IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR AN OPEN AMERICA STAY

Defendant Department of Justice ("DOJ") has moved for entry of an order to stay the processing of a Freedom of Information Act ("FOIA") request Plaintiff Electronic Frontier Foundation ("EFF" or "Plaintiff") submitted in August 2006 to Defendant's component, the Federal Bureau of Investigation ("FBI"), for records related to electronic surveillance tools known as DCS-3000 and Red Hook. Defendant does not dispute that Plaintiff's request is legally entitled to processing under the FOIA and the agency's regulations. Now, however, more than seven (7) months after Plaintiff submitted its request, the DOJ not only has failed to complete its processing, but asks that it be permitted an *additional twenty-seven (27) months* to do so.

Defendant has failed to make the showing necessary for the Court to permit it such an extensive amount of time to process Plaintiff's FOIA request. For this reason, the Court should deny the DOJ's motion, and order the FBI to complete the processing of Plaintiff's request within sixty (60) days. Should the Court grant the FBI a longer period of time to process EFF's request, EFF respectfully asks that the Court order Defendant to make interim releases of material responsive to EFF's request every four (4) weeks, and

submit periodic reports to the Court on the Bureau's progress toward completion of the processing of Plaintiff's FOIA request.

STATEMENT OF FACTS

I. The Carnivore Internet Monitoring System and the New Generation of Electronic Surveillance Tools

On July 11, 2000, the Wall Street Journal reported that the FBI had deployed a surveillance system known as "Carnivore," which monitored traffic at Internet service provider facilities to intercept information in the electronic mail of criminal suspects. Neil King Jr. and Ted Bridis, FBI's Wiretaps To Scan E-Mail Spark Concern, *Wall Street Journal*, July 11, 2000 at A3. The Journal reported that Carnivore "can scan millions of e-mails a second" and "would give the government, at least theoretically, the ability to eavesdrop on all customers' digital communications, from e-mail to online banking and Web surfing." *Id*. This system, later renamed DCS-1000, raised substantial concerns on the part of Congress, privacy and security experts, and the general public about the potential overcollection of personal information in the course of FBI surveillance. *See, e.g.*, John Schwartz, FBI Internet Wiretaps Raise Issues of Privacy, *Washington Post*, July 12, 2000 at E01; Del Quinten Wilber, FBI Taps of E-Mail Provoke Concerns, *Baltimore Sun*, July 24, 2000 at A1; Jacqueline Newmyer, FBI's Carnivore E-Mail Tool Chewed Up by Lawmakers, *Los Angeles Times*, July 25, 2000, at A5; Ted Bridis, Congressional Panel Debates Carnivore as FBI Moves to Mollify Privacy Concerns, *Wall Street Journal*, July 25, 2000 at A24; Lou Dolinar, FBI Software That Peeks at E-Mail is Causing a Stir, *Newsday*, July 30, 2000 at A08; David A. Vise and Dan Eggen, Study: FBI Tool Needs Honing, *Washington Post*, Nov. 22, 2000, at A02; Evidence of FBI

Evasions Feeds Carnivore Doubts, *USA Today*, Nov. 30, 2000 at 16A; John Schwartz, Computer Security Experts Question Internet Wiretaps, *NY Times*, Dec. 5, 2000, at A16.

Documents subsequently released under the FOIA played a significant role in educating the public and decisionmakers about the scope, technical details, and capabilities of Carnivore. *See* Carnivore FOIA Documents, Electronic Privacy Information Center, http://www.epic.org/privacy/carnivore/foia_documents.html (last visited March 12, 2007); *see also* Dan Eggen, More Questions Surface About FBI Software, *Washington Post*, Nov. 18, 2000 at A03; John Schwartz, Wiretapping System Works on Internet, Review Finds, *NY Times*, Nov. 22, 2000 at A19; Dan Eggen, 'Carnivore' Glitches Blamed for FBI Woes, *Washington Post*, May 29, 2002 at A07; John Schwartz, Bin Laden Inquiry was Hindered by F.B.I. E-Mail Tapping, *NY Times*, May 29, 2002 at A16.

In response to concerns about Carnivore's invasiveness, Congress required the Attorney General to submit reports on the use of the surveillance tool in fiscal years 2002 and 2003 to members of the Committees on the Judiciary of the Senate and House of Representatives. Pub. L. 107-273 (2002). These reports to Congress, also disclosed under the FOIA, revealed that the Bureau did not use DCS-1000 to conduct Internet surveillance during that period. FBI Reports to Congress on Use of Carnivore/DCS 1000, Electronic Privacy Information Center, http://www.epic.org/privacy/carnivore /2002_report.pdf & http://www.epic.org/privacy/carnivore/2003_report.pdf (last visited March 12, 2007).

