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12
13 **UNITED STATES DISTRICT COURT**
14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
15 **SAN FRANCISCO DIVISION**

16 ELECTRONIC FRONTIER FOUNDATION,)
17 Plaintiff,)
18 v.)
19 OFFICE OF THE DIRECTOR OF NATIONAL)
20 INTELLIGENCE and DEPARTMENT OF)
21 JUSTICE,)
22 Defendants.)

NOS. 08-1023 JSW & 08-2997 JSW
NOTICE OF MOTION AND MOTION FOR
A STAY OF PROCEEDINGS;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR A STAY OF PROCEEDINGS
Date: April 3, 2009
Time: 9:00 a.m.
Courtroom: 2, 17th Floor

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1 TO THE COURT, DEFENDANTS AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on April 3, 2009, or as soon thereafter as the matter may be
3 heard in Courtroom 2 on the 17th Floor of the United States District Court for the Northern District
4 of California, 450 Golden Gate Avenue, San Francisco, California, plaintiff Electronic Frontier
5 Foundation (“EFF”) will, and hereby does, move for a stay of proceedings in the above-captioned
6 cases.

7 Pursuant to Local Rule 7-2, EFF moves for a court order staying proceedings pending
8 issuance of new guidelines governing the Freedom of Information Act by the Attorney General, as
9 directed by President Obama on January 21, 2009. This motion is based on this notice of motion,
10 the memorandum of points and authorities in support of this motion, the declaration of Marcia
11 Hofmann and attached exhibits in support of this motion, and all papers and records on file with the
12 Clerk or which may be submitted prior to or at the time of the hearing, and any further evidence
13 which may be offered.

14 **MEMORANDUM OF POINTS AND AUTHORITIES**

15 **I. Issue to be Decided**

16 Whether the Court should conserve judicial resources by staying proceedings until the
17 defendants have an opportunity to assess their withholdings under the Attorney General’s
18 forthcoming Freedom of Information Act guidelines, which President Obama has required to
19 implement a presumption of disclosure in government.

20 **II. Statement of Facts**

21 In this Freedom of Information Act (“FOIA”) action, EFF seeks the disclosure of records
22 maintained by Office of the Director of National Intelligence (“ODNI”) and several Department of
23 Justice components concerning the efforts of the agencies and telecommunications carriers to push
24 for changes in U.S. foreign intelligence surveillance law, especially changes to immunize such
25 companies for their role in the government’s unlawful surveillance of millions of Americans. After
26 providing several interim releases of records to EFF, the defendants moved for summary judgment
27 on December 10, 2008, asserting that they have completed the processing of EFF’s FOIA requests
28 and disclosed all responsive information that is not properly exempt from disclosure. Defs. Mot.

1 Summ. J. (No. 08-2997 Dkt. No. 29.)¹ EFF filed a cross motion for summary judgment on January
2 13, 2009, arguing that the government has improperly withheld agency records to which EFF is
3 entitled under the law. Pl. Cross Mot. Summ. J. (No. 08-2997 Dkt. No. 43.)²

4 On his first full day in office, President Obama issued a memorandum concerning the FOIA
5 to the heads of all Executive Branch departments and agencies. Memorandum for Heads of
6 Executive Departments and Agencies, 74 Fed. Reg. 4683 (Jan. 21, 2009) (“Obama FOIA Memo”)
7 (attached to Declaration of Marcia Hofmann (“Hofmann Decl.”) as Ex. A). The Obama FOIA
8 Memo provides, *inter alia*, that “[a]ll agencies should adopt a presumption in favor of disclosure,
9 in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era
10 of open Government. The presumption of disclosure should be applied to *all decisions involving*
11 *FOIA.*” *Id.* (emphasis added). The President also directed the Attorney General “to issue new
12 guidelines governing the FOIA to the heads of executive departments and agencies, reaffirming the
13 commitment to accountability and transparency, and to publish such guidelines in the Federal
14 Register.” *Id.* The new guidelines have not yet been issued; indeed, the new Attorney General did
15 not take office until February 3, 2009, the same day the government opposed EFF’s cross motion
16 for summary judgment. (No. 08-2997 Dkt. No. 46.)

17 **III. Argument**

18 EFF respectfully submits that litigating the propriety of the defendants’ decision to
19 withhold portions of the requested information would be wasteful of judicial resources prior to the
20 issuance of the forthcoming Attorney General guidelines on FOIA compliance in the new
21 Administration. If, as the early commentary suggests, the Obama FOIA Memo effectively reverses
22 the Bush Administration policies under which the withholding decisions at issue here were made,
23 prudence dictates that the responsible agency officials should be permitted to reconsider those
24 earlier determinations in light of the new guidelines, once they are issued.

