

1 David L. Sobel (*pro hac vice*)
sobel@eff.org
2 ELECTRONIC FRONTIER FOUNDATION
1875 Connecticut Ave. NW
3 Suite 650
Washington, DC 20009
4 Telephone: (202) 797-9009 x104
Facsimile: (202) 707-9066

5 Kurt Opsahl (SBN 191303)
kurt@eff.org
6 Marcia Hofmann (SBN 250087)
marcia@eff.org
7 ELECTRONIC FRONTIER FOUNDATION
8 454 Shotwell Street
San Francisco, CA 94110
9 Telephone: (415) 436-9333 x116
Facsimile: (415) 436-9993

10
11 Attorneys for Plaintiff
ELECTRONIC FRONTIER FOUNDATION
12

13 **UNITED STATES DISTRICT COURT**
14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

15 ELECTRONIC FRONTIER FOUNDATION,)
16 Plaintiff,)
17 v.)
18 OFFICE OF THE DIRECTOR OF NATIONAL)
19 INTELLIGENCE,)
20 Defendant.)
21)
22)
_____)

NO. 3:07-CV-5278-SI
**REPLY BRIEF IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION**
Judge: The Hon. Susan Illston
Date: November 30, 2007
Time: 9:00 a.m.
Courtroom: Courtroom 10, 19th Floor

23
24
25
26
27
28

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INTRODUCTION 1

I. THE COURTS HAVE CONSISTENTLY RECOGNIZED THAT PRELIMINARY INJUNCTIONS ARE APPROPRIATE IN FOIA CASES..... 1

II. ODNI’S DELAY IN PROCESSING EFF’S “EXPEDITED” FOIA REQUESTS VIOLATES THE STATUTE 4

III. EFF WILL SUFFER IRREPARABLE INJURY IN THE ABSENCE OF PRELIMINARY RELIEF 8

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

1

2

3 *ACLU v. Dep’t of Defense*, 339 F.Supp.2d 501 (S.D.N.Y. 2004) 3

4 *ACLU v. Dep’t of Justice*, 321 F.Supp.2d 24 (D.D.C. 2004) 8, 10

5 *Aguilera v. FBI*, 941 F.Supp. 144 (D.D.C. 1996)..... 1, 3

6 *Al-Fayed v. CIA*, 2000 WL 34342564 (D.D.C. 2000)..... 3

7 *Assassination Archives & Research Ctr. v. CIA*, 1988 U.S. Dist. LEXIS 18606 (D.D.C. Sept. 29,

8 1988) 3

9 *Cleaver v. Kelley*, 427 F.Supp. 80 (D.D.C. 1976)..... 1, 3

10 *Electronic Frontier Foundation v. Dep’t of Justice*, slip op., 06-CV-1773 (RBW) (D.D.C. Sept. 27,

11 2007) 4

12 *Electronic Privacy Information Center v. Dep’t of Justice (“EPIC”)*, 416 F.Supp.2d 30 (D.D.C.

13 2006)passim

14 *Exner v. Federal Bureau of Investigation*, 542 F.2d 1121 (9th Cir. 1976)..... 5

15 *Fiduccia v. Dep’t of Justice*, 185 F.3d 1035 (9th Cir. 1999) 7, 10

16 *Gerstein v. CIA*, No. C-06-4643 MMC, 2006 U.S. Dist. LEXIS 89847 (N.D. Cal. Nov. 29, 2006) ...

17 8, 9

18 *Gilmore v. National Sec. Agency*, No. C-92-3646 THE, 1993 U.S. Dist. LEXIS 7694 (N.D. Cal.

19 May 3, 1993) 5, 7

20 *Judicial Watch v. U.S. Dep’t of Justice*, slip op., No. 00-1396 (D.D.C., June 27, 2000)..... 3, 4

21 *Leadership Conference on Civil Rights v. Gonzales*, 404 F.Supp.2d 246 (D.D.C. 2005)..... 8, 9

22 *Natural Resources Defense Council v. Department of Energy*, 191 F. Supp. 2d 41 (D.D.C. 2002) 10

23 *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976)..... 4, 5, 7

24 *Payne Enterprises v. United States*, 837 F.2d 486 (D.C. Cir. 1988) 4

25 *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1 (1974)..... 4

Statutes

26 5 U.S.C. § 552(a)(6)(A)(i)..... 4

27 5 U.S.C. § 552(a)(6)(C)(i)..... 4

28 5 U.S.C. § 552(a)(6)(E)(v)(II) 2

INTRODUCTION

1
2 Plaintiff Electronic Frontier Foundation (“EFF”) initiated this action on October 17, 2007,
3 and moved for entry of a preliminary injunction on October 29, 2007, seeking an order requiring
4 Defendant Office of the Director of National Intelligence (“ODNI”) to disclose information
5 relevant to a pending and time-sensitive Congressional debate within ten days.

