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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO

ELECTRONIC FRONTIER FOUNDATION, Plaintiff, v. OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE and UNITED STATES DEPARTMENT OF JUSTICE, Defendants.	Nos. 08-2997 JSW & 08-1023 JSW **NOTICE OF MOTION, AND MOTION FOR A 60-DAY STAY PENDING APPEAL DETERMINATION BY SOLICITOR GENERAL** Date: TBD Time: 9:00 a.m. Courtroom: 2, 17th Floor

NOTICE is hereby given of the filing of this motion by defendants Office of the Director of National Intelligence and the Department of Justice. On September 24, 2009, the Court entered an order denying defendants' motion for summary judgment and granting plaintiff's cross-motion for summary judgment in this Freedom of Information Act ("FOIA") case. The Court ordered that "the improperly withheld documents shall be disclosed by no later than October 9, 2009." (Dkt. No. 90). Defendants respectfully request that the Court stay its order for 60 days from its date of entry, until November 23, 2009, to preserve the status quo pending a

determination by the Solicitor General as to whether an appeal should be taken. This case involves important, complicated issues that require consultations at the highest levels of the Government, making it extraordinarily difficult for the Solicitor General to decide whether to appeal this case by October 9. A stay of the Court's Sept. 24 disclosure order is necessary to avoid the irreparable harm that would result if the Government is forced to disclose its documents to the public before it has the opportunity to pursue its appellate rights. The undersigned counsel hereby certifies that she has conferred with counsel for plaintiff with respect to this motion, and that plaintiff opposes this request.

ARGUMENT

It is within the Court's discretion to determine whether it should stay its order pending appeal, or pending a determination of whether to appeal. See Britton v. Co-Op Banking Group, 916 F.2d 1405, 1412 (9th Cir. 1990). Although we are not seeking a full stay pending appeal at this time, but merely a 60-day stay to give the Solicitor General sufficient time to determine whether to appeal, the standard for a stay pending appeal is satisfied here. In the Ninth Circuit, "[t]he standard for evaluating stays pending appeal is similar to that employed by district courts in deciding whether to grant a preliminary injunction." Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983); see also Hilton v. Braunskill, 481 U.S. 770, 776 (1987) (setting forth four factors governing issuance of stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies"). The Ninth Circuit uses "two interrelated legal tests for the issuance of a preliminary injunction." Lopez, 713 F.2d at 1435. A moving party may either show a "probability of success on the merits and the possibility of irreparable injury" or "demonstrate that serious legal questions are raised and that the balance of hardships tips sharply in its favor." Id.

I. THE GOVERNMENT WILL SUFFER IRREPARABLY IF A STAY IS NOT GRANTED, AND THE BALANCE OF HARDSHIPS WEIGHS IN FAVOR OF THE GOVERNMENT.

Defendants request a 60-day stay of the Court's September 24, 2009 order to allow the

Government to engage in a deliberate consideration of its appellate options. The Federal Rules of Appellate Procedure give the United States 60 days from the date an order is issued to file a notice of appeal, rather than the 30 days afforded in suits between private parties, "to account for the slow machinery of government when the United States is a party responsible for prosecuting the action." U.S. ex rel. Eisenstein v. City of New York, 540 F.3d 94, 99 (2d Cir. 2008) (discussing Fed. R. Civ. P. 4(a)(1)(B)), aff'd, 129 S.Ct. 2230, 173 L.Ed.2d 1255 (2009). The rule recognizes that the "government's institutional decisionmaking practices require more time to decide whether to appeal . . . ." Id.

A 60-day stay of the Court's September 24, 2009 order would give the Solicitor General the benefit of the full time provided by Fed. R. Civ. P. 4(a)(1)(B) to consult with the multiple agencies and agency components involved in this case, and with other interested parties, to determine whether to appeal the Court's order. This case involves significant, complicated legal, factual and policy questions that require consultations at the highest levels of the Government. The primary issue is whether records reflecting communications between the Executive Branch and the Legislative Branch, and between the Executive Branch and telecommunications companies, regarding possible amendments to the Foreign Intelligence Surveillance Act ("FISA") are exempt from disclosure under FOIA's Exemption 5. The Solicitor General will need the full 60-day filing period afforded by Fed. R. Civ. P. 4(a)(1)(B) to engage in the necessary consultations and to determine whether to appeal the Court's September 24, 2009 order. The current disclosure order gives the Solicitor General only 15 days to perform this deliberative process – not only far less than the 60 days provided by the Federal Rules, but even less than the 30 days that the Rules give private parties to decide whether to appeal. The consultation and deliberation required in a case of this magnitude simply cannot be responsibly performed and completed in that highly compressed time frame.

