

UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA

ELECTRONIC FRONTIER )  
FOUNDATION, )  
 )  
Plaintiff, )  
 ) Civ. A. No. 06-1708 (CKK)  
v. )  
 )  
DEPARTMENT OF JUSTICE, )  
 )  
Defendant. )  
\_\_\_\_\_ )

**MOTION FOR AN OPEN AMERICA STAY**

Defendant Department of Justice, on behalf of the Federal Bureau of Investigation (“FBI”), hereby moves for a stay of proceedings pursuant to 5 U.S.C. § 552(a)(6)(C), and Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976). In support of this motion, defendant respectfully submits the attached memorandum of points and authorities with a supporting declaration (attached as Exhibit 1), and a proposed Order. Plaintiff has been consulted as required by LCvR 7(m) and has indicated it opposes this motion, and plaintiff and defendant have jointly agreed upon a proposed briefing schedule for defendant’s motion for an Open America stay. On January 9, 2007, the Court adopted plaintiff and defendant’s proposed briefing schedule by minute entry order.

Respectfully submitted,

KENNETH L. WAINSTEIN, D.C. Bar # 451058  
United States Attorney  
PETER D. KEISLER  
Assistant Attorney General  
ELIZABETH J. SHAPIRO  
Assistant Director

\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_

HEATHER PHILLIPS, CA Bar #191620  
Trial Attorney  
United States Department of Justice  
Federal Programs Branch  
20 Massachusetts Ave., N.W.  
Washington, D.C. 20001  
(202) 616-0679  
Heather.phillips@usdoj.gov



months for plaintiff's FOIA request to rise to the top of the backlog queue for large requests and 24 months for processing), or until May of 2009, to process plaintiff's FOIA request and release any responsive records. See Hardy Declaration ("Hardy Decl.") attached hereto as Exhibit 1.

The FBI acknowledges that it is asking the Court for a lengthy stay, however the FBI's request meets the standards established under Open America, and a stay until May of 2009 is warranted by the facts of this case. The FBI is processing plaintiff's request in accordance with established policies that allow for the equitable and orderly processing of FOIA requests on a first-in/first-out basis. In addition, the FBI attempted to negotiate with plaintiff to narrow the scope of responsive records, but plaintiff declined. Although the FBI has a backlog of pending FOIA requests, it is making substantial efforts to reduce the backlog and has achieved significant reductions in backlog and processing time. Nevertheless, the volume of potentially responsive records in this case, the large number of pending requests that pre-date plaintiff's request, and the limited resources currently available to the FBI for the processing of FOIA requests, constitute exceptional circumstances necessitating a stay so that the FBI may complete its review of the records.

## **II. STATEMENT OF FACTS**

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

#### **1. Duties and Personnel Divisions**

The Record/Information Dissemination Section ("RIDS"), Records Management Division ("RMD"), at FBI Headquarters ("FBIHQ") in Washington, D.C., has the collective mission of effectively planning, developing, directing, and managing responses to requests for access to FBI records and information pursuant to FOIA; Privacy Act; Executive Order 12958, as amended; Presidential, Attorney General, and FBI policies and procedures; judicial decisions;

and Presidential and Congressional directives. Hardy Decl. at ¶ 2. RIDS also provides prepublication review of material written by current and/or former FBI employees concerning FBI matters as mandated by the FBI's employment agreement, executes the FBI's historic declassification program, and assists in managing defense discovery efforts in large counterterrorism criminal trials. Id. at ¶ 22.

Over the years, FOIA management at FBIHQ has continuously re-engineered the process of responding to FOIA/Privacy Act requests in an effort to better serve the needs of requesters who seek information from the FBI. Id. at ¶ 21. In 2002, reorganization of various divisions at FBIHQ resulted in the formation of the RMD, which now handles all FOIA/Privacy Act requests through RIDS. Id. These re-engineering efforts resulted in a new organizational plan for RIDS. Id.

RIDS currently employs approximately 203 personnel, most of whom are Legal Administrative Specialists (“LAS”), and who are assigned among the 11 units within RIDS. Id. at ¶ 22. RIDS employees intake, review, process, and release information in response to FOIA and Privacy Act requests. Id. To accomplish this mission, RIDS consists of the following eleven Units: one Service Request Unit (“SRU”), two Work Process Units (“WPU”), three Classification Units (“CU”), four FOIPA Units (“Disclosure Units”),<sup>1</sup> and the Litigation Support Unit (“LSU”). Id.

The SRU contains the Negotiation Team, which works with individuals whose requests have generated a large volume of records, in an attempt to narrow the scope of responsive records and facilitate a more rapid response. Id. Since 1995, this team has been able to reduce

---

<sup>1</sup> One of the four FOIPA Disclosure Units operates at an off-site location in Savannah, Georgia. Hardy Decl. at ¶ 22 n.3.

the scope of FOIA/Privacy Act requests by over 13 million pages. Id. The SRU has a RIDS Public Information Official, who is responsible for assisting requesters with issues concerning their request. The Government Response Team (“GRT”), also a part of the SRU, provides timely feedback to other federal agencies and other DOJ components with regard to referrals of documents which are either FBI-originated or contain FBI-originated information. Id. Referred documents are sent to the FBI for consultation or for direct response to the requester. Id. Finally, the SRU handles administrative appeals and criminal discovery matters. Id.

The two WPU are responsible for reviewing and sorting all correspondence/incoming requests for information from the public, Congress, Presidential Libraries, foreign governments, other federal and state agencies, and other FBI entities (i.e., FBI field offices, Legal Attaches). Id. The WPU conduct searches of the General Indices (described below) for identifiable records, confirm responsive documents, stamp files for retention, address fee issues (other than fee waiver reviews), retrieve and forward files for scanning into FDPS, respond to status inquiries, and maintain requests prior to their transfer to the Disclosure Units. Id.

