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13  
14 **UNITED STATES DISTRICT COURT**

15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

16 **SAN FRANCISCO DIVISION**

17 ELECTRONIC FRONTIER FOUNDATION, )

18 Plaintiff, )

19 v. )

20 OFFICE OF THE DIRECTOR OF NATIONAL )

21 INTELLIGENCE and DEPARTMENT OF )

22 JUSTICE, )

23 Defendants. )

NOS. 08-1023 JSW & 08-2997 JSW

OPPOSITION TO MOTION FOR A 60-DAY  
STAY PENDING APPEAL  
DETERMINATION BY SOLOCITOR  
GENERAL

Date: October 9, 2009

Time: 9:00 a.m.

Courtroom: 2, 17th Floor

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*Ctr. for Nat’l Security Studies v. Dep’t of Justice*, 217 F. Supp. 2d 58 (D.D.C. 2002)..... 8

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*Dep’t of Justice v. Rosenfeld*, 501 U.S. 1227 (1991)..... 7

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12 *Richardson v. United States*, 841 F.2d 993 (9th Cir. 1988)..... 10

13 *Saldate v. Adams*, 573 F. Supp. 2d 1303 (E.D. Cal. 2008)..... 8

14 *Senate of the Commonwealth of Puerto Rico v. Dep’t of Justice*, 823 F.2d 574 (D.C. Cir. 1987)... 10

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19 **OTHER AUTHORITIES**

20 Attorney General Eric Holder, *Memorandum for Heads of Executive Departments and Agencies re*

21 *the Freedom of Information Act*, March 19, 2009 (available at [http://www.usdoj.gov/ag/foia-](http://www.usdoj.gov/ag/foia-memo-march2009.pdf)

22 [memo-march2009.pdf](http://www.usdoj.gov/ag/foia-memo-march2009.pdf))..... 11-12

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### SUMMARY OF ARGUMENT

The Court should deny Defendants' request for a 60-day stay to decide whether or not they wish to appeal the Court's September 24, 2009 order. First, the government has failed to show it has a strong likelihood of success on the merits of any appeal it make take. The government's objections to the order amount to disagreement with the decision, not a strong likelihood of a different outcome on appeal or reconsideration.

Second, Defendants have failed to show irreparable injury in the absence of a 60-day stay. The harm the government claims it will suffer is speculative unless and until it decides to appeal the order. Speculative injury does not constitute irreparable harm sufficient to warrant the relief the government seeks. A stay pursuant to Federal Rule of Civil Procedure 62(c) is premature in the absence of a valid appeal.

Third, the Electronic Frontier Foundation ("EFF") will suffer irreparable harm if the Court grants the stay sought by the government. As the Court found when deciding EFF's motion for a preliminary injunction earlier in this case, "irreparable harm exists where Congress is considering legislation that would amend the [Foreign Intelligence Surveillance Act] and the records may enable the public to participate meaningfully in the debate over such pending legislation." *Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence*, 542 F. Supp. 2d 1181, 1187 (N.D. Cal. 2008). The value of the information that EFF seeks is particularly time-sensitive because Congress is considering new legislation that would repeal retroactive immunity for telecommunications companies that facilitated the government's warrantless surveillance program. As such, the Court should reaffirm its prior finding of irreparable harm.

Finally, the public interest will benefit from the timely release of the records EFF has requested under the Freedom of Information Act ("FOIA"). The United States Senate is considering two pieces of legislation that would repeal the grant of retroactive immunity that is the primary subject of EFF's FOIA requests. As this Court found when it granted EFF's motion for a preliminary injunction, the information EFF seeks "will be rendered useless in the effort to educate the American public about the issues pertinent to the legislation if such information is produced

1 after Congress amends the law.” *Elec. Frontier Found.*, 542 F. Supp. 2d at 1186. Thus, the stay  
2 should be denied, or at least conditioned on a timely notice of appeal and agreement by the  
3 government to seek expeditious consideration of any appeal.