6 ODNI filed an opposition on November 9, 2007; the agency opposes the motion on the
7 grounds that 1) a preliminary injunction is not an appropriate vehicle for the relief EFF seeks; 2)
8 the Freedom of Information Act (“FOIA”) does not mandate any specific time frame for the
9 processing of an “expedited” request; and 3) no harm will result if the agency is permitted to
10 process the documents on its own schedule, without the Court’s intervention. EFF respectfully
11 submits this reply to address those contentions.

I. The Courts have Consistently Recognized that Preliminary Injunctions are Appropriate in FOIA Cases

12
13 Defendant ODNI incorrectly asserts that motions for preliminary relief in FOIA cases are
14 “generally inappropriate” and that “[a] number of courts have denied requests for preliminary
15 injunctive relief for claims brought under the FOIA” Defendant’s Opposition to Plaintiff’s
16 Motion for Preliminary Injunction (“Def. Opp.”) at 7-8. To the contrary, federal courts have long
17 entertained and, when appropriate, granted requests for preliminary relief in FOIA cases. For
18 instance, in *Cleaver v. Kelley*, 427 F.Supp. 80 (D.D.C. 1976), the court issued a preliminary
19 injunction requiring, within 21 days, the production of all documents responsive to a FOIA request
20 and the filing of an index detailing and justifying any withholdings. The injunction was predicated
21 upon the court’s finding of an “exceptional and urgent need” for disclosure of the requested
22 information. *Id.* at 81-82. Likewise, in *Aguilera v. FBI*, 941 F.Supp. 144 (D.D.C. 1996), the court
23 granted plaintiff’s motion for a preliminary injunction and ordered the agency to “comply with
24 plaintiff’s FOIA requests” and file a *Vaughn* index within 30 days. As in *Cleaver*, the injunction
25 was based upon a finding of “exceptional and urgent need” for disclosure. *Id.* at 152.¹
26

27 ¹ Both *Cleaver* and *Aguilera* were decided before Congress enacted the 1996 FOIA amendments
28 and created the statutory right to expedited processing at issue in this case. In *American Civil
Liberties Union v. DOD*, 339 F.Supp.2d 501, 503 (S.D.N.Y. 2004), decided subsequent to those

1 The most comprehensive consideration of preliminary relief in circumstances similar to
2 those present here was in *Electronic Privacy Information Center v. Dep't of Justice* (“*EPIC*”), 416
3 F.Supp.2d 30 (D.D.C. 2006), a case that Defendant cannot overcome simply by describing as
4 “arguably erroneous[,]” Def. Opp. at 7 n.4, and “wrongly decided,” *id.* at 14. Indeed, the
5 government is attempting to relitigate the *EPIC* case here, regurgitating the precise arguments that
6 were considered – and rejected – by the district court in the District of Columbia less than two
7 years ago.²

8 In *EPIC*, the Justice Department administratively granted a request for expedited FOIA
9 processing upon a finding that, *inter alia*, the request satisfied the same statutory standard at issue
10 in this case – the request concerned a matter about which there is an “urgency to inform the public
11 about an actual or alleged Federal Government activity,” and was made by “a person primarily
12 engaged in disseminating information.” *EPIC*, 416 F.Supp.2d at 34 (quoting 5 U.S.C.
13 § 552(a)(6)(E)(v)(II)). As in this case, despite its decision to grant “expedited processing,” the
14 agency had “neither completed the processing of EPIC’s FOIA requests nor informed EPIC of an
15 anticipated date for the completion of the processing” and the requester moved for a preliminary
16 injunction. *Id.* at 34-35. In an argument that ODNI repeats *verbatim* in this case, DOJ
17 “question[ed] the propriety of EPIC seeking preliminary injunctive relief,” and “accuse[d] EPIC of
18 using the motion for a preliminary injunction, which according to the DOJ seeks ‘a version of the
19 ultimate relief’ in the case, as a litigation tactic ‘to artificially accelerate the proceedings in this
20 case.’” *Id.* at 35; *see also* Def. Opp. at 2-3 (EFF attempts “to artificially accelerate the proceedings
21 in this case” and motion seeks “a version of ultimate relief”).