The WPU handle the various initial tasks required to “perfect” a FOIA/Privacy Act request, including sending letters to acknowledge requests, advising a requester to provide identifying data so that an accurate records search can be made and/or to submit a notarized signature/Privacy Act waiver, and advising a requester when no responsive records are located. Id. The WPU also open new requests, assign a FOIA/Privacy Act Request Number, and enter the perfected requests into the FDPS tracking system. Id. The WPU are responsible for preparing perfected requests for transfer to the four Disclosure Units. Id. A request is considered “perfected” when all administrative tasks have been completed and all responsive documents have been scanned into FDPS. Id. Once a request has been perfected it is placed in

the “perfected backlog” for assignment to a FOIA Disclosure Unit for processing. Id.

To ensure fairness to all requesters and to equitably administer the deluge of FOIA/Privacy Act requests received by the FBI, a request is assigned based on the date of receipt on a first in/first out basis within each of three queues. Id. The FBI uses a three-queue system as a way to fairly assign and process new requests. Id. The three-queue system went into effect on July 10, 1997, replacing the prior system of only two queues (one for 100 pages or less, the other for requests greater than 100 pages). Id. The three-queue system established multi-track processing for requests, based on the amount of time and work involved in handling a particular request. Id. The system nevertheless preserves the principle that, within the three queues, requests are still assigned and processed on a first-in/first out basis. Id.

The placement of a request in one of the three queues depends on the total amount of material responsive to that request: 500 pages or less (“small queue”), 501 to 2,500 pages (“medium queue”), or more than 2,500 pages (“large queue”). Id. This standard operating procedure, coupled with the FBI’s first in/first out policy, permits requests to be addressed in the order in which they are received, while obviating the inequities to other requesters whose interests relate only to a small number of documents. Id. As described above, individuals whose requests have been placed in the large queue are given the opportunity, through contact with the SRU’s Negotiation Team, to reduce the scope of their requests and accelerate assignment of their requests by relocating them to a more advantageous queue. Id.

The three CUs are responsible for complying with the classification/declassification review of FBI records under Executive Order 12958, as amended, and for conducting mandatory declassification review consistent with Executive Order 12958, as amended. Id. The CUs review documents responsive to FOIA/Privacy Act requests, criminal and civil discovery

requests, Congressional and Presidential mandates, Presidential Library requests, mandatory declassification requests, Office of Inspector General Reports, and other federal agency requests in order to determine whether such material should remain classified or be declassified. Id. In addition, the CUs review and prepare classified material for review by the Department of Justice Review Committee (“DRC”).<sup>2</sup> Id.

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

---

<sup>2</sup> The DRC is the FBI's appellate authority with regard to the implementation and administration of Executive Order 12958, as amended, and related directives and guidelines concerning classified information. Hardy Decl. at ¶ 22 n.8.

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

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

Consistent with standard administrative procedure, any records referred to the FBI from other DOJ components or other government agencies in response to a particular request are added to that pending FOIA/Privacy Act request. Id. at ¶ 24. This process is an equitable way for RIDS to maintain administrative control of FOIA/Privacy Act requests. Id. Under this

system, the same LAS assigned to process a particular request will also handle the review of records referred by other DOJ components or government agencies. Id. By ensuring continuity in the processing of FOIA requests, this system is not only fair to all persons seeking information under the FOIA, but is also administratively efficient, since the same issues presented by the referred records will already have been addressed by the LAS in processing the responsive FBI files. Id.

## **2. FBI Systems of Records**

The Central Records System (“CRS”) enables the FBI to maintain all information which it has acquired in the course of fulfilling its mandated law enforcement responsibilities. Id. at ¶ 29. The records maintained in the CRS consist of administrative, applicant, criminal, personnel, and other files compiled for law enforcement purposes. Id. The CRS is organized into a numerical sequence of files, called FBI “classifications,” which are broken down according to subject matter. The subject matter of a file may correspond to an individual, organization, company, publication, activity, or foreign intelligence matter (or program). Id. Certain records in the CRS are maintained at FBIHQ, whereas records that are pertinent to specific field offices of the FBI are maintained in those field offices. Id. While the CRS is primarily designed to serve as an investigative tool, the FBI searches the CRS for documents that are potentially responsive to FOIA/Privacy Act requests. Id. The mechanism that the FBI uses to search the CRS is the Automated Case Support System (“ACS”). Id.

On or about October 16, 1995, the ACS was implemented for all Field Offices, Legal Attaches, and FBIHQ in order to consolidate portions of the CRS that were previously automated. Id. at ¶ 20. The ACS can be described as an internal computerized subsystem of the CRS. Id. Because the CRS cannot electronically query the case files for data, such as an

individual's name or social security number, the required information is duplicated and moved to the ACS so that it can be searched. Id. More than 105 million records from the CRS were converted from automated systems previously utilized by the FBI. Id. Automation did not change the CRS; instead, automation has facilitated more economic and expeditious access to records maintained in the CRS. Id.

The retrieval of data from the CRS is made possible through the ACS using the General Indices, which are arranged in alphabetical order. Id. at ¶ 31. The entries in the General Indices fall into two categories: (a) a “main” entry, or “main” file, carries the name corresponding with a subject of a file contained in the CRS; and (b) “reference” entries, sometimes called “cross-references,” are generally only a mere mention or reference to an individual, organization, or other subject matter, contained in a document located in another “main” file on a different subject matter. Id. The General Indices to the CRS files are the means by which the FBI can determine what retrievable information, if any, the FBI may have in its CRS files on a particular subject matter or individual. Id. at ¶ 34.