In March 2006, the DOJ Office of the Inspector General issued a report on the implementation of the Communications Assistance for Law Enforcement Act of 1994

("CALEA"), Pub. L. No. 103-414, 108 Stat. 4279, a law that imposes obligations upon telecommunications carriers to help law enforcement carry out electronic surveillance. U.S. Department of Justice Office of the Inspector General, Audit Report 06-13, The Implementation of the of Communications Assistance for Law Enforcement Act, 107 (March 2006), http://www.usdoj.gov/oig/reports/FBIa0613/final.pdf.

The report contained, *inter alia*, information about two electronic surveillance systems that have been developed by the FBI:

> System DCS-3000. The FBI has spent nearly $10 million on this system. The FBI developed the system as an interim solution to intercept personal communications services delivered via emerging digital technologies used by wireless carriers in advance of any CALEA solutions being deployed. Law enforcement continues to utilize this technology as carriers continue to introduce new features and services.
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> * * *
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> Red Hook. The FBI has spent over $1.5 million to develop a system to collect voice and data calls and then process and display the intercepted information in the absence of a CALEA solution.

Id.

II. Plaintiff's FOIA Request and the FBI's Response

By letter sent to the FBI via facsimile on August 11, 2006, Plaintiff requested under the FOIA "all agency records (including, but not limited to, electronic records) concerning electronic surveillance systems known as DCS-3000 and Red Hook." Def. Ex. A at 1. In two separate letters dated August 22, 2006, the FBI acknowledged receipt of Plaintiff's request to the Bureau. Def. Ex. B.[1] The FBI failed to disclose any records

[1] Defendant asserts that the FBI sent Plaintiff a letter dated August 30, 2006, stating that the Bureau had found no records responsive to Plaintiff's request through a search of FBI Headquarters' automated indices. Def. Mot. at 9-10; Hardy Decl. ¶ 27; Def. Ex. C. Plaintiff did not receive this letter via mail; however, Plaintiff does not dispute that the

responsive to Plaintiff's request within the 20-working-day time frame mandated by FOIA, and Plaintiff filed this suit on October 3, 2006. On February 9, 2007, the FBI moved 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), seeking an additional twenty-seven (27) months to process Plaintiff's FOIA request.

ARGUMENT

This issue raised in this motion is discrete and clear. Plaintiff submitted a FOIA request to the FBI more than seven (7) months ago seeking records about the Bureau's electronic monitoring technology, and the agency has failed to comply with the FOIA's mandated time frame for responding to a FOIA request. The agency's failure to complete the processing of Plaintiff's request constitutes a continuing impediment to Plaintiff's (and the public's) ability to examine the FBI's means of conducting electronic surveillance, which has been exceedingly controversial in recent years. The FBI now seeks more than two additional years to complete processing of the request. For the reasons discussed herein, this Court should deny Defendant's motion for a stay of proceedings and order the FBI to process Plaintiff's request within sixty (60) days.

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letter was sent. In any event, the adequacy of the FBI's search is not at issue, since the FBI acknowledges that it subsequently located approximately 20,000 pages of potentially responsive material through additional inquiries to FBI Headquarters divisions. Def. Mot. at 10; Hardy Decl. ¶¶ 27-28.

I. Defendant Has Not Carried Its Burden of Showing That It is Entitled to an *Open America* Stay By Offering Plaintiff an Opportunity to Narrow Its Request

As an initial matter, Defendant contends that Plaintiff "should not be allowed to . . . complain" that the FBI seeks twenty-seven (27) additional months to process Plaintiff's FOIA request because Plaintiff has not reached an agreement with the FBI on the narrowing of the request. Defendant's Motion for an *Open America* Stay (hereafter "Def. Mot.") at 22. Defendant's argument is based on two conversations that counsel for Plaintiff had with Mr. Loren Shaver, a representative of the FBI. Declaration of Marcia Hofmann (hereafter "Hofmann Decl.") ¶ 3 (attached hereto as Exhibit 1); Hardy Decl. ¶ 28; Def. Exhibit D. As Defendant notes, Mr. Shaver described to counsel "in very basic terms[] the general types of records [the FBI] had identified and retrieved" in response to Plaintiff's request, and asked whether Plaintiff would be willing to eliminate broad categories of documents from the scope of the request. Def. Ex. D; Hofmann Decl. ¶ 6. Mr. Shaver informed Plaintiff initially that the FBI had identified 14,000 pages potentially responsive to Plaintiff's request, and later adjusted the number to 20,000 potentially responsive pages. Hofmann Decl. ¶ 4. He characterized the records in such broad terms such as "e-mails," "conference papers," "procedure and policy write-ups," and "certification and accreditation data," among other categories. Hofmann Decl. ¶ 5. Plaintiff's counsel suggested that the parties seek to narrow or prioritize the request in some manner other than by dismissing broad categories of documents from the scope of the request. Hofmann Decl. ¶ 7. Mr. Shaver said that other forms of narrowing would require review of the documents and would be impracticable until a later date. *Id.*