#### 4 **MEMORANDUM OF POINTS AND AUTHORITIES**

##### 5 **I. Introduction**

6 This Freedom of Information Act (“FOIA”) case concerns several requests submitted by the  
7 Electronic Frontier Foundation (“EFF”) to defendants Office of the Director of National  
8 Intelligence and Department of Justice many months ago to learn about the efforts of the agencies  
9 and telecommunications carriers to push for changes in U.S. foreign intelligence surveillance law.  
10 The Court granted EFF’s cross motion for summary judgment on September 24, 2009, and ordered  
11 Defendants to release all improperly withheld documents by October 9, 2009. The government  
12 now moves for a 60-day stay “pending a determination by the Solicitor General as to whether an  
13 appeal should be taken.” The government’s motion for a stay is premature and any such  
14 determination to appeal is purely speculative and inconsistent with President Obama’s stated  
15 commitment to an unprecedented era of government transparency. Accordingly, it should be  
16 denied.

##### 17 **II. Issue to be Decided**

18 Whether the Court should stay its September 24, 2009 order granting EFF’s cross motion  
19 for summary judgment for 60 days to permit the government an additional two months to consider  
20 whether or not it wishes to file a notice of appeal of this Court’s order.

##### 21 **III. Statement of Facts**

22 In this FOIA action, EFF seeks the disclosure of records maintained by ODNI and several  
23 DOJ components concerning efforts by the agencies and telecommunications carriers to seek  
24 changes to U.S. foreign intelligence surveillance law, particularly to immunize the carriers for their  
25 role in the government’s unlawful surveillance of millions of Americans. EFF submitted the first  
26 round of these requests in December 2007, and a second set in April 2008. All of them were  
27 granted expedited processing under the applicable statutory standard, and this Court issued a  
28 preliminary injunction to enforce EFF’s statutory right to expedited processing of the December

1 2007 requests. April 4, 2008 Order (08-1023 Dkt. 43.) After providing several interim releases of  
2 records to EFF, the defendants moved for summary judgment on December 10, 2008, asserting that  
3 they had completed the processing of EFF's FOIA requests and disclosed all responsive  
4 information that is not properly exempt from disclosure. Defs. Mot. Summ. J. (08-2997 Dkt. 29.)<sup>1</sup>  
5 EFF filed a cross motion for summary judgment on January 13, 2009, arguing that the government  
6 had improperly withheld a substantial number of agency records to which EFF is entitled under the  
7 law. Pl. Cross Mot. Summ. J. (08-2997 Dkt. 43.)

8         Shortly thereafter, on his first full day in office, President Obama issued a memorandum  
9 concerning the FOIA to the heads of all Executive Branch departments and agencies. *Memorandum*  
10 *for Heads of Executive Departments and Agencies*, 74 Fed. Reg. 4683 (Jan. 21, 2009). The Obama  
11 FOIA Memo provides, *inter alia*, that “[a]ll agencies should adopt a presumption in favor of  
12 disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in  
13 a new era of open Government. The presumption of disclosure should be applied to all decisions  
14 involving FOIA.” *Id.* The President also directed the Attorney General “to issue new guidelines  
15 governing the FOIA to the heads of executive departments and agencies, reaffirming the  
16 commitment to accountability and transparency, and to publish such guidelines in the Federal  
17 Register.” *Id.* The Court granted a stay during summary judgment briefing to give the government  
18 an opportunity to determine the effect of the guidelines on this case. March 23, 2009 Order (08-  
19 1023 Dkt. 77; 08-2997 Dkt. 60.) On May 12, 2009, after applying the new guidelines, the  
20 defendants emailed EFF a small number of additional records identified for “discretionary release,”  
21 and filed revised *Vaughn* declarations and indices reflecting the disclosures. (08-1023 Dkts. 79-83;  
22 08-2997 Dkts. 62-66.)

23         On September 24, 2009, the Court denied the government's motion for summary judgment  
24 and granted EFF's cross motion, ordering the defendants to produce all improperly withheld  
25 documents by October 9. Order (08-1023 Dkt. 90; 08-2997 Dkt. 72.) On September 30, 2009, the  
26 government filed a motion to stay the order for 60 days “to allow the Government to engage in a

27 \_\_\_\_\_  
28 <sup>1</sup> On October 8, 2008, this Court ordered that Case Nos. 08-1023 and 08-2997 be consolidated for  
purposes of summary judgment. (08-1023 Dkt. 65; 08-2997 Dkt. 21.)

1 deliberate consideration of its appellate options.” Mot. for a 60-Day Stay Pending Appeal  
2 Determination by Solicitor General at 2:28-3:1 (hereafter “Mot. to Stay”) (08-1023 Dkt. 91; 08-  
3 2997 Dkt. 73.)