In the absence of a stay, defendants would be required to disclose all of the withheld documents by October 9, 2009. The irreparable harm that would result is clear: once the documents have been surrendered, not only is any possible appeal moot, but the status quo can never be restored. The documents are in the public domain forever, and the breach of

confidentiality caused by public release cannot be undone. Accordingly, courts routinely grant stays in FOIA cases.[1] As the First Circuit recognized, in the absence of a stay, the appeal will become moot, and the vital public policy interest represented by the claimed exemption will be irretrievably harmed:

> [T]he Constitution and laws entitle litigants to have their cases independently reviewed by an appellate tribunal. Meaningful review entails having the reviewing court take a fresh look at the decision of the trial court before it becomes irrevocable. Appellants' right of appeal here will become moot unless the stay is continued pending determination of the appeals. Once the documents are surrendered pursuant to the lower court's order, confidentiality will be lost for all time. The status quo could never be restored.

Providence Journal, 595 F.2d at 890 (emphasis added). The need to preserve the Government's right to appellate review of a disclosure order is "perhaps the most compelling justification" for the grant of a stay. John Doe Agency, 488 U.S. at 1309 (Marshall, J., in chambers). In this case, once the Government is forced to disclose the withheld documents to plaintiff, its right to a meaningful appeal will be lost, and the status quo cannot be restored. In sum, there is no doubt that the harm from compliance with the September 24, 2009 order is both significant and irreparable.[2]

On the other side of this balance, a 60-day stay would not substantially harm plaintiff. Should the Government decide not to appeal, plaintiff will obtain access to the documents it seeks. The most that plaintiff suffers is a delay of 45 days beyond the current disclosure

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[1] See Dep't of Commerce v. Assembly of the State of California, 501 U.S. 1272 (1991); DOJ v. Rosenfeld, 501 U.S. 1227 (1991); John Doe Agency v. John Doe Corp., 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers); Taylor v. Dep't of the Army, 684 F.2d 99, 102 (D.C. Cir. 1982); see also Martin v. IRS, 857 F.2d 722, 724 (10th Cir. 1988); Acumenics Research & Technology v. DOJ, 843 F.2d 800, 803 (4th Cir. 1988); Coastal States Gas Corp. v. Dep't of Energy, 644 F.2d 969, 973-74 (3d Cir. 1981); Providence Journal Co. v. FBI, 595 F.2d 889, 889-90 (1st Cir. 1979).

[2] It is no answer to say that the Government can avoid this injury by taking an immediate appeal before October 9. Filing an appeal before that date would not itself excuse the Government from disclosing the documents, and forcing the Solicitor General to decide whether to appeal in that highly compressed time frame would damage the deliberative process that the existing 60-day appeal period is designed to protect.

deadline of October 9.[3] Finally, the public interest militates in favor of a stay. Exemption 5 is intended to protect the confidentiality of the Government's deliberative process and attorney work product. See Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8-9 (2001). These interests will be irrevocably compromised if statutorily-exempt documents are ordered disclosed before completion of appellate review. Issuance of a stay, in contrast, will not harm the public interest. Like plaintiff, the most the public interest stands to lose from the Court granting defendants' request is having to wait an additional 45 days for release of the documents.

II. THE GOVERNMENT IS LIKELY TO PREVAIL ON APPEAL, IF THE SOLICITOR GENERAL AUTHORIZES ONE.

The Court is already familiar with the Government's positions regarding Exemption 5 and Exemption 6, and no purpose would be served by repeating them here. While we recognize that the Court has rejected those positions, there unquestionably are substantial grounds for the Government's positions on these important and unsettled issues, and there is at least a reasonable prospect that the Court of Appeals will agree with the Government in one or more regards. Moreover, even if this Court's conclusions regarding Exemption 5 and Exemption 6 are accepted, the Court erred in several other ways in granting plaintiff's cross-motion for summary judgment and ordering the Government to disclose the withheld documents.

First, the Court failed to reach the Government's claims of privilege over responsive documents that were not exchanged between ODNI and DOJ officials and congressional staff or representatives of telecommunications companies. While the Court correctly noted that the "bulk" of the documents at issue consists of confidential email messages concerning FISA reform legislation exchanged between ODNI or DOJ officials and congressional staff (Dkt. No. 90 at 7), many of the documents at issue were not exchanged with Congress but remained within the Executive Branch. These documents were responsive to plaintiff's FOIA requests because of the breadth of those requests: plaintiff requested all records concerning communications between ODNI or DOJ officials and congressional staff (or representatives of

[3] If the Solicitor General authorizes an appeal, defendants would seek a stay pending appeal at that time.