22 Citing the same settled authority that EFF relies upon here, the court rejected the
23

24 amendments, the court noted that it had previously heard “argument on plaintiffs’ preliminary
25 injunction motion,” rejected the government’s argument that the processing issue was moot
26 because the defendant agencies were responding “as soon as practicable,” and “held that
jurisdiction was proper.”

27 ² This Court last year relied upon the *EPIC* decision, and quoted it approvingly, in *Gerstein v. CIA*,
28 No. C-06-4643 MMC, 2006 U.S. Dist. LEXIS 89883 (N.D. Cal. Nov. 29, 2006) (“*Gerstein I*”),
where the Court granted a “motion to compel” the processing of a FOIA request within 30 days.

1 government's argument:

2 DOJ's argument that EPIC acts improperly in seeking a preliminary injunction is
3 unavailing. On numerous occasions, federal courts have entertained motions for a
4 preliminary injunction in FOIA cases and, when appropriate, have granted such
5 motions. See *ACLU v. Dep't of Defense*, 339 F.Supp.2d 501, 503 (S.D.N.Y. 2004)
6 (granting preliminary injunction motion in FOIA case and requiring production
7 within one month); *Aguilera v. FBI*, 941 F.Supp. 144, 152-53 (D.D.C. 1996)
8 (granting preliminary injunction in FOIA case and requiring expedited processing to
9 be completed within approximately one month); *Cleaver v. Kelley*, 427 F.Supp. 80,
10 81-82 (D.D.C. 1976) (granting preliminary injunction in FOIA case and requiring
11 expedited processing to be completed within approximately twenty days); see also
12 *Al-Fayed v. CIA*, 2000 U.S. Dist. LEXIS 21476, at *19-20 (D.D.C. Sept. 20, 2000)
13 (denying preliminary injunction in FOIA case after conducting four-part analysis);
14 *Assassination Archives & Research Ctr. v. CIA*, 1988 U.S. Dist. LEXIS 18606, at
15 *1-3 (D.D.C. Sept. 29, 1988) (same).

16 *EPIC*, 416 F.Supp.2d at 35 (footnote omitted).³

17 Even in those cases where applications for preliminary injunctions seeking expedited
18 processing of FOIA requests were *denied*, the courts have never suggested, as Defendant implies,
19 that such relief is somehow improper. ODNI cites several cases in which reviewing courts merely
20 determined that the specific facts before them did not warrant expedited processing. Def. Opp. at
21 7, n.4; see, e.g., *Assassination Archives and Research Ctr. v. CIA*, No. 88-2600, 1988 U.S. Dist.
22 LEXIS 18606 (D.D.C., Sept. 29, 1988) (denying preliminary injunction motion after conducting
23 four-part analysis); *Al-Fayed v. CIA*, 2000 WL 34342564 (D.D.C. 2000) (same).⁴ In *Judicial*
24 *Watch v. U.S. Dep't of Justice*, slip op., No. 00-1396 (D.D.C., June 27, 2000), the plaintiff "did not
25

26 ³ In addition to asserting that *EPIC* was "wrongly decided," ODNI notes that "the preliminary
27 injunction entered in that case was later modified upon reconsideration, following a submission by
28 the government regarding its processing capacity." Def. Opp. at 14 (citation omitted). The
modification of the injunction's dictates (*i.e.*, granting more time) in no way diminishes the fact
that the court, in keeping with long established precedent, found preliminary relief to be
appropriate. Indeed, the government concedes that the modification was based upon an agency
"submission . . . regarding its processing capacity" in conformance with the *EPIC* court's holding
that the "presumption of agency delay raised by failing to respond to an expedited request within
twenty days" can be rebutted if the agency meets its burden of presenting "credible evidence that
disclosure within such time period is truly not practicable." *EPIC*, 416 F.Supp. 2d at 39 (footnote
omitted). Here, as we discuss *infra*, ODNI has not even attempted to meet that burden.