#### 4 **IV. Argument**

5 The government’s motion for a stay pending appeal is premature, because no appeal will be  
6 “pending from an interlocutory or final judgment” unless and until the defendants actually appeal  
7 the Court’s September 24, 2009 order. *See* Fed. R. Civ. P. 62(c). Should the Court determine that a  
8 stay is appropriate, however, it should not allow the government the full 60 days it seeks, because  
9 that is an excessive amount of time given the time-sensitive nature of EFF’s rights and Defendants’  
10 obligations. Instead, the Court should grant a conditional stay that will preserve the parties’ rights,  
11 serve the public interest, and facilitate the undisputed need for expedition in this case.

##### 12 A. Legal Standard

13 While the Federal Rules of Civil Procedure do not contemplate stays pending a  
14 determination of *whether* to appeal, the rules do provide for stays pending an *actual* appeal. Rule  
15 62(c) states:

16 When an appeal is pending from an interlocutory or final judgment that grants,  
17 dissolves, or denies an injunction, the court may suspend, modify, restore, or grant  
18 an injunction on terms for bond or other terms that secure the opposing party’s  
rights.

19 When deciding whether to issue a stay pending appeal, the Court considers four factors: “(1)  
20 whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2)  
21 whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will  
22 substantially injure the other parties interested in the proceeding; and (4) where the public interest  
23 lies.” *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Golden Gate Restaurant Ass’n v. City and*  
24 *County of San Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008); *Humane Soc’y of the United States*  
25 *v. Gutierrez*, 523 F.3d 990, 991 (9th Cir. 2008).

26 The government bears the burden of showing such an extraordinary measure is necessary.  
27 *Summers v. Howard University*, No. 02-7069, 2002 WL 31269623, at \*1 (D.C. Cir. Oct. 10, 2002)  
28 (per curiam) (movant must satisfy “stringent standards required for a stay pending appeal”); *Ctr.*



1 *for Int'l Env'tl. Law v. Office of the U.S. Trade Rep.*, 240 F. Supp. 2d 21, 22 (D.D.C. 2003) (“it is  
2 the movant’s obligation to justify the court’s exercise of such an extraordinary remedy”) (quoting  
3 *Cuomo v. U.S. Nuclear Regulatory Comm’n*, 772 F.2d 972, 978 (D.C. Cir. 1977)). A movant “must  
4 do more than merely allege imminent harm” to obtain a stay; he “must *demonstrate* immediate  
5 threatened injury as a prerequisite to . . . relief.” *Caribbean Marine Servs. Co. v. Baldrige*, 844  
6 F.2d 668, 674 (9th Cir. 1988) (emphasis in original). If a movant fails to meet the “minimum  
7 showing” of a threat of an immediate irreparable injury, this Court “need not decide whether [the  
8 movant is] likely to succeed on the merits.” *Oakland Tribune, Inc. v. Chronicle Publ’g Co.*, 762  
9 F.2d 1374, 1376 (9th Cir. 1985).

10 B. The Government Has Failed to Make a Strong Showing That It is Likely to Prevail  
11 on the Merits of An Appeal.

12 While Defendants claim that “there is at least a reasonable prospect that the Court of  
13 Appeals will agree” with the government’s arguments on Exemptions 5 and 6, Mot. to Stay at 5:11-  
14 12, they are unable to offer any persuasive argument that they are likely to succeed on the merits of  
15 an appeal. The government primarily asserts that the Court failed to sufficiently address various  
16 arguments, but cannot identify a deficiency that suggests the likelihood of a different outcome on  
17 appeal or reconsideration.<sup>2</sup>

18 The government first argues that the Court did not address the government’s claims of  
19 privilege over documents exchanged between and among agency representatives and other  
20 Executive branch officials. Mot. to Stay at 5:17-7:7. However, the Court’s holding on this point is  
21 clear: “The Court . . . finds that Exemption 5 does not extend to communications that have been  
22 shared with government bodies or private corporations outside an Executive branch agency  
23 because these entities are not considered ‘agencies’ within the meaning of FOIA.” Order at 7:17-

24 \_\_\_\_\_  
25 <sup>2</sup> EFF intends to address the government’s motion for leave to file a motion for reconsideration,  
26 which was filed just a few hours before this opposition. (08-1023 Dkt. 93; 08-2997 Dkt. 75.) As an  
27 initial matter, however, we note that nothing in the government’s motion to stay indicates “a  
28 material difference in fact or law exists from that which was presented to the Court,” the  
“emergence of new material facts or a change of law” since the Court issued its order, or a  
“manifest failure by the Court to consider material facts or dispositive legal arguments which were  
presented to the Court[.]” Civil L.R. 7-9(b)(1)-(3).