telecommunications companies) concerning amendments to FISA. This is a much broader request than one that seeks only communications between ODNI or DOJ officials and congressional staff (or representatives of telecommunications companies) concerning amendments to FISA. Thus, email exchanges between agency officials, in which they discuss a communication with a congressional staffer concerning amendments to FISA, were responsive to the request and were included within defendants' Exemption 5 claim. Indeed, the parties both acknowledged in their briefs that the withheld documents at issue include email communications that Executive Branch officials exchanged with each other concerning amendments to FISA. See, e.g., Plaintiff's Opposition to Defendants' Consolidated Motion for Summary Judgment and Cross-Motion for Summary Judgment (Dkt. No. 43) at 14 ("While the defendants have shown that some of the records at issue in this case qualify as 'inter-agency or intra-agency memoranda' [citing defendants' Vaughn indices], the government has failed to show that a great deal of withheld material meets this standard."); Defendants' Consolidated Motion for Summary Judgment ("Defendants' Opening Brief") (Dkt. No. 29) at 7 ("DOJ and ODNI staff also exchanged email with each other and with other Executive Branch staff in preparation for, or in order to deliberate on, these inter-Branch communications."), 14 ("Many of the records requested by plaintiff are quintessentially pre-decisional and deliberative because they consist of communications within the Executive Branch, or between high-level Executive Branch officials in policy-oriented positions and Members of Congress or their staffs, concerning proposed, hotly debated FISA amendments."), 15 ("ODNI withheld pursuant to the deliberative process privilege memorandums for the record that were created by ODNI staff when they returned from meetings or briefings with Congress.").

Nonetheless, the Court simply did not address the issue of whether these documents were properly withheld. The Court's ruling that communications that were shared with government officials outside the Executive Branch did not meet Exemption 5's inter-agency or intra-agency threshold requirement clearly does not apply to documents that were exchanged among officials within the same agency, or among officials in different agencies, or among agency officials and White House staff. The Court determined, however, that it did not need to reach any of

defendants' arguments on the applicability of the deliberative process privilege, the presidential communications privilege, the common interest privilege, or the attorney work product doctrine, having found that defendants failed to establish the threshold requirement. We respectfully submit that the Court erred in not deciding whether communications that were not shared with individuals outside the Executive Branch, although reflecting communications between ODNI or DOJ officials and congressional staff or telecommunications companies, were protected from disclosure under FOIA's Exemption 5.

Second, the Court did not address in any meaningful way defendants' argument that communications between ODNI or DOJ officials and representatives of the telecommunications companies concerning amendments to FISA satisfy the inter-agency or intra-agency threshold requirement because these parties were communicating about common interests they shared as co-defendants in litigation. See Defendants' Opening Brief at 23-26, citing Hunton & Williams, LLP v. DOJ, 2008 WL 906783 at * 5 (E.D. Va. Mar. 31, 2008) (holding that if documents exchanged between DOJ and non-government entity satisfy the requirements of the common interest privilege, that is sufficient to create an inter-agency or intra-agency relationship for purposes of FOIA's Exemption 5); Defendants' Opposition to Plaintiff's Cross-Motion for Summary Judgment and Reply in Support of Defendants' Consolidated Motion for Summary Judgment ("Defendants' Reply Brief") (Dkt. No. 46) at 10 n. 2, 21-24. The Court's conclusion that these communications are not protected from disclosure under Exemption 5 because the telecommunications companies communicated with the Government to advance their own interests, relying on Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 11 (2001), misses the Government's common interest argument, to which Klamath does not speak.

Third, the Court did not rule on defendants' assertion of Exemption 3 to withhold the identities of telecommunications companies' employees and agents. The Court acknowledged that defendants claimed that this information was protected by Exemptions 3 and 6, and that EFF abandoned its challenge to the withholding of any material under Exemption 3. Dkt. No. 90 at 3-4, 9 & n. 1. The Court nevertheless held that this information must be disclosed because the Court rejected defendants' Exemption 6 argument. Defendants properly asserted and supported

their claim that disclosure of information as to whether any particular telecommunications carrier has assisted, or may in the future assist, the Government with intelligence activities would reveal intelligence sources and methods and is, therefore, exempt from disclosure pursuant to well-recognized non-disclosure statutes and Exemption 3. Defendants' Opening Brief at 29-31; Defendants' Reply Brief at 24-25. The Court erred by not addressing and ruling on the Government's Exemption 3 claim.

For at least these reasons, a potential appeal of the Court's September 24, 2009 order would raise serious legal questions and is likely to succeed.[4] Defendants respectfully request that the Court stay its order for 60 days to give the Solicitor General sufficient time to determine whether to pursue such an appeal.

Dated: Sept. 30, 2009

Respectfully submitted,

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[4] Defendants intend to request leave to file a motion for reconsideration to give the Court the opportunity to correct these errors in its order. Granting the requested 60-day stay would in addition give the Court an adequate opportunity to consider and rule on the forthcoming motion.