⁴ Indeed, the D.C. Circuit, in its only discussion of the FOIA expedited processing provision, itself
applied the preliminary injunction standard in affirming the district court decision in the *Al-Fayed*
case. *Al-Fayed v. CIA*, 254 F.3d 300, 304 (D.C. Cir. 2001) (court conducted merits review of
"whether plaintiffs are entitled to a preliminary injunction").

1 make . . . a request” for expedited processing under the statutory standard at issue here. *Id.* at 2. In
2 any event, the court recognized that “Congress wished to reserve the role of the courts for . . .
3 occasions . . . when plaintiff can show a genuine need and reason for urgency in gaining access to
4 Government records” *Id.* at 1, quoting *Open America v. Watergate Special Prosecution*
5 *Force*, 547 F.2d 605, 615-616 (D.C. Cir. 1976) (internal quotation marks omitted).

6 Finally, ODNI cites the recent decision in *Electronic Frontier Foundation v. Dep’t of*
7 *Justice*, slip op., 06-CV-1773 (RBW) (D.D.C. Sept. 27, 2007) (attached to Def. Opp. as Exhibit 3)
8 in support of its suggestion that preliminary relief is somehow inappropriate. Def. Opp. at 8. In
9 fact, the court followed *EPIC*, conducted a preliminary injunction analysis, and concluded that “the
10 agency has effectively rebutted the presumption of delay by providing a detailed explanation as to
11 why the time period prescribed by the FOIA could not be met,” as required by *EPIC*. *See* slip op.
12 at 5.

13 While ODNI suggests that the range of judicial remedies in FOIA cases is somehow
14 limited, there is no such restriction. As the D.C. Circuit has noted, “[t]he FOIA imposes no limits
15 on courts’ equitable powers in enforcing its terms.” *Payne Enterprises v. United States*, 837 F.2d
16 486, 494 (D.C. Cir. 1988), citing *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 19-20
17 (1974). “[U]nreasonable delays in disclosing non-exempt documents violate the intent and purpose
18 of the FOIA, and the courts have a duty to prevent [such] abuses.” *Id.*, 837 F.2d at 494 (citation
19 omitted). An exercise of that duty is all that EFF requests here.

20 **II. ODNI’s Delay in Processing EFF’s “Expedited” FOIA Requests Violates the Statute**

21 The government mistakenly asserts that the FOIA “does not require agencies to process
22 expedited requests within a specific time limit.” Def. Opp. at 9-10. Such a conclusion would
23 require the Court to ignore both the plain language of the statute and the manner in which it has
24 been construed for more than 30 years.

25 ODNI reads the expedited processing provision of the statute in isolation, divorcing it from
26 the generally-applicable 20-day processing time limit contained in 5 U.S.C. § 552(a)(6)(A)(i), and
27 the provisions of 5 U.S.C. § 552(a)(6)(C)(i), which states:
28

1 Any person making a request to any agency for records . . . shall be deemed to have
2 exhausted his administrative remedies with respect to such request if the agency
3 fails to comply with the applicable time limit provisions of this paragraph. If the
4 Government can show exceptional circumstances exist and that the agency is
exercising due diligence in responding to the request, *the court may retain*
jurisdiction and allow the agency additional time to complete its review of the
records.

5 (emphasis added). In *Open America*, 547 F.2d at 616, the D.C. Circuit construed the provision

6 to mean that “exceptional circumstances exist” when an agency . . . is deluged with
7 a volume of requests for information vastly in excess of that anticipated by
8 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.

9 *See also Exner v. Federal Bureau of Investigation*, 542 F.2d 1121 (9th Cir. 1976); *Gilmore v.*
10 *National Sec. Agency*, No. C-92-3646 THE, 1993 U.S. Dist. LEXIS 7694, at *34 (N.D. Cal. May 3,
11 1993) (*Exner* adopted a “limited version of the holding in *Open America* allow[ing] an agency to
12 claim ‘exceptional circumstances’ where it is faced with an unforeseen and unforeseeable increase
13 in the number of FOIA requests”).

