

1 TONY WEST
 Assistant Attorney General

2

3 ELIZABETH J. SHAPIRO
 Deputy Director, Federal Programs Branch

4 MARCIA BERMAN (PA Bar No. 66168)
 Senior Counsel, U.S. Department of Justice
 Civil Division, Federal Programs Branch
 20 Massachusetts Ave., N.W., Room 7132
 Washington, D.C. 20530
 Telephone: (202) 514-2205
 Facsimile: (202) 616-8470
 Email: marcia.berman@usdoj.gov
 8 *Attorneys for Defendants*

9

10 UNITED STATES DISTRICT COURT

11 NORTHERN DISTRICT OF CALIFORNIA

12 SAN FRANCISCO

13

14 ELECTRONIC FRONTIER FOUNDATION, 15 Plaintiff, 16 v. 17 OFFICE OF THE DIRECTOR OF NATIONAL 18 INTELLIGENCE and UNITED STATES 19 DEPARTMENT OF JUSTICE, 20 Defendants.) Nos. 08-2997 JSW & 08-1023 JSW)) REPLY IN SUPPORT OF) EMERGENCY FILING FOR) TEMPORARY STAY PENDING) APPEAL DECISION BY SOLICITOR) GENERAL REGARDING APPEAL) AND IMMEDIATE) ADMINISTRATIVE STAY, PER) DIRECTION OF U.S. COURT OF) APPEALS FOR THE NINTH) CIRCUIT)
---	--

21

22 Defendants' Emergency Filing was submitted pursuant to an order from the United States

23 Court of Appeals for the Ninth Circuit, stating as follows: "Appellants' emergency motion for

24 stay pending appeal of the district court's October 7, 2009 order is denied without prejudice to

25 renewal following presentation to the district court and the district court's issuance of an order

26 granting or denying the motion." Oct. 9, 2009 9th Cir. Order. Defendants again respectfully

27 request that the Court stay its September 24, 2009 disclosure order, until November 8, 2009, to

28 prevent the irrevocable disclosure of confidential deliberative material and information that

1 could reveal the Government's intelligence sources and methods while the Solicitor General
2 determines whether to pursue an appeal of that order. This case involves multiple exemptions
3 and several categories of documents, which raise different legal issues. In the absence of a stay,
4 not only will the information be permanently disclosed to the public, but any appeal of the
5 Court's order will be mooted because the documents will have been disclosed, thereby depriving
6 the Ninth Circuit of the ability to review the important issues in this case.

7 Plaintiff's opposition to the current motion rests solely on its cramped view of this
8 Court's authority to act. Defendants continue to seek a stay, until November 8, to allow the
9 Solicitor General to consider the important issues involved in this case and determine whether to
10 pursue an appeal of the Court's September 24, 2009 decision. This short stay is sought pursuant
11 to (1) Title 28, which gives the Solicitor General 60 days, or until November 23, to decide
12 whether to appeal, see 28 U.S.C. § 2107(b), FRAP 4(a)(1)(B); and (2) the Court's inherent
13 authority to control its docket and amend the previously-ordered disclosure date. See, e.g.,
14 United States v. Robertson, 110 F.3d 1113, 1116 (5th Cir. 1997) (noting that district court
15 granted Government stay so that it could appeal court's decision, and that Government filed
16 notice of appeal after court granted stay); Keep Yellowstone Nuclear Free v. Dep't of Energy,
17 Case No. 06-CV-205 (Oct. 5, 2009 order granting Government 60-day stay of disclosure order in
18 FOIA case); Marriott Int'l Resorts, L.P. v. United States, 63 Fed. Cl. 144, 145 (2004) (granting
19 Government's motion to certify an interlocutory appeal and noting that court had previously
20 granted stay to enable Government to "make an orderly and considered decision whether to file
21 an interlocutory appeal . . ."); rev'd on other grounds, 437 F.3d 1302 (Fed. Cir. 2006)
22 (reversing decision that Government appealed); Davila v. Texas, 489 F. Supp. 803, 810 (S.D.
23 Tex. 1980) (granting plaintiff a 30-day stay in which to file an appeal, where case would have
24 been effectively mooted in the absence of a stay).