1 19. The government’s argument reflects disagreement with the Court’s decision, nothing more.

2       The Defendants next argue that the order failed to address the government’s contention that  
3 “communications between ODNI or DOJ officials and representatives of the telecommunications  
4 companies concerning amendments to FISA satisfy the inter-agency or intra agency threshold  
5 requirement because these parties were communicating about common interests they shared as co-  
6 defendants in litigation.” Mot. to Stay at 7:8-7:7:22. The Court did address this argument,  
7 however—and found it unpersuasive. Order at 8:18-9:3 (explaining, *inter alia*, “the Court finds that  
8 any withheld communications between representatives of the telecommunications companies and  
9 government officials also fail to meet the threshold requirement necessary to claim Exemption 5  
10 protection”); *see also id.* at 9:4-9 (“Although the Court is not persuaded by . . . Defendants’ further  
11 arguments on the applicability of . . . the common interest privilege . . . the Court need not address  
12 the parties’ remaining contentions regarding privilege because the Court finds that Defendants have  
13 failed to meet their burden to establish the threshold requirement for exemption.”). Therefore, this  
14 contention is similarly unavailing.

15       Finally, the government simultaneously argues that the Court failed “to rule on defendants’  
16 assertion of Exemption 3 to withhold the identities of telecommunications companies’ employees  
17 and agents” and that the Court ruled “that this information must be disclosed.” Mot. to Stay at  
18 7:23-8:6. As this Court knows, EFF only challenged the withholding of material under Exemptions  
19 5 or 6 “to the extent that records can be disclosed without revealing classified information or the  
20 government’s intelligence sources and methods.” Pl. Cross Mot. Summ. J. at 8 n.5 (08-2997 Dkt.  
21 43); Reply in Support of Pl. Cross. Mot. Summ. J. at 15:21-16:1 (08-2997 Dkt. 67). The  
22 government argues that “disclosure of information as to whether any particular telecommunications  
23 carrier has assisted, or may in the future assist, the Government with intelligence activities would  
24 reveal intelligence sources and methods.” Mot. to Stay at 8:1-3. Even if true, this would not make  
25 the identities of telecommunications carrier lobbyists exempt, let alone indicate a likelihood of  
26 success on appeal. Reply in Support of Pl. Cross. Mot. Summ. J. at 16:6 to 17:17.

27       Accordingly, because the government has failed to show a likelihood of success on the  
28 merits of any appeal it might take, the Court should deny the request for a stay. *Armstrong v.*

1 *Executive Office of the President*, 877 F. Supp. 750, 752 (D.D.C. 1995) (denying motion for a stay  
2 where, among other shortcomings, the defendant agency’s likelihood of success on the merits of an  
3 appeal was “*de minimis*”).

4 C. The Government Has Failed to Show It Will Be Irreparably Harmed If It Does Not  
5 Have 60 Days to Decide Whether to Appeal.

6 The government has failed to show that it will be irreparably harmed if the Court does not  
7 grant a 60-day stay to allow the Solicitor General additional time to decide whether to appeal the  
8 Court’s September 24 order. The harm the government claims it will suffer is speculative, since the  
9 government will suffer no injury whatsoever if it ultimately decides not to appeal the order.<sup>3</sup>  
10 Moreover, the decision under review is “consistent with the President’s directive” on FOIA. Sept.  
11 24, 2009 Order at 10 n.2. There is no reason to believe that the Solicitor General would be likely to  
12 authorize an appeal.