#### **B. Plaintiff’s FOIA Request**

By letter dated August 11, 2006, plaintiff submitted a FOIA request to the FBI. Id. at ¶ 25. Plaintiff’s request sought “all agency records (including, but not limited to, electronic records) concerning electronic surveillance systems known as DCS-3000 and Red Hook.” Id. at Exhibit A, attached thereto. By two separate letters both dated August 22, 2006, FBIHQ acknowledged receipt of plaintiff’s FOIA request, and notified plaintiff that the request for DCS-3000 and Red Hook had been assigned FOIPA Request Nos. 1056287-000, and 1056307-000, respectively. Id. at Exhibit B, attached thereto. By letter dated August 30, 2006, FBIHQ advised plaintiffs that a search of the automated indices to the FBI’s Central Records System (“CRS”)

located no main Headquarters files responsive to plaintiff's DCS-3000 request. Id. at Exhibit C, attached thereto. FBIHQ conducted a similar search for plaintiff's Red Hook request, and that search located one main Headquarters file. Id. ¶ 27 n.10.

In addition to initiating a standard search of records in the CRS, the FBI also conducted an individualized inquiry of the most logical offices at FBIHQ which could have potentially responsive records. Id. at ¶ 37. RIDS prepared and circulated an Electronic Communication ("EC") to those FBIHQ divisions and offices most likely to possess potentially responsive records requesting all personnel to conduct a thorough search of any documents in their possession, including unserialized copies and e-mails responsive to plaintiff's request.<sup>3</sup> Id. As a result of these search efforts, which are now complete, a total of approximately 20,000 pages potentially responsive to plaintiff's request were located. Id. at ¶ 38.

Plaintiff was notified of the large volume of potentially responsive documents, and by letter dated January 9, 2007, FBIHQ provided plaintiff with documentation of a telephone conversation between a RIDS employee and plaintiff's counsel, Marcia Hofmann. Id. at ¶ 28. This letter reiterated that: (a) the records found to be responsive to plaintiffs' requests totaled approximately 20,000 pages; and (b) the FBI, in discussions with Ms. Hofmann, attempted to narrow the scope of the request in order to reduce the numbers of potentially-responsive records, thereby accelerating the processing of plaintiff's request, but these efforts were unsuccessful. Id. at Exhibit D, attached thereto.

The 20,000 potentially-responsive documents are being scanned into electronic format

---

<sup>3</sup> For administrative convenience, although initially assigned two FOIA request numbers, the two requests were combined into one search EC and were treated as if they were one request. Hardy Decl. at ¶ 37 n.13.

and will be forwarded to the perfected-case backlog for assignment to a FOIPA processing analyst. Id. at ¶ 39. Based on the page count of approximately 20,000 pages, plaintiff's request is currently in the large queue of the perfected-case backlog. Id. As explained above, in order to ensure fairness to all requesters and to equitably administer the deluge of FOIA/Privacy Act requests received by the FBI, a request is assigned based on the date of receipt on a first in/first out basis from within each of three queues. Id. Based on the date of plaintiff's request – August 11, 2006 – there are approximately five (5) requests, which total 35,801 pages, pending ahead of plaintiff's request in the large queue. Id.

The FBI anticipates that the earliest plaintiff's request will be assigned to a Disclosure Unit for processing is in approximately three (3) months, which is the estimated time for this request to rise to the top of the queue.<sup>4</sup> Id. at ¶ 39. The FBI will be able to process approximately 800 pages every four (4) weeks, and anticipates that it will require approximately twenty-four (24) months for responsive documents to be processed and released to plaintiffs. Id. Due to the size and complexity of the material, which consist of a number of highly technical documents as well as lengthy email trails, the FBI will release documents on a rolling basis, that is, as a significant number of the documents are processed they will be released approximately

---

<sup>4</sup> If, for example, in a later-filed request, the FBI and/or DOJ grants a request for expedited processing (or expedition is ordered by a court), that request is moved to the head of the backlog queue. Hardy Decl. at ¶ 39 n.14. As a result, a request that has been granted expedition could conceivably jump ahead of plaintiff's request as would any perfected request with a date antecedent to that of plaintiff. Id.

every four (4) weeks until the production is complete, rather than delay the release until the entire production is ready. Id.

C. **Facts Supporting an Open America Stay: The FBI's Increasing FOIA Workload, Steps Taken to Address Backlog and Processing Delays, and Competing Demands on FBI Resources**

The number of FOIA and Privacy Act requests received by the FBI has increased dramatically from the early 1980s. Hardy Decl. at ¶ 5. The Freedom of Information and Privacy Acts ("FOIPA") Section [the predecessor to RIDS] began processing requests in 1975. Id. Initially overwhelmed by the number of requests, by 1981, the FBI had maintained a steady backlog of between 4,000-7,000 requests. Id. Then, beginning in 1985, the unavailability of additional employees and a steady, large stream of new requests increased the backlog substantially, until in 1996 there were in excess of 16,000 requests. Id. In 1996, the median time for a pending request was in excess of three years. Id.

In the past, the FBI repeatedly sought additional funding for the creation of new FOIPA positions. Id. at ¶ 6. For example, Congress appropriated funds in the 1997 fiscal year budget providing for 129 additional employees, and in the 1998 fiscal year budget providing for 239 additional employees. Id. In 2002, RIDS moved to paperless processing through its FOIPA Document Processing System ("FDPS"). Id. The FDPS allows the user to scan FBI files, documents, and correspondence, and enables the user to process pages electronically rather than manually. Id. RIDS is now using this system to process virtually all of its FOIA/Privacy Act requests. Id. The new process required the FBI to redistribute some of its FOIPA personnel to other sections within the RMD in order to support the scanning and archival services necessary for automated processing. Id. Despite an additional reduction of RIDS personnel following September 11, 2001, the new efficiencies stemming from FDPS allowed the FBI to make great

strides in reducing its FOIA/Privacy Act backlog. Id. For example, the backlog of requests in RIDS in various stages of processing between December 31, 1996 and December 31, 2006, dropped from 16,244 to 1,672. Id. The median processing time for a pending request dropped from 1,160 days on December 31, 1996, to 156 days on December 31, 2006. Id.