14 The statute and relevant caselaw thus provide that standard, non-expedited requests must be
15 processed within 20 days; that judicial supervision of the FOIA process is appropriate immediately
16 upon the expiration of that time limit; and that an agency may be granted “additional time” only
17 when it can show, *inter alia*, that it “is deluged with a volume of requests for information vastly in
18 excess of that anticipated by Congress.” It defies logic to conclude, as ODNI would apparently
19 have it, that a request entitled to *expedited* processing somehow imposes *less* of a burden on a
20 recalcitrant agency. As the court found in *EPIC*,

21 Congress could not have intended to create the absurd situation wherein standard
22 FOIA requests must be processed within twenty days (unless the agency can show
that exceptional circumstances exist for a delay), yet expedited requests empower an
agency to unilaterally decide to exceed the standard twenty-day period.

23 *EPIC*, 416 F.Supp.2d at 38.⁵ The court thus held that:

24 _____
25 ⁵ ODNI makes much of the fact that the legislative history indicates that Congress’ intent was “not
26 to require that [expedited] requests be processed within . . . [a] specific period of time.” Def. Opp.
27 at 10 (citation omitted). As the *EPIC* court noted, however, “[t]he legislative history of the
28 amendments makes clear that, although Congress opted not to impose a specific deadline on
agencies processing expedited requests, its intent was to ‘give the request priority for processing
more quickly than otherwise would occur.” *EPIC*, 416 F.Supp.2d at 38 (citation omitted; emphasis
in original).

1 an agency that violates the twenty-day deadline applicable to standard FOIA
2 requests presumptively also fails to process an expedited request “as soon as
3 practicable.” That is, a *prima facie* showing of agency delay exists when an agency
4 fails to process an expedited FOIA request within the time limit applicable to
5 standard FOIA requests.

6 The presumption of agency delay raised by failing to respond to an
7 expedited request within twenty days is certainly rebuttable if the agency presents
8 credible evidence that disclosure within such time period is truly not practicable.

9 *Id.* at 39 (footnote omitted). *See also Gerstein I*, 2006 U.S. Dist. LEXIS 89883, at *9-*10 (this
10 Court adopts *EPIC* analysis).

11 Here, ODNI does not even attempt to meet that burden.⁶ The agency merely asserts that “it
12 is simply not practicable” to complete the processing of EFF’s requests (submitted on August 31,
13 2007) prior to December 31, 2007. Def. Opp. at 13. In support of that assertion, the agency
14 vaguely cites “the existence of classified materials, which . . . contributes significantly to the
15 complexities attendant to processing a FOIA request,” and the routine fact that “documents subject
16 to other exemptions . . . must similarly be identified and, where necessary, redacted, and
17 documents generated by other agencies or authorities must be referred for review back to those
18 same agencies or authorities.” *Id.* at 12 (citations omitted). The agency does not identify the
19 number of employees it has assigned to process the requests, or provide the Court with any other
20 specific information that might explain why it will require *four months* to process “approximately
21 250 pages of unclassified material and approximately sixty-five pages of classified material”
22 identified as responsive to the FOIA requests. *Id.* at 6.

23 ODNI’s position here is strikingly similar to DOJ’s in *EPIC*, where the court noted that the
24 agency was “content to rest on its unsupported allegations that delay is necessary because *EPIC*’s
25 requests are ‘broad’ and involve classified documents.” *EPIC*, 416 F. Supp. 2d at 40 (citation
26 omitted). Finding that such “vague assertions, unsupported by credible evidence, are insufficient to
27 demonstrate that further delay is currently necessitated,” the court noted that “courts often find that
28 one to two months is sufficient time for an agency to process broad FOIA requests that may

⁶ While arguing that *EPIC* was “wrongly decided,” the agency does not even mention the “credible evidence” standard in its opposition, let alone explain why an agency should not be required to make such a showing.

1 involve classified or exempt material.” *Id.* (citations omitted).⁷

2 In *Gilmore*, this Court considered – and rejected – similar agency claims in the context of
3 an *Open America* enlargement of processing time sought by the National Security Agency. In
4 asserting “exceptional circumstances,” the agency claimed that “the highly complex and technical
5 nature of the information dealt with by NSA, and the extreme sensitivity of much of that
6 information necessarily delay the processing of FOIA requests.” *Gilmore*, 1993 U.S. Dist. LEXIS
7 7694 at *36. Noting that “it does not appear that those are acceptable grounds for delay under
8 FOIA,” the Court emphasized that “[n]o special exception [from the statutory time limits] was
9 created for any agency, including the NSA and *other intelligence agencies that face its particular*
10 *problems.*” *Id.* at *36-*37 (emphasis added).