While Plaintiff declined the FBI's invitation to narrow its request, it did so

because the number of potentially responsive pages was so indefinite, and because Plaintiff was unwilling to remove broad categories of documents from the scope of the request without a better understanding of their content.[2] Hofmann Decl. ¶ 8. This position was informed partly by counsel's prior dealings with the FBI in FOIA matters, which have shown that an uncertain estimate of "potentially responsive" pages is likely to change drastically once responsive material is actually reviewed. Hofmann Decl. ¶ 9.

For example, in *Electronic Privacy Information Center v. Dep't of Justice*, Civ. No. 05-845, 2005 U.S. Dist. LEXIS 40318 (D.D.C. Nov. 16, 2006) (attached hereto as Exhibit 2), the FBI initially estimated that 130,000 pages of document were potentially responsive to the plaintiff's request for records concerning the renewal of the USA PATRIOT Act. Hardy Decl. ¶ 20 (filed June 29, 2005) (attached hereto as Exhibit 3). The estimate was uncertain because in that case the FBI had not yet located or reviewed all potentially responsive documents to determine whether they were in fact responsive to the plaintiff's request. *Id.* Ultimately, the FBI determined that only 18,000 pages actually fell within the scope of the plaintiff's request — just 14% of the originally estimated universe of documents. Def.'s Response to Pl.'s Notice of Filing at 1 (filed Nov. 14, 2005) (attached hereto as Exhibit 4).

Plaintiff stresses that it remains open to discussing ways to narrow the scope of its request or prioritize the release of material at issue once the amount and substance of the responsive records are clearly defined. Hofmann Decl. ¶ 10. However, the purpose of requesting this material would be defeated if Plaintiff blindly agreed to remove

[2] Indeed, Defendant concedes that it *still* has not determined how many documents are *actually* responsive to Plaintiff's request, and that processing analysts have not yet reviewed the documents. Hardy Decl. ¶¶ 38-39.

potentially important records from the scope of the request without an informed understanding of their content or even number. Hofmann Decl. ¶ 11.

II. The DOJ has Failed to Show That it Should Be Permitted More Than Two Additional Years to Process EFF's Request

In support of its motion, the DOJ acknowledges that it is seeking a "lengthy stay" of proceedings in which to process Plaintiff's request, but maintains that it is entitled to more than two additional years pursuant to the FOIA and *Open America*, 547 F.2d at 615. The legal standard that DOJ must satisfy to demonstrate an entitlement to a stay is well established. The "exceptional circumstances-due diligence" standard derives from two sources: the FOIA itself, 5 U.S.C. § 552(a)(6)(C)(i)-(iii); and the D.C. Circuit's opinion in *Open America*, 547 F. 2d 605, which construed the statutory provision. This Court recently recognized that:

> [u]nder D.C. Circuit law, a stay pursuant to [the statute] 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 the 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."

The Wilderness Society v. Dep't of the Interior, No. 04-0650, 2005 U.S. Dist. LEXIS 20042, at **31-32 (D.D.C. Sept. 12, 2005) (citations omitted; emphasis in original) (attached hereto as Exhibit 5).[3] *See also Electronic Privacy Information Center v. Dep't*

[3] The court noted in *Wilderness Society* that

> [p]ursuant to the 1996 amendments, Congress *tightened the standard* for obtaining a stay by defining the term "exceptional circumstances" so as to exclude any "delay that results from a predictable agency workload of requests . . . unless the agency demonstrates reasonable progress in reducing its backlog of requests." 5 U.S.C. § 552(a)(6)(C)(ii).

of Justice, No. 02-0063, 2005 U.S. Dist. LEXIS 18876, at **10-11 (D.D.C. Aug. 31 2005) (same) (attached hereto as Exhibit 6). Under this standard, Defendant fails to show that it actually should be permitted such extensive time by the Court to process Plaintiff's request.[4] Therefore, Defendant's motion should be denied.