25 The Solicitor General has undertaken to complete her deliberations in this matter – which
26 are underway – on an accelerated basis, by November 8. These deliberations are necessarily
27 formal and government-wide, in recognition of what the Court itself deemed to be the important
28 issues at stake. The Solicitor General must decide not only whether to appeal, but also on what

1 grounds, which entails a consideration of the multiple exemptions and various categories of
2 documents at issue. A stay until November 8 is a modest amount of time (less than the time
3 provided by the Federal Rules of Appellate Procedure) in which to consult with all interested
4 parties, review the legal merits of myriad arguments, and reach a determination on whether to
5 pursue appeal.

6 Although the Court has inherent authority to consider the instant emergency filing,
7 defendants filed a Notice of Appeal on October 8, removing any procedural impediment to the
8 Court's issuance of a stay pending appeal. See Oct. 7, 2009 Order at 2. As defendants have
9 previously set forth, they meet the test for a stay pending appeal. See Mtn. for 60-Day Stay
10 Pending Appeal Determination at 2-8; Defs.' Emergency Motion for Temporary Stay filed in
11 Ninth Circuit at 15-20 and reply thereto (attached to emergency filing). The Government will
12 unquestionably suffer irreparable harm if it must disclose confidential deliberative
13 communications and information that could reveal intelligence sources and methods before
14 appellate review of the Court's September 24 decision. Once these records are disclosed, their
15 confidentiality will be instantly forfeited and cannot be recovered at a later point. See, e.g.,
16 Dep't of Health and Human Servs. v. Alley, 129 S.Ct. 1667 (2009) (staying district court's
17 disclosure order in FOIA case pending appeal); DOJ v. Rosenfeld, 501 U.S. 1227 (1991) (same);
18 John Doe Agency v. John Doe Corp., 488 U.S. 1306, 1307-09 (1989) (staying district court's
19 disclosure order in FOIA case pending disposition of petition for writ of certiorari); Kamakana v.
20 City and County of Honolulu, 447 F.3d 1172, 1178 (9th Cir. 2006) (staying order requiring
21 disclosure of sealed documents pending appeal); Hunt v. CIA, 981 F.2d 1116, 1117 (9th Cir.
22 1992) (staying FOIA disclosure order pending appeal) Irons v. FBI, 811 F.2d 681, 683 (1st Cir.
23 1987) (denial of stay pending appeal of disclosure order "force[s] the government to let the cat
24 out of the bag, without any effective way of recapturing it if the district court's directive [were]
25 ultimately found to be erroneous"); Providence Journal Co. v. FBI, 595 F.2d 889, 889-90 (1st
26 Cir. 1979) (noting that the "confidentiality [of disclosed records] will be lost for all time").
27 Indeed, plaintiff has conceded that we "may" be entitled to a stay pending appeal because
28 "disclosure of the requested documents would render an appeal moot." Pl.'s Opp. to Defs.' Mtn.

1 for 60-Day Stay at 8. The harm to plaintiff from the short stay requested is negligible, especially
2 given the fact that defendants have shortened their request for a stay to November 8.

3 Moreover, for the reasons stated in the Government's original application to this Court
4 for a stay and reiterated in its application to the Ninth Circuit, there is a substantial prospect of
5 succeeding on the merits of an appeal of the Court's September 24 decision, which appeal will
6 be mooted if a stay is not issued. At a minimum, the Government has now briefed the significant
7 errors in the Court's order; plaintiff has yet to offer a cogent explanation for these errors. It
8 remains undisputed that the Government's Exemption 5 withholding includes documents that
9 remained within the Executive Branch. These documents were not exchanged with Congress or
10 telecommunications companies, and easily meet the inter-agency or intra-agency threshold
11 requirement under the Court's construction of Exemption 5. Yet the Court failed to address the
12 Government's assertion of privilege over these documents, ending its analysis at the threshold
13 stage for all of the Exemption 5 material. The Court subsequently denied the Government's
14 motion for reconsideration. This is clearly a meritorious issue for appeal and one on which the
15 Government is likely to prevail.