11 Finally, we note that the Ninth Circuit has unequivocally held that agency “difficulties” of
12 the kind ODNI cites here may not be invoked to justify FOIA processing delays:

13 Though FOIA doubtless poses practical difficulties for federal agencies, federal
14 agencies can educate Congress on the practical problems they have, and attempt to
15 persuade Congress to change the law or provide additional funds to achieve
16 compliance. So long as the Freedom of Information Act is the law, we cannot
17 repeal it by a construction that vitiates any practical utility it may have.
18 . . . It may be that agency heads, such as the Attorney General in this case, can be
19 forced by the Freedom of Information Act to divert staff from programs they think
20 more valuable to Freedom of Information Act compliance But these policy
21 concerns are legislative, not judicial, and we intimate no views on them. Congress
22 wrote a tough statute on agency delay in FOIA compliance, and recently made it
23 tougher.

24 *Fiduccia v. Dep’t of Justice*, 185 F.3d 1035, 1041 (9th Cir. 1999). The “tough statute” that
25 Congress enacted clearly does not countenance a four-month delay in the processing of 315 pages
26 of material responsive to “expedited” FOIA requests. ODNI is in violation of the law and has
27 failed to demonstrate an entitlement to any more time than it has already had.

28 ⁷ By no stretch of the imagination can EFF’s requests be characterized as “broad.” The *EPIC* court
cited judicial orders requiring “agencies to process over 6000 pages of material within 60 days,”
and “the ‘vast majority’ of the processing of 7500 pages to be completed within 32 days.” *Id.*
(citations omitted). The 315 pages of responsive material at issue here pales in comparison.

III. EFF Will Suffer Irreparable Injury in the Absence of Preliminary Relief

As we noted in our opening memorandum, “[c]ourts have recognized that the requisite injury is present, and preliminary injunctive relief is appropriate, in cases [where] expedited FOIA processing is at issue and where time thus is of the essence, because delay ‘constitutes a cognizable harm.’” Motion for Preliminary Injunction (“Pl. Mot.”) at 14 (Dkt. No. 6), quoting *Gerstein I*, 2006 U.S. Dist. LEXIS 89883, at *15. We further noted that this Court and others have explicitly stated that the pendency of legislation related to the subject of a FOIA request weighs in favor of a grant of expedited processing. Pl. Mot. at 16; see *Gerstein v. CIA*, No. C-06-4643 MMC, 2006 U.S. Dist. LEXIS 89847, at *20 (N.D. Cal. Nov. 29, 2006) (“*Gerstein II*”) (granting expedited processing where court noted that “there is a significant recognized interest in enhancing public debate on potential legislative action”); see also *Leadership Conference on Civil Rights v. Gonzales*, 404 F.Supp.2d 246, 260 (D.D.C. 2005); *ACLU v. Dep’t of Justice*, 321 F.Supp.2d 24, 31 (D.D.C. 2004).

In the face of this clear authority, ODNI argues that EFF has failed to show the requisite injury because “at this stage plaintiff does not know, and certainly has not established, whether its request will produce any responsive, non-exempt documents that will contribute to th[e] debate” on the pending foreign intelligence surveillance legislation. Def. Opp. at 16. First of all, ODNI has now acknowledged that “[a]s a result of [its] comprehensive search and review process,” documents responsive to EFF’s requests “have been identified.” Def. Opp. at 6. As for the question of whether ODNI will ultimately disclose “non-exempt” material, even a decision to *withhold* all of the responsive documents would influence consideration of the pending legislation.

EFF seeks access to information “vital to the current and ongoing debate surrounding whether, and how, foreign intelligence surveillance law should be amended, especially with regard to providing legal immunity to telecommunications carriers for their past participation in unlawful government surveillance operations.” Declaration of Marcia Hofmann in Support of Motion for Preliminary Injunction (“Hofmann Decl.”), ¶ 19 (Dkt. 7). Key members of Congress have indicated that they are less likely to support a grant of such immunity if the Executive Branch refuses to disclose relevant information. For example, on May 21, 2007, Sens. Patrick J. Leahy and Arlen

