicitor General whether or not to appeal. Both parties agree that, although Defendants did in fact file a notice of appeal of the Order, Defendants did not – and have not – moved for a stay pending appeal. However, on October 9, 2009, the Ninth Circuit issued an order denying Defendants'/Appellants' motion for a stay pending appeal without prejudice to renewing the motion following presentation of such motion to the district court. (Docket no. 106.)

There has been no material change in circumstances and the Court is still not persuaded that it should exercise its discretion to stay its directive that Defendants disclose the disputed documents pending a decision whether or not to appeal the Court's original Order. At this point, because a notice of appeal has been filed, a properly noticed motion for a stay pending

1 appeal would have been appropriately filed before this Court. *See* Fed. R. Civ. P. 62(c).
2 However, such a motion is not before the Court and Defendants have repeatedly reiterated that
3 they have not filed such a motion. Regardless, the Court will address the substantive factors in
4 ruling on such a motion in order to obviate the need for the parties to return once again to this
5 Court before addressing the issue of a stay pending appeal.

6 In order to prevail on a motion to stay pending appeal, Defendants would have to
7 address the following factors: "(1) whether the stay applicant has made a strong showing that he
8 is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a
9 stay; (3) whether issuance of the stay will substantially injure the other parties interested in the
10 proceeding; and (4) where the public interest lies." *See Hilton v. Braunskill*, 481 U.S. 770, 776
11 (1987). In ruling on a motion for a stay pending appeal, courts employ "'two interrelated legal
12 tests' that 'represent the outer reaches of a single continuum.'" *Golden Gate Restaurant Ass'n v.*
13 *City and County of San Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008) (citing *Lopez v.*
14 *Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983)). "At one end of the continuum, the moving party
15 is required to show both a probability of success on the merits and the possibility of irreparable
16 injury." *Lopez*, 713 F.2d at 1435. "At the other end of the continuum, the moving party must
17 demonstrate that serious legal questions are raised and that the balance of hardships tips sharply
18 in its favor." *Id.*

19 Although Defendants have not moved for the relief of a stay pending appeal, the Court
20 finds that they have not met the burden of demonstrating that such a stay would be warranted
21 under the circumstances. In ruling on the original cross motions for summary judgment as well
22 as the motion for leave to file a motion for reconsideration, the Court remains unpersuaded by
23 the contentions advanced by Defendants in support of their refusal to disclose the subject
24 documents. The Court reviewed and explicitly rejected Defendants' contentions that any
25 exemption under FOIA or privilege barred disclosure of the disputed documents and
26 information. Having made no new argument, the Court does not find that Defendants have
27 made a strong showing that they are likely to prevail on the merits of their appeal. Second, the
28

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Court finds that the public interest and the balance of hardships squarely favor timely production of the requested documents.

Considering the delay in disclosure thus far in this matter, the current administration's pointed directive on transparency in government, and the public's renewed interest in the question of legal immunity for the telecommunications companies that participated in the warrantless wiretapping program while considering currently pending legislation repealing the amendments to FISA, the Court finds that the public interest lies in favor of disclosure. This Court has already found, when deciding the motion for preliminary injunction in this case, that "irreparable harm exists where Congress is considering legislation that would amend the FISA and the records may enable the public to participate meaningfully in the debate over such pending legislation." *Electronic Frontier Foundation v. Office of the Director of National Intelligence*, 542 F. Supp. 2d 1181, 1187 (N.D. Cal. 2008). The Court finds that same harm to the public interest exists in the context of the current debate regarding legislation designed to repeal the retroactive immunity for telecommunications companies. The unusual circumstances of the continued debate on the issue of legal immunity for the telecommunications companies that participated in the government's warrantless wiretapping program distinguish this case from the common FOIA matter. Although timely disclosure would negatively affect the Defendants' position on appeal, it is not clear that Defendants will even pursue the appeal already filed and, regardless, the Court finds the equities weigh in favor of denial of a stay.

Accordingly, the Court once again DENIES Defendants' renewed motion for a temporary stay pending decision by the Solicitor General regarding whether to pursue an appeal. In order to obviate the need for the parties to appear once again before this Court before seeking the same redress on appeal, the Court has addressed the pertinent factors it would analyze in denying a motion to stay this action pending appeal.

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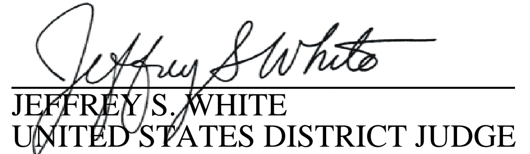
United States District Court
For the Northern District of California

1 The Court VACATES the hearing set for October 16, 2009 and CONTINUES the
2 temporary stay of Defendants' disclosure obligations until October 16, 2009 at 4:00 p.m. PST
3 pending further order of the Ninth Circuit Court of Appeals.
4
5 **IT IS SO ORDERED.**
6 Dated: October 13, 2009



JEFFREY S. WHITE
7 UNITED STATES DISTRICT JUDGE
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United States District Court
For the Northern District of California