During 2006 there was an increase in requests, up from an average of 911 per month in 2005 to an average of 1,277 per month. Id. at ¶ 7. Despite this increase, the FBI met or surpassed its primary goal of reducing the time required to process requests. Id. In this regard, the median time for processing small requests (less than 500 pages) decreased by 10%; the median time for medium requests (501 pages -2500 pages) decreased by 16%. Id. However, the median time for the processing of large queue requests (over 2500 pages) increased by 22 %. Id. This increase was due to a concerted effort to reduce the backlog of the older, larger cases. Id. This effort resulted in the number of pending large queue requests decreasing from 122 to 151. Id.

RIDS has taken all possible steps – using available technologies – to aid in the streamlining and reduction of the FOIA/Privacy Act backlog. Id. at ¶ 8. These include the use of direct on-line computer searches to locate responsive records, the use of forms that eliminate delays associated with word processing, the formation of specific teams to target backlog issues, the development of alternative methods to handle consultations with other government agencies, and the formation of the RIDS FOIPA Litigation Services Unit (“LSU”), which handles all FOIA/Privacy Act litigation. Id. RIDS has a FOIPA Process Board and an Information Technology Change Management Board to improve existing processes, including the use of information technology enhancements to the existing automated processing system. Id. These boards provide a systematic methodology to implement continuous process improvement for the

future. Id.

Two steps the FBI is taking to update its technology and facilities have the potential to reduce dramatically the FBI FOIA/Privacy Act processing times: (a) development of the electronic investigative case file (the Sentinel Project) and (b) establishment of an FBI Central Records Complex. Id. at ¶ 9. The Sentinel Project is an on-going, multi-year project that will result in the elimination of paper investigative case files. Id. With an embedded Records Management Application (“RMA”), FBI employees will be able to search for and retrieve these records electronically. Id. Concurrently, the FBI has begun the process of designing and building a new, state-of-the art Central Records Complex (“CRC”) in Frederick County, Virginia. Id. This initiative will consolidate all closed FBI paper records from more than 265 different storage locations to one central site. Id. When requested, paper records will be scanned and forwarded electronically. Id. These initiatives will significantly improve RIDS’s search and record retrieval capabilities by increasing search accuracy, by decreasing search time, by reducing lost files and missing serials, and eliminating the manual movement of files. Id. RIDS expects these initiatives, after they are fully implemented, to reduce by 40% current processing times. Id. Phase One of the Sentinel Program is scheduled to be launched in the spring of 2007. Id. In 2006, RIDS completed its first phase of moving to an interim facility in Frederick County, Virginia, to recruit and train new employees in anticipation of the construction of the CRC. Id. While this move is essential to future FBI FOIA/Privacy Act operations, it has created significant strains on the FBI’s FOIA/Privacy Act resources. Id.

Although the decision regarding the exact location of the permanent CRC site in Frederick County, Virginia, is still pending at the U.S. General Services Administration, the FBI has begun the temporary relocation of RMD sections to interim sites in Frederick County,

Virginia, and will continue with a full relocation of its workforce once the permanent CRC is built and ready for occupancy, sometime around the year 2010. Id. at ¶ 11. The interim sites are approximately 90 miles out of the Washington, D.C. metropolitan area. Id.

RIDS began relocation of its operations in February of 2006 by establishing an advance team to prepare for the eventual relocation of RIDS in incremental stages. Id. at ¶ 12. In the summer of 2006, RIDS began the first phase of its relocation by reassigning five and one half of its ten unit functions to an interim site. Id. The reassigned sections were half of the Service Request Unit, and all of Work Process Unit One, Work Process Unit Two, FOIPA Unit One, FOIPA Unit Two, and Classification Unit Two. Id. To ensure continuing RIDS operations during the move, half of the Service Request Unit function and the functions of FOIPA Unit Three, Classification Unit One, Classification Unit Three, and the Litigation Support Unit remain at FBIHQ. Id. These FBIHQ units, with a total of 85 employees currently on board, consist of the most senior and experienced RIDS employees. Id.

As evidenced by the FBI's 2006 FOIA/Privacy Act statistics discussed above, RIDS is making every effort to minimize disruption to operations during this transition period. Id. at ¶ 13. This has been made all the more challenging because many employees have decided not to transfer with their unit function, opting to retire or find other jobs rather than relocate to Frederick County, Virginia. Id. Unfortunately, many of these employees are among the most senior and experienced in their area of expertise. Id. Since RMD announced its off-site relocation plans, a total of 58 former RIDS employees have either resigned, retired, or found other jobs in the Washington, D.C., area, rather than relocate with their unit. Id. To date, a total of 64 RIDS employees from FBIHQ relocated with their unit to Frederick County, Virginia. Id.

To bring staffing levels back up, the FBI is engaged in aggressive and intense recruitment

and hiring efforts in the Frederick County, Virginia area. Id. at ¶ 14. In response to several recent postings for new hires, RIDS selected 333 individuals for interviews in June and November of 2005 and in January, February, March, August, October, and December of 2006, collectively. Id. Of the 333 selected for interview, 82 candidates advised they were no longer interested prior to interview; of the remaining 251 candidates interviewed, 94 either declined the initial offer of conditional employment following their interview or were disqualified during their background investigation, 35 employees have come on board, and the remaining are still pending in the background process. Id. Past experience has shown that approximately 33% of those in FBI background investigations successfully complete the process. Id. With approximately 203 employees currently on the rolls, RIDS is 115 positions under its funded staffing level of 311 employees due to attrition and reasons attributable to the move. Id.