1 Specter (Chairman and Ranking Member of the Senate Judiciary Committee, respectively) wrote to
2 the Attorney General to reiterate the Committee's longstanding requests for various documents
3 concerning foreign intelligence surveillance. Declaration of David Sobel, Exhibit A. The Senators
4 noted that the Committee is considering legislation relating to surveillance activities, and that the
5 requested information is "critical" to the legislative process:

6 [T]he Administration has offered a legislative proposal that it contends seeks to
7 "modernize" the Foreign Intelligence Surveillance Act (FISA). As you know, the
8 Judiciary Committee has historically overseen changes to FISA and it is this
9 Committee's responsibility to review the Administration's proposal with great care.
10 The draft legislation would make dramatic and far-reaching changes to a critical
11 national security authority. *Before we can even begin to consider any such
12 legislative proposal, we must be given appropriate access to the information
13 necessary to carry out our oversight and legislative duties.*

14 *Id.* at 2 (emphasis added). More recently, on October 22, 2007, Sens. Leahy and Specter wrote to
15 the Counsel to the President and reiterated their unwillingness "to consider immunity" if the
16 Administration was not more forthcoming with relevant information.

17 If the Administration wants our support for immunity [from liability for
18 communications carriers], it should comply with the [Committee's] subpoenas,
19 provide the information, and justify its request. As we have both said, it is
20 wrongheaded to ask Senators to consider immunity without their being informed
21 about the legal justifications purportedly excusing the conduct being immunized.
22 Although the two of us have been briefed on certain aspects of the President's
23 program, this cannot substitute for access to the documents and legal analysis
24 needed to inform the legislative decisions of the Committee as a whole.

25 Declaration of David Sobel, Exhibit B at 1. It is thus clear that a decision by ODNI to withhold the
26 requested information while the legislation is still pending would, in and of itself, be a "meaningful
27 [albeit perverse] contribution to the ongoing public debate," *Gerstein II*, 2006 U.S. Dist. LEXIS
28 89847, at *21 (internal quotation marks omitted), and render some members of Congress less
inclined to support a grant of immunity.

Finally, ODNI argues that "[e]ven with respect to any non-exempt documents that may be
released [after Congress acts], plaintiff's ability to inform the public about the subject matter of its
FOIA requests will not be precluded altogether, but merely postponed." Def. Opp. at 17. The
government's assertion flies in the face of the rationale adopted by this Court in *Gerstein* and by
other courts that have recognized that the value of requested information will diminish after a
legislative debate has concluded. *See, e.g., Leadership Conference on Civil Rights v. Gonzales*,

1 404 F.Supp.2d 246, 260 (D.D.C. 2005) (“FOIA requests could have vital impact on development of
2 the substantive record in favor of reauthorizing or making permanent the special provisions of the
3 Voting Rights Act”); *ACLU v. Dep’t of Justice*, 321 F.Supp.2d at 30 (“a principle aim of plaintiff’s
4 FOIA request is to provide information for the ongoing national debate about whether Congress
5 should renew Section 215 and other Patriot Act surveillance provisions before they expire”). As
6 the Ninth Circuit has recognized, “[t]he value of information is partly a function of time,”
7 *Fiduccia*, 185 F.3d at 1041, and delay in the processing of FOIA requests “may well result in
8 disclosing the relevant documents after the need for them in the formulation of national . . . policy
9 has been overtaken by events.” *Natural Resources Defense Council v. Department of Energy*, 191
10 F. Supp. 2d 41, 43 (D.D.C. 2002).⁸ While ODNI blithely contends that the usefulness of the
11 requested information will be “merely postponed” by further processing delays, the relevant
12 precedent recognizes that its value will, in fact, be lost.⁹

13
14 ⁸ Debate in Congress on immunity for telecommunications companies is ongoing and intense. Last
15 week, Dow Jones reported that the “Senate Judiciary Committee Thursday deferred a vote on
16 controversial legislation underpinning the government’s warrantless wiretapping program until next
17 week. . . . Given that after next week, lawmakers retire for the Thanksgiving break, this could push
18 a determination on the immunity issue until at least December.” Corey Boles and John Godfrey,
19 *US Lawmakers Defer FISA Legislation Vote For A Week*, Dow Jones Newswires, November 8,
20 2007, available online at [http://money.cnn.com/news/newsfeeds/articles/djf500/200711081241](http://money.cnn.com/news/newsfeeds/articles/djf500/200711081241DOWJONESDJONLINE000975_FORTUNE5.htm)
21 [DOWJONESDJONLINE000975_FORTUNE5.htm](http://money.cnn.com/news/newsfeeds/articles/djf500/200711081241DOWJONESDJONLINE000975_FORTUNE5.htm).

