

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

_____	)	
	)	
ELECTRONIC FRONTIER FOUNDATION,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09-17235
	)	
OFFICE OF THE DIRECTOR OF NATIONAL	)	(D.C. Nos. 08-1023 &
INTELLIGENCE and DEPARTMENT OF	)	08-2997 (N.D. Cal.)
JUSTICE,	)	
	)	
Defendants-Appellants.	)	
	)	
_____	)	

**REPLY TO OPPOSITION TO  
EMERGENCY MOTION FOR STAY PENDING APPEAL**

1. Appellee essentially ignores a critical reality about litigation of cases under the Freedom of Information Act: a denial of a stay does not simply alter the status quo while the case remains pending; it moots the case, thereby depriving the court of appeals of the opportunity to address the issues brought to it in a considered and orderly manner, and necessarily and irreparably destroys the confidentiality of the records at issue. For these reasons, as we have explained, courts routinely grant stays in FOIA cases where, as here, there are substantial prospects of success on the merits. Nothing in appellee’s opposition justifies departing from that practice here.

2. The government's motion demonstrates that the district court ordered disclosure of documents without ever deciding critical issues that must be addressed before any disclosure is ordered, such as the applicability of Exemption 3 and the privileges asserted under Exemption 5 with respect to documents that are indisputably intra-agency or inter-agency. In response, EFF asserts that those unresolved issues should be decided in its favor, and suggests that the district court's decision therefore may be sustained on appeal on grounds other than those relied on by the district court itself.

Needless to say, the government disagrees with EFF's position on the merits of these issues. If EFF wishes to defend the district court's judgment on appeal on alternative grounds, it is free to do so. But that is hardly a basis for denying a stay pending appeal, and thereby granting EFF the documents it seeks without any court ever having put EFF's legal arguments to the test.

3. At various points, EFF argues that the government is unlikely to succeed on appeal because the district court's "factual findings" are insulated by the clearly-erroneous standard of review. But the district court *did not make any findings of fact*, nor could it have done so. The court was acting on motions for summary judgment, and therefore had neither the occasion nor the power to resolve contested factual issues. Thus, for example, contrary to EFF's assertion (at 19), the district court never made any "finding" (or, indeed, any reference at all) regarding EFF's factual assertion

that the identities of telecommunications companies that assisted the government's intelligence activities are "out of the bag." The government disputes that assertion, and there is no finding of fact by the district court on which EFF can rely.

4. As to the remaining categories of documents – the documents concerning communications with the telecommunications companies for which the government asserted a common interest privilege in the district court, and the communications with Congress for which the deliberative process and Presidential communications privileges were asserted – the Solicitor General has not determined whether an appeal will be pursued. The government requests the short additional period of time to complete consultation and her consideration. Appellee has not demonstrated irreparable injury of the sort that would outweigh the interest in assuring that she has the ability to do so.

5. If the Court wishes to minimize any asserted adverse consequences of a stay for EFF, the government is prepared to brief and argue this appeal on an expedited basis.

## CONCLUSION

For the foregoing reasons, the disclosure order should be stayed pending appeal, and the district court's administrative stay should be extended pending disposition of this motion.

Respectfully submitted,  
TONY WEST  
Assistant Attorney General  
Civil Division

*/s/ Douglas N. Letter*

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Douglas N. Letter  
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*/s/ Scott R. McIntosh*

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## CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2009, I have filed and served the foregoing EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR STAY PENDING APPEAL AND IMMEDIATE ADMINISTRATIVE STAY by causing copies to be filed electronically with the Clerk of the Court and with causing copies to be served electronically on:

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