In addition, in light of the continuing resolution pursuant to which much of the federal government is operating, and which has resulted in a hiring freeze until further notice, RMD may not be able to hire any new support employees in the immediate future. Id. The new RIDS employees who have less than one year of experience are in various stages of professional development, but none are yet operating as experienced employees; it takes an average of three years to adequately train a new employee in the FOIA/PA process to be able to work independently in a productive, efficient, and effective manner. Id. Accordingly, RIDS has only a limited number of experienced employees processing FOIA/PA requests at this time. Id.

Simultaneously with this reduction in personnel, RIDS has experienced a significant increase in its FOIA litigation workload, including several urgent and competing federal district court litigation deadlines that have impacted the FBI's ability to process recently located records. Id. at ¶¶ 10, 15.

In Gerstein v. CIA, et al., Civ. A. No. 06-4643 (N.D. Cal.), plaintiff seeks, inter alia, access to all documents related to criminal referrals submitted to the U.S. Department of Justice or the FBI since January 1, 2001, regarding unauthorized disclosures of classified information to the press or public. Hardy Decl. at ¶ 16. The court has ordered the FBI to expedite plaintiff's request, which has resulted in the FBI's intense search and identification of over 2,500 pages of potentially responsive records, with the search still ongoing. Id. The FBI sought and received an additional 120 days from the original date of January 5, 2007, initially ordered by the court to complete its review and processing of this material. Id. The FBI must now review, process and release over 2,500 pages by April 27, 2007. Id.

In the FBI's largest FOIA litigation in its history, Rosenfeld v. U.S. Department of Justice, et al., Civ. A. Nos. 90-3576 MHP, 85-1709 MHP and 85-2247 (N.D. Cal.), the FBI has been ordered to conduct hand searches of its COINTELPRO files for numerous subjects and to open 13 new FOIPA requests on individual subjects. Hardy Decl. at ¶ 17. In order to comply with these demands, the FBI has again had to realign its personnel resources and has made a substantial commitment of resources to address these court-ordered issues. Id.

In Hidalgo v. FBI, Civ. A. No. 06-CV-1513 (D.D.C.), the FBI has had to review and process over 3,000 pages of documents responsive to plaintiff's request for documents related to an acknowledged FBI informant, with a completion date of March 16, 2007. Hardy Decl. at ¶ 18. Also, in Vampire Nation v. Dep't of Justice, et al., Civ. A. No. 06-CV-01950 (D.D.C.), the FBI is requesting an Open America stay from the Court in the next several weeks. Hardy Decl. at ¶ 19. If the request is either denied by the court or substantially reduced, additional shifting of already strained employee resources will become necessary. Id.

Finally, in the past, the backlog in RIDS has been exacerbated by the high volume of

administrative appeals which require review and response by the RIDS personnel. Id. at ¶ 20. RIDS personnel work closely with the staff of the U.S. Department of Justice, Office of Information and Privacy (“OIP”), to review and assist with OIP’s responses and determinations of pending appeals. Id. During 2006, the FBI received a total of 1015 administrative appeals. As of January 31, 2007, 525 administrative appeals were pending resolution. Id. While this number does not represent an increase, the number of appeals remains another significant drain on resources, because inevitably the time spent by RIDS personnel handling these appeals reduces the amount of time for regular processing duties. Id.

### **III. ARGUMENT**

#### **A. Legal Standard For a Stay of Proceedings**

An agency receiving a FOIA request generally must determine whether to comply with the request within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i). Once the initial twenty days has passed without an agency determination on the request, the FOIA requester “shall be deemed to have exhausted his administrative remedies,” Id. at § 552(a)(6)(C)(I), and the requestor can file suit in federal court. The Court may, however, “allow the agency additional time to complete its review of the records” upon a showing that “exceptional circumstances exist and that the agency is exercising due diligence in responding to the request.” Id. § 552(a)(6)(C)(i). This provision “was designed and inserted specifically as a safety valve for [FOIA].” Open America, 547 F.2d at 610.

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

(ii) For purposes of this subparagraph [5 U.S.C. § 552(a)(6)(C)], the term

“exceptional circumstances” does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

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

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

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

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

Id. at 616 (quoting 5 U.S.C. § 552(a)(6)(C)).<sup>6</sup> See also Oglesby v. Department of the Army, 920 F.2d 57, 64 (D.C. Cir. 1990) (“Frequently, if the agency is working diligently, but exceptional circumstances have prevented it from responding on time, the court will refrain from ruling on

---

<sup>5</sup> The 1996 Amendments to FOIA upheld the decision in Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976), affirmed the proposition that stays should be granted to agencies deluged with FOIA requests, and clarified that even a “predictable agency workload of requests” constituted “exceptional circumstances” when an agency could demonstrate that it was making progress in reducing its backlog. See, e.g., H.R. Rep. No. 104-795, at 24, reprinted in 1996 U.S.C.C.A.N. 3448, 3467 (noting that the FOIA Amendments were “consistent” with the holding in Open America).

<sup>6</sup> At the time of the Open America decision, the D.C. Circuit found “exceptional circumstances” where the FBI had a backlog of “only” 5,137 requests. See Open America, 547 F.2d at 609, 613.

the request itself and allow the agency to complete its determination.”). Courts “cannot focus on theoretical goals alone, and completely ignore the reality that these agencies cannot possibly respond to the overwhelming number of requests received within the time constraints imposed by FOIA.” Cohen v. FBI, 831 F. Supp. 850, 854 (S.D. Fla. 1993).