18 On Thursday, November 15, 2007, the Senate Judiciary Committee held its mark-up
19 session, and reported a bill without retroactive immunity, leaving that decision to the full Senate.
20 Pamela Hess, *House OKs Surveillance Oversight Bill*, Associated Press, November 15, 2007,
21 available online at [http://ap.google.com/article/ALeqM5hJKgeE0Z-SivATjok-utYBdh9wDwD8SU](http://ap.google.com/article/ALeqM5hJKgeE0Z-SivATjok-utYBdh9wDwD8SUFI800)
22 [FI800](http://ap.google.com/article/ALeqM5hJKgeE0Z-SivATjok-utYBdh9wDwD8SUFI800). On the same day, the House of Representatives passed the RESTORE Act, H. R. 3773. *Id.*
23 Today, the Dow Jones Newswire reported the Senate plans to act on the FISA bill when it returns
24 from the Thanksgiving break on December 3, as “one of the few measures the Senate deals with”
25 in its two-week December session. See John Godfrey and Corey Boles, *US Senate To Take Up*
26 *Wiretapping Bill In December - Aide*, Dow Jones Newswire, November 16, 2007, available online
27 at [http://money.cnn.com/news/newsfeeds/articles/djf500/200711161401DOWJONESDJONLINE](http://money.cnn.com/news/newsfeeds/articles/djf500/200711161401DOWJONESDJONLINE000751_FORTUNE5.htm)
28 [000751_FORTUNE5.htm](http://money.cnn.com/news/newsfeeds/articles/djf500/200711161401DOWJONESDJONLINE000751_FORTUNE5.htm).

23 It is thus imperative that the requested documents are available to be part of this debate, and
24 therefore ODNI’s proposed December 31, 2007 release date, Def. Opp. at 6, appears designed to
25 keep the requested documents from contributing to the critical portion of the debate that will occur
26 in November and December.

26 ⁹ ODNI’s final argument is that issuance of a preliminary injunction would not serve the public
27 interest because it “has the potential to complicate and disrupt the processing of other FOIA
28 requests.” Def. Opp. at 19 (citation omitted). If, however, as the agency claims, EFF’s FOIA
requests have been “moved to the front of the FOIA queue” and “are currently being processed
ahead of [all other] pending FOIA requests,” *id.* at 5, it is difficult to understand how the hastened

CONCLUSION

When EFF submitted its FOIA requests to ODNI on August 31, 2007, it asserted that there was “an urgency to inform the public” about the requested information because “Congress will imminently consider modifying FISA” and such information “will help the public and Congress fully participate in the looming debate over whether the government’s authority to conduct electronic surveillance should be further expanded and facilitated by telecommunications companies.” Exhibits K & L (attached to Hofmann Decl.). ODNI granted EFF’s request for expediting processing, thus acknowledging the “urgency to inform the public” and the relevance of the requested information to the “looming debate” in Congress. With the legislative debate now underway, the agency asserts that it will be *four months* from the date of the requests – until December 31, 2007 – before it will be able to complete the processing of *315 pages* of material responsive to EFF’s “expedited” requests.

The need for injunctive relief is clear. For the reasons stated above, EFF respectfully requests that its motion for a preliminary injunction be granted.

DATED: November 16, 2007

By _____ /s/
David L. Sobel (*pro hac vice*)
sobel@eff.org
ELECTRONIC FRONTIER FOUNDATION
1875 Connecticut Ave. NW
Suite 650
Washington, DC 20009
Tel: (202) 797-9009 x104/Fax: (202) 707-9066

Kurt Opsahl (SBN 191303)
kurt@eff.org
Marcia Hofmann (SBN 250087)
marcia@eff.org
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Tel: (415) 436-9333 x116/Fax: (415) 436-9993

Attorneys for Plaintiff
ELECTRONIC FRONTIER FOUNDATION

completion of the processing of EFF’s requests would work to the detriment of other requesters. If anything, faster processing of EFF’s requests will allow the agency to return to the processing of the other pending requests more quickly.