13 As the Ninth Circuit has noted, “[s]peculative injury does not constitute irreparable injury  
14 sufficient to warrant granting a preliminary injunction,” nor, under the preliminary injunction  
15 standard, a stay pending appeal. *Caribbean Marine Servs.*, 844 F.2d at 674 (citing *Goldie’s*  
16 *Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 472 (9th Cir. 1984)). Any stay under Federal Rule  
17 of Civil Procedure 62(c) is premature in the absence of a valid appeal. *Century Laminating, Ltd. v.*

18 <sup>3</sup> While the government contends that “courts routinely grant stays in FOIA cases,” Mot. to Stay at  
19 4:1-2, none of the cases they cite appears to involve a stay pending an “appeal determination,” but  
20 rather stays requested once appeals or petitions for certiorari had actually been filed and were  
21 pending. *Dep’t of Commerce v. Assembly of the State of California*, 501 U.S. 1272 (1991),  
22 *subsequent proceeding* at 797 F. Supp. 1554, 1557-58 (E.D. Cal. 1992) (Supreme Court granted a  
23 stay pending appeal 19 days after the government filed a notice of appeal); *Dep’t of Justice v.*  
24 *Rosenfeld*, 501 U.S. 1227 (1991) (stay granted “pending final disposition of the appeal”); *John Doe*  
25 *Agency v. John Doe Corp.*, 488 U.S. 1306, 1310 (1989) (Marshall, J., in chambers) (stay granted  
26 pending disposition of petition for certiorari to review judgment); *Taylor v. Dep’t of the Army*, 684  
27 F.2d 99, 102 (D.C. Cir. 1982) (district court denied motion for a stay “pending appeal,” then  
28 appeals court granted emergency application for a stay); *Martin v. IRS*, 857 F.2d 722, 724 (10th  
Cir. 1988) granting emergency motion for a “stay pending appeal”); *Acumenics Research & Tech.*  
*v. Dep’t of Justice*, 843 F.2d 800, 803 (4th Cir. 1988) (plaintiff “successfully moved for a stay  
pending appeal and took this appeal”); *Costal States Gas Corp. v. Dep’t of Energy*, 644 F.2d 969,  
973-74 (3d Cir. 1981) (after the district court denied the defendant agency’s motion for  
reconsideration, the “agency sought a stay from [the appellate court] pending appeal”); *Providence*  
*Journal Co. v. FBI*, 595 F.2d 889, 889 (1st Cir. 1979) (appeals court granted defendants and  
intervenor “stays pending their appeals”).

1 *Montgomery*, 595 F.2d 563, 569 (9th Cir. 1979) (Rule 62(c) “presuppose[s] the existence of a valid  
2 appeal”); *see also In re Seizure of Approximately 28 Grams of Marijuana*, No. 3-01 M 30204  
3 MHP, 2004 WL 2915286, \*3 (N.D. Cal. Dec. 16, 2004) (finding motion for a stay under Rule 62(c)  
4 premature where movant had not filed an appeal); *Saldade v. Adams*, 573 F. Supp. 2d 1303, 1314  
5 (E.D. Cal. 2008) (noting the court had denied a stay pursuant to Rule 62(c) as premature where an  
6 appeal had not yet been filed); *Barber v. Simpson*, No. 2:05-cv-2326-GEB-DAD, 2006 WL  
7 2548189, at \*4 (E.D. Cal. Sept. 1, 2006) (“a Rule 62(c) injunction appears premature since Plaintiff  
8 has not yet filed an appeal to the Ninth Circuit”); *Davila v. Texas*, 489 F. Supp. 803, 810 (S.D. Tex.  
9 1980) (“Technically, Rule 62(c) is not properly invoked until ‘an appeal is taken’”); *Corpus Christi*  
10 *Peoples’ Baptist Church, Inc. v. Texas Dep’t of Human Res.*, 481 F. Supp. 1101, 1111-12 (S.D.  
11 Tex. 1979), *aff’d per curiam*, 621 F.2d 438 (5th Cir. 1980) (noting that an injunction to preserve  
12 the status quo during the pendency of plaintiffs’ “possible appeal” was inappropriate under Rule  
13 62(c), which by its express terms applies only when an “appeal is taken”). Whenever a court denies  
14 a stay pending appeal when no appeal has yet been filed, it necessarily also denies a stay pending  
15 the putative appellant’s determination of whether to appeal.

16 The injury the Court should consider when deciding whether to grant a stay is not the  
17 speculative harm from disclosure of the withheld documents—unless and until the Solicitor  
18 General authorizes an appeal, that harm is pure conjecture. Rather, the relevant harm is the  
19 government having two weeks rather than two months to ruminate on whether to appeal. That harm  
20 is negligible in light of the irreparable harm to EFF’s statutory rights under the FOIA and the  
21 strong public interest in informed legislative debate, detailed more fully *infra* in Sections IV.D and  
22 IV.E.