“[E]xceptional circumstances” therefore include “any delays encountered in responding to a request as long as the agencies are making good-faith efforts and exercising due diligence in processing requests on a first-in, first out basis.” Appleton v. FDA, 254 F. Supp. 2d 6, 8-9 (D.D.C. 2003). In addition, “exceptional circumstances” include delays encountered when an agency is “deluged with a volume of requests for information vastly in excess of that anticipated by Congress, when the existing resources are inadequate to deal with the volume of such requests within the time limits of . . . [5 U.S.C. § 552(a)(6)(A)], and when the agency can show that it is ‘exercising due diligence’” in processing the requests. Edmonds v. FBI, 2002 WL 32539613, at \*1 (D.D.C. Dec. 3, 2002) (quoting Open America, 547 F.2d at 616).<sup>7</sup> “It also has been recognized, based on [] legislative history, that other circumstances in addition to FOIA request backlogs may be a basis for finding exceptional circumstances, including ‘resources being devoted to the declassification of classified material of public interest, and the number of requests for records by courts or administrative tribunals.’” Center for Public Integrity v. U.S. Department of State, 2006 WL 1073066, \*2 (D.D.C. 2006) (quoting Wilderness Soc’y v. U.S. Department of the Interior, 2005 WL 3276256, \*6 (D.D.C. 2005)).

Thus, under D.C. Circuit law, exceptional circumstances have been construed to exist and

---

<sup>7</sup> “Exceptional circumstances” permitting the granting of additional time do not include delays resulting from a “predictable workload” of FOIA requests, “unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.” 5 U.S.C. § 552(a)(6)(C)(ii).

a stay pursuant to FOIA and the Open America doctrine may be granted: “(1) when an agency is burdened with an unanticipated number of FOIA requests; *and* (2) when agency resources are inadequate to process the requests within time limits set forth in the statute; *and* (3) when the agency shows that it is exercising ‘due diligence’ in processing the requests; *and* (4) the agency shows ‘reasonable progress’ in reducing its backlog of requests.” Williams v. FBI, 2000 WL 1763680, \*2 (D.D.C. 2000) (emphasis in original) (citations omitted); see also Summers v. Department of Justice, 925 F.2d 450, 452 n.2 (D.C. Cir. 1991) (noting first three factors).

Courts have frequently issued orders extending the time to respond to FOIA requests. See e.g., Piper v. United States Department of Justice, 339 F. Supp. 2d 13, 16 (D.D.C. 2004) (discussing a stay of two years given to the FBI); Appleton, 254 F. Supp. 2d at 11 (granting FDA’s motion for stay pending completion of search and production of documents); Williams v. FBI, 2000 WL 1763680, at \*3 (giving the FBI until May 2, 2001, to review records requested prior to August 21, 1998); Judicial Watch of Florida, Inc. v. United States Department of Justice, 102 F. Supp. 2d 6, 9 & n.1 (D.D.C. 2000) (discussing an order giving the FBI until June 8, 2000, to respond to a request dated July 15, 1997); Edmond v. United States Attorney, 959 F. Supp. 1, 4 (D.D.C. 1997) (giving the U.S. Attorney’s Office until April 1, 1998 to respond to a request filed August 14, 1992); Rabin v. United States Department of State, 980 F. Supp. 116, 123-24 (E.D.N.Y. 1997) (granting motion for Open America stay and permitting Department of State over three years to process plaintiff’s FOIA request); Jiminez v. FBI, 938 F. Supp. 21, 31 (D.D.C. 1996) (granting FBI’s request for stay and permitting it over four years to respond to plaintiff’s FOIA request); Ohaegbu v. FBI, 936 F. Supp. 7, 8-9 (D.D.C. 1996) (granting request for stay and permitting July 1997 response to FOIA request submitted in July 1995).

As shown below, because the FBI can demonstrate both exceptional circumstances and

due diligence in handling plaintiff's request, as well as reasonable progress in reducing its backlog, the Court should stay the proceedings until May of 2009 to allow the FBI time to process plaintiff's request.

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

**1. Plaintiff's Refusal to Narrow the Scope of its Request Weighs in Favor of Granting a Stay**

An important consideration in determining whether or not an Open America stay is warranted is the extent to which a requester cooperated with the agency by agreeing to modify or narrow the request. FOIA expressly provides that the “[r]efusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing the request (or a modified request) . . . after being given the opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist . . . .” 5 U.S.C. § 552(a)(6)(C)(iii). This factor weighs heavily in favor of granting a stay here.

Plaintiff's request seeks “[a]ll records (including but not limited to, electronic records) concerning electronic surveillance systems known as DCS-3000 and Red Hook, to include any reports made by the FBI to Congress on the Bureau's use of these technologies.” Hardy Decl. at Exhibit A. The FBI informed plaintiff that the records found to be potentially responsive to plaintiff's requests totaled approximately 20,000 pages. Id. at Exhibit D. Given the large volume of potentially responsive documents, the FBI requested that plaintiff limit the scope of the documents requested, but plaintiff declined to do so. Id. Given that plaintiff submitted an extremely broad FOIA request, and then refused to narrow the scope, plaintiff should not be allowed to thereafter complain when the FBI requires additional time to process the

extraordinarily large number of documents that are potentially responsive to plaintiff's request.