25 As this Court has recognized, “the power to stay proceedings is incidental to the power

26 ¹ On October 8, 2008, the Court ordered that Case Nos. 08-1023 and 08-2997 be consolidated for
27 purposes of summary judgment. (No. 08-1023 Dkt. No. 65; No. 08-2997 Dkt. No. 21.)

28 ² EFF’s reply in support of its cross motion for summary judgment is currently due February 17,
2009.

1 inherent in every court to control the disposition of the causes on its docket with economy of time
 2 and effort for itself, for counsel, and for litigants.” *FormFactor, Inc. v. Micronics Japan Co., Ltd.*,
 3 No. 06-07159 JSW, 2008 U.S. Dist. LEXIS 13114, at *4 (N.D. Cal. Feb. 11, 2008) (quoting *Landis*
 4 *v. North American Co.*, 299 U.S. 248, 254 (1936) (internal quotation marks omitted)); *see also*
 5 *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 110-11 (9th Cir. 2005). When considering whether or not
 6 to grant a stay, the Court must consider factors such as:

7 the possible damage which may result from the granting of a stay, the hardship or
 8 inequity which a party may suffer in being required to go forward, and the orderly
 9 course of justice measured in terms of the simplifying or complicating of issues,
 10 proof, and questions of law which could be expected to result from a stay.

11 *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962); *FormFactor*, 2008 U.S. Dist. LEXIS
 12 13114, at **4-5.

13 **A. EFF Will Suffer Hardship and Inequity If Forced to Proceed in This Action**
 14 **Under the Former Presidential Administration’s FOIA Policy.**

15 EFF will suffer hardship if this case proceeds before the new Administration can assess
 16 whether its position in the litigation will change. President Obama’s newly announced presumption
 17 in favor of disclosure is a stark departure from previous Executive Branch policy, which was
 18 articulated in a memorandum issued by former Attorney General John Ashcroft on October 12,
 19 2001. As the DOJ’s Office of Information and Privacy explained at the time of its issuance:

20 [i]n replacing the predecessor FOIA memorandum [issued by former Attorney
 21 General Janet Reno], the Ashcroft FOIA Memorandum establishe[d] a new “sound
 22 legal basis” standard governing the Department of Justice’s decisions on whether to
 23 defend agency actions under the FOIA when they are challenged in court. This
 24 differ[ed] from the “foreseeable harm” standard that was employed under the
 25 predecessor memorandum.

26 Dep’t of Justice, Office of Information and Privacy, *New Attorney General FOIA Memorandum*
 27 *Issued*, FOIA POST (Oct. 15, 2001) (Hofmann Decl. Ex. B). As such, the Obama Memo has already
 28 been perceived as a significant change in Executive Branch FOIA policy. *See, e.g.*, Hope Yen,
Advocates Praise Obama Move on Disclosure, Associated Press (Jan. 22, 2009) (Hofmann Decl.
 Exhibit C) (“Obama’s directive . . . effectively reverses Ashcroft’s memo, restoring open records
 laws largely to how they were interpreted during the Clinton administration.”); Andrew Noyes,
Obama’s FOIA Directive Brings Praise, Bit Of Skepticism, National Journal’s CongressDaily (Jan.

1 22, 2009) (Hofmann Decl. Ex. D) (“The announcement was an about-face from a directive by
2 former Attorney General John Ashcroft instructing agencies to withhold information by using
3 exemptions if an argument could be made to do so.”).³

4 Of course, the full impact of the Obama Administration’s change in FOIA policy will not
5 be known until the Attorney General issues new guidelines governing the FOIA as directed by the
6 President. Courts have found that a stay is especially appropriate where, as here, there are pending
7 administrative proceedings that may have a bearing on the disposition of the case. As the Ninth
8 Circuit has noted:

9 A trial court may, with propriety, find it is efficient for its own docket and the fairest
10 course for the parties to enter a stay of an action before it, pending resolution of
11 independent proceedings which bear upon the case. This rule applies whether the
12 separate proceedings are judicial, administrative, or arbitral in character, and does
13 not require that the issues in such proceedings are necessarily controlling of the
14 action before the court.

15 *Lockyer*, 398 F.3d at 1111 (quoting *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857,
16 863-64 (9th Cir. 1979)); *see also Painters’ Pension Trust Fund v. Manganaro Corp.* 693 F. Supp.
17 1222, 1224 (D.D.C. 1988) (“stays are not infrequently granted when simultaneously pending
18 [administrative] proceedings might illuminate or resolve matters also confronting courts”)
19 (citations omitted); *Crown Cent. Petroleum Corp. v. Dep’t of Energy*, 102 F.R.D. 95, 98-99 (D.
20 Md. 1984) (staying a FOIA action *sua sponte* to allow completion of administrative proceedings
21 before the Department of Energy’s Office of Hearing and Appeals).