16 Similarly, plaintiff has yet to attempt to justify the Court's treatment of the Government's
17 Exemption 3 assertion over the identities of representatives of telecommunications companies.
18 The Court held that the identities of telecommunications companies' employees and agents were
19 not protected under FOIA's Exemption 6, and seemingly ordered defendants to produce this
20 information. But defendants also claimed Exemption 3 over this very same information, on the
21 grounds that disclosure of the identities of representatives of telecommunications companies
22 who communicated with ODNI and DOJ would assist our adversaries in drawing inferences
23 about whether certain telecommunications companies may or may not have assisted the
24 Government. Defendants explained that disclosure of the identities of those individuals and
25 entities that assisted, or in the future may assist, the Government with intelligence activities
26 could impede the Government's ability to gather intelligence information, and we demonstrated,
27 in multiple declarations (including one submitted by the Director of National Intelligence), that
28 this information is properly protected as intelligence sources and methods under Exemption 3.

1 See McConnell decl. at ¶¶ 23-27; Steele decl. at ¶¶ 18-19; Brand decl. at ¶¶ 27-29; Supplemental
2 Hackett decl. at ¶ 4 (filed 02-03/2009) (Dkt. No. 48, case no. 08-2997); Defs.' Opp. to Pl.'s
3 Cross-Mtn. for Summ. Judgment and Reply at 24-25. The Court recognized that plaintiff was
4 not challenging the withholding of information that would reveal the Government's intelligence
5 sources and methods, and then simply failed to address the applicability of Exemption 3 to the
6 identities of representatives of telecommunication companies. Sept. 24 Order at 9-10; see also
7 Pl.'s Opp. to Mtn. for 60-Day Stay at 6. The Government is likely to prevail on the merits of this
8 issue too on appeal.

9 In addition, the applicability of Exemption 5 to records of confidential negotiations
10 exchanged between the Executive Branch and Congress, undertaken in the performance of the
11 two branches' constitutionally-assigned roles in the legislative process, is an issue of first
12 impression that involves the interests of Congress as well as a number of components of the
13 Executive Branch, and that the Ninth Circuit would be foreclosed from addressing if the appeal
14 becomes moot as a result of the denial of a stay. At the very least, the Government has
15 demonstrated that serious and significant questions exists for resolution on appeal.

16 On balance, a stay is necessary to prevent the irrevocable disclosure of information that
17 the Government claims is protected from disclosure under FOIA Exemptions 3 and 5, and to
18 preserve the issues in this case for appellate review. Accordingly, defendants respectfully
19 request that the Court stay its September 24, 2009 disclosure order until November 8, 2009. In
20 the alternative, if the Court declines to stay its order until November 8, defendants respectfully
21 request a temporary administrative stay through this Friday, October 16, 2009, to give the
22 Government time to resubmit its stay request to the Ninth Circuit and the Ninth Circuit time to
23 consider that request.

24
25 Dated: Oct. 13, 2009

Respectfully submitted,

26 TONY WEST
Assistant Attorney General

27 ELIZABETH J. SHAPIRO
28 Deputy Director, Federal Programs Branch

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

/s/ Marcia Berman
MARCIA BERMAN (PA Bar No. 66168)
Senior Counsel, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W., Room 7132
Washington, D.C. 20530
Telephone: (202) 514-2205
Facsimile: (202) 616-8470
E-mail: marcia.berman@usdoj.gov

Attorneys for Defendants