23 If the government actually decides to sidestep its new policy on FOIA and file a notice of  
24 appeal, it may—at that time—be entitled to a short stay of the Court’s order because disclosure of  
25 the requested documents would render an appeal moot. *Ctr. for Int’l Envtl. Law*, 240 F. Supp. 2d at  
26 22-23; *Ctr. for Nat’l Security Studies v. Dep’t of Justice*, 217 F. Supp. 2d 58, 58 (D.D.C. 2002).  
27 However, that scenario is not before the Court. As things stand today, a 60-day stay is unnecessary  
28 and excessive. If the Court believes any delay is warranted, it should fashion a conditional stay that

1 will preserve the parties' rights, serve the public interest, and recognize the need for expedition in  
2 this case. Such a stay should require the government to file a notice of appeal and seek expedited  
3 consideration from the Ninth Circuit no later than October 15, 2009, in order for the stay to remain  
4 in effect. If, however, the government fails to exercise its right to appeal or fails to seek expedited  
5 consideration by that date, the Court's stay should expire. *See Ctr. for Int'l Envtl. Law*, 240 F.  
6 Supp. 2d at 24 (granting stay "only for a limited time and on the condition that defendants seek  
7 expedited consideration from the court of appeals"); *People for the Am. Way Found. v. Dep't of*  
8 *Educ.*, 518 F. Supp. 2d 174, 179 (D.D.C. 2007) (conditioning stay on, *inter alia*, government's  
9 filing a notice of appeal and petitioning appeals court for expedited consideration).

10 D. EFF Will Suffer Irreparable Harm If the Court Stays Its September 24, 2009 Order  
11 for 60 Days.

12 Because "stale information is of little value," a stay of the length sought by Defendants will  
13 substantially and irreparably injure EFF. *See Payne Enters., Inc. v. United States*, 837 F.2d 486,  
14 494 (D.C. Cir. 1988). EFF submitted the oldest of the FOIA requests at issue here nearly two years  
15 ago. Defendants granted expedited processing for all the requests, and, as the Court found when it  
16 granted EFF's motion for a preliminary injunction to ensure the first round of requests were  
17 processed in an expeditious manner, "Plaintiff has met its burden of demonstrating that it will  
18 suffer irreparable injury in the absence of relief." *Elec. Frontier Found.*, 542 F. Supp. 2d 1181 at  
19 1185 (08-1023 Dkt. 34). The government still has not produced most of the documents requested  
20 by EFF, and further delay continues to compromise our statutory rights to expedited treatment and  
21 the requested material.

22 Moreover, as the Court found when deciding EFF's motion for a preliminary injunction,  
23 "irreparable harm exists where Congress is considering legislation that would amend the [Foreign  
24 Intelligence Surveillance Act] and the records may enable the public to participate meaningfully in  
25 the debate over such pending legislation." *Id.* at 1187. The value of the information that EFF  
26 requested from Defendants here is particularly time-sensitive because Congress is again  
27 considering such legislation, as described in detail *infra* in Section IV.E. As such, the Court should  
28

1 reaffirm its prior finding of irreparable harm.<sup>4</sup> While the bills discussed below are not the same  
2 legislation that was pending when the Court granted EFF's motion for a preliminary injunction,  
3 their effect is substantially the same. Further delay will continue to harm the legislative and public  
4 debate over updating foreign intelligence surveillance law and EFF's ability to meaningfully take  
5 part in that debate. The goals of the FOIA, "efficient, prompt, and full disclosure of information,"  
6 will only be frustrated by the further delay of the government's compliance with the law. *See*  
7 *August v. FBI*, 328 F.3d 697, 699 (D.C. Cir. 2003) (quoting *Senate of the Commonwealth of Puerto*  
8 *Rico v. Dep't of Justice*, 823 F.2d 574, 580 (D.C. Cir. 1987) (emphasis in original)).

9 E. The Public Interest Will Be Served By the Expeditious Release of Documents At  
10 Issue In This Case.

11 The public interest will be served by the denial of the stay requested by the government and  
12 expeditious release of the records requested by EFF. The United States Senate is actively  
13 considering two bills that would repeal the grant of retroactive immunity that is the primary subject  
14 of EFF's FOIA requests. Just as this Court found when it granted EFF's motion for a preliminary  
15 injunction, "the requested information will be rendered useless in the effort to educate the  
16 American public about the issues pertinent to the legislation if such information is produced after  
17 Congress amends the law." *Elec. Frontier Found.*, 542 F. Supp. 2d at 1186. The stay requested by  
18 the government would frustrate that goal.