A. The DOJ Has Failed to Demonstrate That Exceptional Circumstances Exist to Justify a Stay

In addition to its relatively large FOIA request backlog, Defendant claims that it has encountered three exceptional circumstances weighing in favor of a twenty-seven-month stay of proceedings. First, the FBI has relocated its FOIA operations from Washington, DC to Frederick, Virginia, and has lost a number of FOIA staff as a result. Def. Mot. at 23-24; Hardy Decl. ¶¶ 11-14. Second, the FBI cites four actual and potential federal district court deadlines, which Defendant claims are "taking resources away from other pending FOIA requests." Def. Mot. at 24; Hardy Decl. ¶¶ 15-20. Finally, Defendant explains that a "high volume" of administrative appeals further exacerbates the FBI's FOIA backlog. Def. Mot. at 24; Hardy Decl. ¶ 20. However, Defendant has failed to show that these events justify a twenty-seven-month stay of proceedings in this case.

First, this Court recently determined that an agency's other processing commitments and personnel difficulties are insufficient to justify an *Open America* stay. In *Leadership Conference on Civil Rights v. Gonzales*, the Department of Justice sought

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Id. at *31 (emphasis added).

[4] As this Court has held, "Congress *imposed a burden* on agencies to account for any delay in the processing of standard FOIA requests[.]" *Electronic Privacy Information Center v. Dep't of Justice*, 416 F. Supp 2d 30, 39 n.8 (D.D.C. 2006) (emphasis added).

an additional forty-four (44) months to complete the processing of the plaintiff's six (6) FOIA requests. 404 F. Supp. 2d 246, 252 (D.D.C. 2005). In support of the motion, the government defendants cited circumstances similar to those in this case, such as a "large backlog of pending FOIA requests," including a number of requests "in the 'project' category which take a much longer time to process than other requests." *Id*. at 259. The defendants also argued, "the work of the [FOIA processing] unit has not only been disrupted by court orders requiring maximum manpower on an emergency basis to other litigation and cases but also personnel issues." *Id*. On these facts, the Court found that the Department failed to demonstrate that exceptional circumstances existed to justify an *Open America* stay, explaining:

> The Court is in no position to determine which "projects" warrant an emergency treatment and which "projects" do not. Furthermore, the Court will not get involved in defendants' personnel and project management difficulties. Therefore, defendants have shown the existence of a *predictable* backlog of FOIA requests. In addition, defendants have not convinced the Court that they are acting with due diligence to decrease their backlog. Accordingly, defendants motion for an *Open America* stay . . . is denied.

Id. (emphasis added).

Furthermore, there is little evidence that the litigation deadlines cited by Defendant will significantly affect the Bureau's ability to process Plaintiff's FOIA request in a timely manner. The FBI's court-imposed processing deadline in *Hidalgo v. FBI*, Civ. No. 06-1513 (D.D.C.) will have passed even before briefing is complete on Defendant's pending stay motion. Hardy Decl. ¶ 18. Furthermore, the Court has ordered the FBI to complete its processing of the documents at issue in *Gerstein v. CIA*, Civ. No. 06-4643 (N.D. Cal.) before the end of next month. Hardy Decl. ¶ 16. In a third case cited

by Defendant, *Vampire Nation v. Dep't of Justice*, Civ. No. 06-01950 (D.D.C.), Defendant represents that it has not yet even moved for an *Open America* stay, and the Court has not ordered the FBI to process any documents pursuant to a deadline. Hardy Decl. ¶ 19. There is no indication that these cases should significantly affect Defendant's capability to process Plaintiff's request, and their mere existence does not justify the stay Defendant requests.

Finally, the FBI's claim that a high volume of administrative appeals constitutes an exceptional circumstance is unavailing. According to Defendant, the Bureau received 1015 administrative appeals in 2006. Def. Mot. at 24; Hardy Decl. ¶ 20. As of January 31, 2007, 525 administrative appeals were pending resolution. Def. Mot. at 24; Hardy Decl. ¶ 20. As the FBI concedes, "this number does not represent an increase," but "remains a significant drain on resources." Def. Mot. at 24; Hardy Decl. ¶ 20. The FBI presents no evidence that these administrative appeals are anything more than part of the Bureau's predictable FOIA backlog, nor that the agency is taking steps to reduce the number of administrative appeals pending resolution. Thus, the appeals cannot be considered an exceptional circumstance weighing in favor of a stay.