22 Therefore, it is appropriate for the Court to stay this proceeding until the Attorney General
23 issues the new FOIA guidelines and the defendants have an opportunity to assess how the
24 Administration’s new policies will affect this case, if at all.⁴

25 ³ As the Associated Press observed, the Obama Memo is “the latest in a three-decade-long
26 pingpong game with FOIA policy. In the late 1970s, Carter’s attorney general, Griffin Bell, issued
27 guidance to err on the side of releasing information. Under Reagan, William French Smith came in
28 and reversed that; he told them, ‘when in doubt withhold.’ Then under Clinton, Janet Reno
reversed it again; she told agencies their presumption should be for release. But Bush Attorney
General John Ashcroft went back the other way in October 2001, telling agencies he would defend
any legal justification for withholding documents.” Hofmann Decl. Ex. C.

⁴ President Obama has also indicated a shift in approach to claims of executive privilege by former
presidents in the context of the Presidential Records Act. Exec. Order No. 13489, 74 Fed. Reg.
4669 (Jan. 21, 2009) (Hofmann Decl. Ex. E). It is reasonable to permit the government time to

1 **B. A Stay of Proceedings May Simplify the Issues Remaining to Be Litigated in**
2 **This Case and Serve the Interests of Judicial Economy.**

3 In the interest of judicial economy, the Court should stay further proceedings in this case
4 pending the Attorney General's issuance of new guidelines governing the FOIA. Indeed, the DOJ
5 Office of Information and Privacy, a component involved in this case, has agreed with EFF in
6 another case that postponing proceedings until the Attorney General's guidelines are issued "will
7 serve the interest of judicial economy and possibly preclude unnecessary litigation." Joint Mot.
8 Stay Proceedings & Amend Briefing Schedule at 3, *Electronic Frontier Foundation v. Office of the*
9 *United States Trade Rep.*, No. 08-1599-RMC (D.D.C. filed Jan. 30, 2009) (Hofmann Decl. Ex. F).
10 In that case, Judge Rosemary M. Collyer stayed proceedings until thirty (30) days after the
11 Attorney General issues the new guidelines, but no later than June 30, 2009. Feb. 2, 2009 Collyer
12 Order (Hofmann Decl. Ex. G). A similar stay in this case will make it possible for the agencies to
13 determine whether additional information should be released under the forthcoming Attorney
14 General guidelines in response to EFF's requests, which will conserve judicial resources by
15 reducing the likelihood that the parties will have to relitigate claims over the same material in the
16 coming months.

17 **C. No Damage Will Result From a Stay of Proceedings in This Case.**

18 The government will suffer no hardship or inequity from the stay requested by EFF. Indeed,
19 a stay of proceedings will conserve agency resources—if this case is resolved before the Attorney
20 General guidelines are issued, EFF will have to submit duplicative FOIA requests to receive the
21 benefit of the new presumption of disclosure, forcing the agencies to process the same material
22 again. Giving the government time to determine whether its positions will change under the
23 Attorney General's forthcoming guidance may eliminate the need for additional FOIA requests
24 seeking the material at issue here.⁵

25 determine how the new Administration's policy on prior assertions of executive privilege will
26 affect this case, given the defendant's sweeping invocation of the presidential communications
27 privilege to withhold many records responsive to EFF's FOIA requests. *See* Defs. Mot. Summ. J.
28 ⁵ The defendants may contend that the withholding decisions at issue in this case must be governed
by the executive policies in place at the time those determinations were made. While the D.C.
Circuit has found that, under certain circumstances, a court should apply the provisions of a
superceded executive order on national security classification, that result "relied on a 'carry-over

1 **IV. CONCLUSION**

2 For the foregoing reasons, EFF's motion to stay proceedings should be granted. An
3 appropriate proposed order accompanies this memorandum.

4
5 DATED: February 10, 2009

Respectfully submitted,

6
7 /s/ Marcia Hofmann

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25 provision' in the superceding executive order that preserved classification decisions made under
26 the prior order." *Campbell v. Dep't of Justice*, 164 F.3d 20, 29 n.7 (D.C. Cir. 1998) (citation
27 [withholding] decisions under the [old directive] into question." *Id.* at 29 (footnote omitted). Here,
28 that question cannot be answered until the new guidelines are issued, although, as we have noted,
the Obama FOIA Memo has been perceived as a clear break from the approach under which the
determinations at issue here were made.