19 On September 17, 2009, Senator Russ Feingold and seven other senators introduced the  
20 Judicious Use of Surveillance Tools In Counterterrorism Efforts ("JUSTICE") Act. S. 1686 111th  
21 Cong. (2009). Section 303 of the JUSTICE Act would eliminate Section VIII of the FISA  
22 Amendments Act, which granted retroactive legal immunity for telecommunications companies  
23 that participated in President Bush's warrantless wiretapping program when President Bush signed  
24 it into law on July 7, 2008. Just last week, on September 29, 2009, Senator Christopher Dodd,  
25

26 <sup>4</sup> According to the "law of the case" doctrine, "a court is ordinarily precluded from reexamining an  
27 issue previously decided by the same court, or a higher court, in the same case." *Hydrick v.*  
28 *Hunter*, 466 F.3d 676, 687 (9th Cir. 2006) (quoting *Richardson v. United States*, 841 F.2d 993, 996  
(9th Cir. 1988)). While the doctrine is subject to several exceptions, *see Jeffries v. Wood*, 114 F.3d  
1484, 1489 (9th Cir. 1997) (en banc), none of them applies here.

1 joined by Senators Patrick Leahy, Russ Feingold and Jeff Merkley, introduced S. 1725, or the  
2 Retroactive Immunity Repeal Act, which would similarly repeal the grant of telecommunications  
3 company immunity. Both bills were introduced as part of the debate over the reauthorization of the  
4 USA PATRIOT Act, parts of which are set to expire on December 31, 2009. It is clear that any  
5 further delay by Defendants will irreparably harm EFF's ability, and that of the public, to obtain  
6 information in a timely fashion that is vital to the robust debate over retroactive immunity.

7 Defendants contend that if the Court grants a full 60-day stay, "[t]he most that plaintiff  
8 suffers is a delay of 45 days beyond the current disclosure deadline of October 9." Mot. for Stay at  
9 4:18-5:1. While the government's math is correct, its conclusion is not. If there is to be meaningful  
10 public debate on the issue of retroactive legal protection for telecommunications carriers, that  
11 examination "cannot be based solely upon information that the Administration voluntarily chooses  
12 to disseminate." *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 416 F. Supp. 2d 30, 41 n.9 (D.D.C.  
13 2006). EFF's FOIA requests go to the heart of an already vigorous public and congressional  
14 debate. The information EFF seeks must be disclosed while that debate is still ongoing because it  
15 "cannot be restarted or wound back." *Elec. Frontier Found.*, 542 F. Supp. 2d at 1186, quoting  
16 *Gerstein v. CIA*, No. C-06-4643 MMC, 2006 WL 3462659 at \*4 (N.D. Cal. Nov. 29, 2006). As the  
17 government pointed out when it opposed EFF's motion for a preliminary injunction in an almost  
18 identical case before Judge Illston, "new information may reinvigorate the public's interest in this  
19 matter." Defs' Opp. to Pl's Mot. for Prelim. Inj. at 17:14, *Elec. Frontier Found. v. Office of the*  
20 *Director of Nat'l Intelligence* (07-5278 Dkt. 22.).

21 The Supreme Court has long recognized our democracy's interest in "the uninhibited,  
22 robust, and wide-open debate about matters of public importance that secures an informed  
23 citizenry." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 815 (1985) (quoting *New*  
24 *York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (internal quotation marks omitted)); see also  
25 *Board of Educ. v. Pico*, 457 U.S. 853, 876 (1982) ("[T]he Constitution presupposes the existence  
26 of an informed citizenry prepared to participate in governmental affairs."). Furthermore, as the  
27 Attorney General has noted, "[t]imely disclosure of information is an essential component of  
28 transparency." Attorney General Eric Holder, *Memorandum for Heads of Executive Departments*

1 *and Agencies re the Freedom of Information Act* at 3, March 19, 2009 (*available at*  
2 <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>). The government should be permitted no  
3 further postponement in complying with this Court's order and with the law, particularly  
4 considering the strong public interest in the requested documents.

5 **V. Conclusion**

6 For the foregoing reasons, the government's motion to stay proceedings should be denied.  
7 An appropriate proposed order accompanies this memorandum.

8  
9 DATED: October 6, 2009

Respectfully submitted,

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11  
12 /s/ Marcia Hofmann

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