

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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)	
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 STAY MOTION**

1. As explained in detail in the stay motion (at 12-15), there is a compelling need to provide a temporary stay of the disclosure order in order to permit the Solicitor General to make her decision regarding appeal in this complex case. The numerous categories of documents, the variety of statutory and constitutional considerations that bear on them, the number of Executive Branch components that have interests in the documents and the broader issues, and the additional interests of Congress in the confidentiality of its communications with the Executive Branch – all of these factors make it imperative that the Solicitor General have adequate time

for consultation and deliberation.

EFF does not respond to any of these points. Instead, it simply suggests (at 15-16 n.1) that the necessary consultations and deliberations can be completed by October 15. The suggestion that the Solicitor General can engage in the kind of comprehensive and considered review that this case demands in six days is obviously without merit.

EFF also suggests (at 14-15) that this Court should ignore the harms that would arise from disclosure of the documents, such as the destruction of the documents' confidentiality and the loss of this Court's own power to review the decision below, on the ground the Solicitor General ultimately might decide not to appeal. But the whole point of the stay is to preserve the status quo while the Solicitor General decides after consultation *whether or not* to appeal (and if to appeal, on what grounds). If a stay is denied, she is denied the opportunity to make that decision altogether, the disclosure of the documents will have mooted the case, and the harms resulting from disclosure will be irreversible. EFF's asserted interest in having access to the documents immediately, before the Solicitor General and the many interested components of the government have had an adequate opportunity to consider the appeal question in the comprehensive manner required, does not remotely outweigh these irreparable injuries.

2. The government's motion (at 16-20) identified significant errors in the district court's disclosure order, including the court's insistence on ordering disclosure of documents without ever resolving the applicability of the FOIA exemptions under which the documents have been withheld. In response to this showing, EFF simply asserts without argument (at 13) that the district court's decision is correct. EFF makes no effort to defend the district court's specific errors, or the government's grounds for withholding of the various categories of documents, that were identified in the stay motion.

For example, the opposition makes no attempt to justify the district court's treatment of the government's invocation of Exemption 3 for certain records. As explained in our motion, the Office of the Director of National Intelligence and the Department of Justice have withheld the identities of representatives of telecommunications companies under Exemption 3 because disclosure of those identities could reveal intelligence sources and methods that are protected by the National Security Act, 50 U.S.C. § 403-1(i)(1), and other federal laws. See Declaration of J. Mitchell McConnell, Director of National Intelligence, at ¶¶ 24-26 (district court docket # 42) (explaining threats to intelligence gathering capabilities that would result from disclosures regarding private parties that assist intelligence gathering). The district court has ordered the agencies to disclose this information

without even addressing the applicability of Exemption 3, much less holding that Exemption 3 does not apply. Op. 9-10. In the absence of a stay, this patent error by the district court will go unredressed.

Similarly, the district court ordered the disclosure of materials that are indisputably intra-agency and inter-agency under Exemption 5, such as materials exchanged within and between DOJ and ODNI, without ever purporting to decide the government's invocation of privilege with respect to those materials. Op. 7-8. The stay motion points out this obvious error; EFF says nothing in response. Nor does EFF say anything about the legal bases for withholding communications between the Executive Branch and Congress or telecommunications companies.

2. EFF argues (at 10) that the relief being sought by the government is “virtually identical” to a stay pending appeal, and that the government therefore must meet the substantive requirements that apply when a stay pending appeal is sought. But as explained in the motion, the government is *not* seeking a conventional stay pending appeal, but rather a temporary stay pending the completion of the necessary deliberations by the Solicitor General regarding appeal. Although the motion in fact satisfies the requirements for a stay pending appeal, there is no reason why those requirements should apply.

EFF also argues (at 10-11) that the government has not met the procedural

requirements of Rule 8. But even if this request for a temporary stay is deemed to be subject to those requirements, the requirements have been satisfied.

Rule 8 provides that a movant seeking a stay pending appeal must ordinarily seek relief from the district court in the first instance, and that if the movant fails to do so, it must explain why moving in the district court would be impracticable. FRAP 8(a)(1), 8(a)(2)(A)(i). Here, the temporary stay being sought from this Court has already been sought from and denied by the district court. If the government were now seeking a conventional stay pending appeal (*i.e.*, a stay of the disclosure order pending briefing, argument, and disposition of an appeal by the government), Rule 8(a) would presumptively require the government to turn first to the district court, which declined to decide whether it would grant such a request. But the government is not asking this Court for such a stay. And no purpose whatsoever would be served by requiring the government to return to the district court with respect to the present request for a temporary stay, for the district court has already made clear that, in its view, the government has already had all the time it needs. See Stay Denial Order 2 (“the matter has been submitted on the parties’ cross-motions long enough for the Defendants to consider their options regarding a possible appeal”).

CONCLUSION

For the foregoing reasons, the disclosure order should be stayed until November 8, and an immediate administrative stay should be entered pending disposition of this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2009, I have filed and served the foregoing
REPLY TO OPPOSITION TO EMERGENCY STAY MOTION by causing copies
to be filed electronically with the Clerk of the Court and with causing copies to be
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