Therefore, regardless of how difficult or time-consuming the processing of Plaintiff's FOIA request may be when facing a large FOIA request backlog, litigation deadlines and personnel difficulties, Defendant has failed to cite exceptional circumstances sufficient to satisfy the well-established *Open America* standard as construed in this Circuit.

B. DOJ has not Exercised "Due Diligence" in Its Processing of Plaintiff's FOIA Request

DOJ has also failed to satisfy the "due diligence" prong of the standard. The D.C. Circuit has recognized that the FOIA's legislative history requires an agency to have exercised "due diligence" *from the outset* in order to qualify for the kind of relief DOJ seeks here. *Oglesby v. Dep't of the Army*, 920 F.2d 57, 62 n.3 (D.C. Cir. 1990) ("The court [has] authority to allow the agency additional time to examine requested records in exceptional circumstances where the agency was exercising due diligence in responding to the request *and had been since the request was received*.") (quoting H.R. Conf. Rep. No. 1380, 93d Cong., 2d Sess. 11 (1974)) (emphasis added).

The record clearly establishes that the Bureau has not even approached the requisite showing in its handling of Plaintiff's request to date. EFF's request was submitted to the FBI on August 11, 2007. Def. Ex. A. Since then, the DOJ has located more than 20,000 "potentially responsive documents," Hardy Decl. ¶ 38, but has not yet even assigned them to a FOIA/Privacy Act processing analyst for review. Hardy Decl. ¶ 39.

It is thus clear that Defendant DOJ has, to date, failed to exercise "due diligence" in its handling of material responsive to this FOIA request. By no stretch of the imagination can DOJ's response be deemed diligent "since the request was received," *Oglesby*, where it has taken more than *seven (7) months* to merely collect documents that *may* be responsive to Plaintiff's request. Notwithstanding any representations that might be made in the government's submissions, it is beyond dispute that Defendant DOJ has failed to meet its burden of satisfying the "exceptional circumstances-due diligence" test.

Thus, the Court should not permit Defendant an additional twenty-seven months to process EFF's request, but should order the FBI to process and release non-exempt material responsive to EFF's request within sixty (60) days.

III. Courts Routinely Order Agencies to Process Documents Pursuant to FOIA Requests

The approach that Plaintiff suggests is not unusual. This Court has recently imposed specific processing deadlines on agencies, requiring the prompt delivery of non-exempt records to FOIA requesters. For example, in *Judicial Watch, Inc. v. Dep't of Energy*, 191 F. Supp. 2d 138 (D.D.C. 2002), the Court ordered the Commerce Department and the Transportation Department to process, respectively, 9000 and 6000 pages of material; to complete the processing within sixty (60) days; and to provide the requester with a *Vaughn* index within seventy-two (72) days. *Id.* at 141. It is worth noting that the requesters of the FOIA requests at issue in that case did *not* claim to be entitled to expedited processing.

Similarly, in *Natural Resources Defense Council v. Dep't of Energy* ("*NRDC*"), the Court ordered the Energy Department to process 7500 pages of material; to complete the processing of the "vast majority" of the material within thirty-two (32) days; to complete all processing within forty-eight (48) days; and to provide the requester with a *Vaughn* index within sixty-three (63) days. 191 F. Supp. 2d 41, 43-44 (D.D.C. 2002). Again, the FOIA request in *NRDC* had *not* been granted expedited treatment.

For these reasons, the Court should not only deny Defendant's motion for an *Open America* stay, but also order the FBI to complete processing of Plaintiff's request

within sixty (60) days.[5]

CONCLUSION

For the foregoing reasons, the Court should deny Defendant's motion for entry of an *Open America* stay, and require Defendant DOJ and its component the FBI to process Plaintiff's FOIA request for records concerning the FBI's electronic surveillance efforts within sixty (60) days of the Court's order. Should the Court grant the FBI a longer period of time to process EFF's request, Plaintiff respectfully asks that the Court order Defendant to make interim releases of documents responsive to Plaintiff's request every four (4) weeks, and submit periodic reports to the Court on the Bureau's progress toward completing the processing of Plaintiff's FOIA request.

Respectfully submitted,

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[5] If, however, the Court should permit the FBI a longer period of time to process Plaintiff's request, it should order the FBI to make interim releases of responsive material every four (4) weeks, as well as require the Bureau to periodically report to the Court on its progress toward competing the processing of the request. Defendant has already indicated its willingness to process about 800 pages approximately every four (4) weeks, once Plaintiff's request has been assigned to a FOIPA Disclosure Unit. Def. Mot. at 11; Hardy Decl. ¶ 39.