## **2. The FBI is Operating Under Exceptional Circumstances**

During 2006 there was an increase in FOIA requests, up from an average of 911 per month in 2005 to an average of 1,277 per month. Hardy Decl. at ¶ 7. As of December 31, 2006, the backlog of requests in RIDS in various stages of processing stood at 1,672. Id. at ¶ 6. The FBI has taken all possible steps to aid in the streamlining and reduction of the FOIA/Privacy Act backlog, including development of the electronic investigative case file (the Sentinel Project), and the establishment of an FBI Central Records Complex in Frederick, Virginia. Id. at ¶¶ 8-9. The FBI expects these initiatives, after they are fully implemented, to reduce by 40% current processing times. Id. at ¶ 9. Unfortunately, however, in the short term, there has been an impact on available FBI FOIA processing resources.

While RIDS has transferred more than half of its unit functions to an interim site in Frederick, Virginia, many of the employees in those units, who are among the most senior and experienced in their areas of expertise, have opted to retire or find other jobs rather than relocate. Id. at ¶ 13. Since RMD announced its off-site relocation plans, a total of 58 former RIDS employees have either resigned, retired, or found other jobs in the Washington, D.C., area, rather than relocate with their unit. Id.

To bring staffing levels back up, the FBI is engaged in aggressive and intense recruitment and hiring efforts in the Frederick County, Virginia area. Id. at ¶ 14. Nonetheless, RIDS has yet to fill many of the available positions. In addition, the new RIDS employees who have less than one year of experience are in various stages of professional development, but none are yet operating as experienced employees; it takes an average of three years to adequately train a new

employee in the FOIA/PA process to be able to work independently in a productive, efficient, and effective manner. Id. Accordingly, RIDS has only a limited number of experienced employees processing FOIA/PA requests at this time. Id. In fact, with approximately 203 employees currently on the rolls, RIDS is 115 positions under its funded staffing level of 311 employees due to attrition and reasons attributable to the move to Frederick, Virginia. Id. Moreover, the continuing resolution under which the federal government is currently operating has also resulted in a hiring freeze until further notice. Id.

Simultaneously with this reduction in personnel, RIDS has experienced a significant increase in its FOIA litigation workload, including several urgent and competing federal district court litigation deadlines that have impacted the FBI's ability to process recently located records. Id. at ¶¶ 10, 15. As described above, RIDS has been ordered by courts in Gerstein v. CIA, et al., Civ. A. No. 06-4643 (N.D. Cal.), Rosenfeld v. U.S. Department of Justice, et al., Civ. A. Nos. 90-3576 MHP, 85-1709 MHP and 85-2247 (N.D. Cal.), and Hidalgo v. FBI, Civ. A. No. 06-CV-1513 (D.D.C.), to process and produce documents in the next few months. Hardy Decl. at ¶¶ 16-18. These cases take resources away from other pending FOIA requests.

Finally, the backlog in RIDS is exacerbated by the high volume of administrative appeals that require review and response by the RIDS personnel. Id. at ¶ 20. During 2006, the FBI received a total of 1015 administrative appeals. As of January 31, 2007, 525 administrative appeals were pending resolution. Id. While this number does not represent an increase, the number of appeals remains another significant drain on resources, because inevitably the time spent by RIDS personnel handling these appeals reduces the amount of time for regular processing duties. Id.

For all of these reasons, the FBI faces “exceptional circumstances” in reducing its FOIA backlog warranting an Open America stay, and a stay until May of 2009 is well within the range of stays granted by other courts. See, e.g., Edmonds, 2002 WL 32539613, at \*2 (FOIA staff’s time spent on administrative appeals, litigation and “large projects” contributed to finding of exceptional circumstances); Jiminez, 938 F. Supp. at 31 (four-year stay granted to process 700 pages); Haddon v. Freeh, 31 F. Supp. 2d 16, 19 (D.D.C. 1998) (noting that court had granted Open America stay until January 1998 on request submitted to FBI nearly four years before); Guzzino v. FBI, 1997 WL 22886, \*2 (D.D.C. 1997) (granting more than four-year stay because “[t]he FBI has shown that even though it is exercising due diligence, because of inadequate resources it is unable to respond to plaintiff’s request within the statutory [] limit.”); Ohaegbu, 936 F. Supp. at 8 (one-year stay granted to process 175 pages); Schweihs v. FBI, 933 F. Supp. 719, 721-22 (N.D. Ill. 1996) (exceptional circumstances justify four years to process undefined number of pages “over 1500”; dismissing action without prejudice); Cecola v. FBI, 1995 WL 549066, at \*2 (N.D. Ill. 1995) (exceptional circumstances justified over two years to process 4,500 pages; dismissing action without prejudice).

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

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

Each year the FBI receives thousands of FOIPA requests. Hardy Decl. at ¶¶ 5-7. Due to this continual influx, and to the appeals and litigation arising from it, the FBI’s backlog jumped

from its 1981 level of between 4,000-7,000 requests to a high of 16,000 requests in 1996. Id. at ¶ 5. In 1996, the median time for a pending request was in excess of three years. Id. The FBI, however, has demonstrated its commitment to reducing the backlog of information requests that confront it, and has achieved significant reductions since 1996. Moreover, the FBI has taken all available steps to implement even greater reductions and to achieve a more streamlined processing of FOIA requests in the future.

In the past, the FBI repeatedly sought additional funding for the creation of new FOIPA positions. Id. at ¶ 6. For example, Congress appropriated funds in the 1997 fiscal year budget providing for 129 additional employees, and in the 1998 fiscal year budget providing for 239 additional employees. Id. In 2002, RIDS moved to paperless processing through its FOIPA Document Processing System (“FDPS”). Id. The FDPS allows the user to scan FBI files, documents, and correspondence, and enables the user to process pages electronically rather than manually. Id. RIDS is now using this system to process virtually all of its FOIA/Privacy Act requests. Id. The new process required the FBI to redistribute some of its FOIPA personnel to other sections within the RMD in order to support the scanning and archival services necessary for automated processing. Id. Despite an additional reduction of RIDS personnel following September 11, 2001, the new efficiencies stemming from FDPS allowed the FBI to make great strides in reducing its FOIA/Privacy Act backlog. Id. For example, the backlog of requests in RIDS in various stages of processing between December 31, 1996 and December 31, 2006, dropped from 16,244 to 1,672, resulting in a reduction of 14,572 requests. Id. The median processing time for a pending request dropped from 1,160 days on December 31, 1996, to 156 days on December 31, 2006. Id.

During 2006 there was an increase in requests, up from an average of 911 per month in 2005 to an average of 1,277 per month. Id. at ¶ 7. Despite this increase, the FBI met or surpassed its primary goal of reducing the time required to process requests. Id. In this regard, the median time for processing small requests (less than 500 pages) decreased by 10%; the median time for medium requests (501 pages -2500 pages) decreased by 16%. Id. However, the median time for the processing of large queue requests (over 2500 pages) increased by 22 %. Id. This increase was due to a concerted effort to reduce the backlog of the older, larger cases. Id. This effort, however, resulted in the number of pending large queue requests decreasing from 122 to 151. Id.

As described above, the FBI has taken additional steps to further reduce the backlog and reduce processing time, including development of the electronic investigative case file (the Sentinel Project), and the establishment of an FBI Central Records Complex in Frederick, Virginia. Id. at ¶¶ 8-9. Although the implementation stage of these projects has strained FBI resources, ultimately the FBI expects these initiatives, after they are fully implemented, to reduce current processing times by 40%. Id. at ¶ 9; see Pray v. FBI, 1995 WL 764149, \*1 (S.D.N.Y. 1995) (considering improved technology as a factor in establishing due diligence).

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

Moreover, the FOIPA Section's current three-queue, first-in/first-out system, is an improvement on the two-track, first-in/first-out system the D.C. Circuit expressly recognized as supporting the due diligence requirement. See Open America, 547 F.2d at 616. As explained above, the move to a three-tiered system has greatly increased the efficiency and fairness with which the FBI processes the thousands of FOIA requests it receives each year.

The FBI has likewise exercised due diligence in responding to plaintiff's FOIA request. The FBI has identified approximately 20,000 pages of documents potentially responsive to plaintiff's request. Id. at ¶ 38. The FBI is in the process of scanning the documents and will place plaintiff's request, pursuant to standard procedures, in the large queue of the perfected-case backlog, where it will be reviewed on a first-in/first-out basis. Id. at ¶ 39. Given the volume of potentially-responsive documents, and the fact that processing involves a page-by-page, line-by-line review of the responsive documents to determine what, if any, FOIA and/or Privacy Act exemptions may apply, it is not surprising that it will take the FBI months to process these documents. Id. at 22; see, e.g., Jimenez, 938 F. Supp. at 24, 31-32 (issuing Open America stay until March 2000, five years after request filed, so FBI could process 700 pages); Ohaegbu, 936 F. Supp. at 8 (granting stay until July 1997, over three years after request filed, to permit FBI to process 175 pages); Cecola, 1995 WL 549066, \*1-2 (dismissing case without prejudice to permit FBI until November 1999 to complete processing of over 1,500 pages responsive to a request filed over six years before); Fox v. United States Department of Justice, 1994 WL 923072 (C.D. Cal. 1994) (granting FBI motion for stay until 1999 to process 300 pages of documents responsive to a request filed six years before).<sup>1</sup>

---

<sup>1</sup> In these prior cases, the courts granted Open America stays lasting for several years to permit

Thus, because the FBI is “making a good faith effort and exercising due diligence in processing [plaintiff’s] requests on a first-in first-out basis,” see Kuffel v. BOP, 882 F. Supp. 1116, 1127 (D.D.C. 1995), its request for a stay should be granted. See also Rabin, 980 F. Supp. at 122 (“[D]efendant State Department has shown the . . . ‘due diligence’ that courts have required . . . [It] appears to be attempting to comply with requests.”); Lisee v. CIA, 741 F. Supp. 988, 989 (D.D.C. 1990) (holding that agencies’ processing of FOIA requests on a first-in, first-out basis satisfied the “exceptional circumstance” and “due diligence” requirements for stay); Ferguson v. FBI, 722 F. Supp. 1137, 1140 (S.D.N.Y. 1989) (extensions should be given when the court is “presented with evidence of an overburdened agency following necessary procedures”) (citations omitted); Freeman v. Department of Justice, 822 F. Supp. 1064, 1066 (S.D.N.Y. 1993) (the court is “satisfied that [the FBI] is doing the best it can do within its physical limitations to process all requests in a timely manner”).

---

the FBI to process hundreds of pages of documents. The present case, by contrast, involves a request that requires the review of many times that amount of material.



UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA

ELECTRONIC FRONTIER )  
FOUNDATION, )  
 )  
Plaintiff, )  
 )  
vii. )  
 )  
DEPARTMENT OF JUSTICE, )  
 )  
Defendant. )  
\_\_\_\_\_ )

Civ. A. No. 06-1708 (CKK)

**ORDER**

UPON CONSIDERATION of defendant’s Motion for an Open America Stay, it  
is this \_\_\_ day of \_\_\_\_\_, 2007 hereby:

ORDERED that the Motion is GRANTED; and it is

FURTHER ORDERED that the defendant shall, on or before May 11, 2009, provide the  
Court with a status report concerning defendant’s processing of plaintiff’s request under the  
Freedom of Information Act (“FOIA”).

SO ORDERED.

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE