

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC FRONTIER FOUNDATION,)
)
Plaintiff,)
)
v.) Civ. No. 06-1773-RBW
)
DEPARTMENT OF JUSTICE,)
)
Defendant.)
_____)

**REPLY IN SUPPORT OF PLAINTIFF’S MOTION FOR A
PRELIMINARY INJUNCTION AND RESPONSE TO DEFENDANT’S
SUPPLEMENT TO MOTION FOR *OPEN AMERICA* STAY**

On April 2, 2007, defendant Department of Justice (“DOJ”) moved for a stay of proceedings until February 2013 to allow the FBI to complete its processing of the FOIA requests at issue in this case. DOJ subsequently conceded that the requests are legally entitled to “expedited processing,” but the Bureau has still not released a single page of responsive material to plaintiff, despite the fact that the requests have now been pending for more than one year. On August 22, 2007, plaintiff moved for entry of a preliminary injunction requiring the FBI to process 2500 pages of material each month and release non-exempt records or portions of records on a monthly, rolling basis. Defendant has now opposed plaintiff’s motion and filed a “supplement” in support of its stay motion. The government’s submission warrants a brief reply.

1. Notwithstanding defendant’s suggestion that preliminary injunctive relief is somehow inappropriate in FOIA cases, the recent weight of authority clearly rejects that view. As this Court recognized last year, “[o]n numerous occasions, federal courts have entertained motions for a preliminary injunction in FOIA cases and, when appropriate,

have granted such motions.” *Electronic Privacy Information Center v. Dep’t of Justice*, 416 F. Supp. 2d 30, 35 (D.D.C. 2006) (citations omitted). More recently, as we noted in our opening memorandum, the Court found that “where a plaintiff contends in good faith that an agency has failed to expedite a FOIA request in accordance with statute or regulation . . . the availability of an order that effectively is an injunction, preliminary or otherwise, should not be foreclosed.” *Electronic Frontier Foundation v. Dep’t of Justice*, C.A. No. 07-0656 (JDB) (D.D.C. June 15, 2007) (order granting in part and denying in part motion for preliminary injunction), attached to Motion for Preliminary Injunction as Exhibit B, at 4. Such an order is all that plaintiff seeks here.

2. The FBI’s characterizations of the burdensomeness of processing plaintiff’s FOIA requests are clearly unreliable. The government’s motion to stay proceedings until February 2013 was initially premised upon the Bureau’s assertion that “72,000 pages of records [are] potentially responsive to EFF’s FOIA requests.” Defendant’s Opposition and Supplement (“Def. Opp.”) at 8. The Bureau now reports that it “has reviewed approximately 21,000 pages of documents; of those, it has identified 750 pages as responsive and eliminated the remainder as nonresponsive.” *Id.* (citation omitted). In other words, less than 3.6 percent of the FBI’s original estimate is, in fact, responsive to the requests and subject to processing. Assuming that a similar percentage will apply to the remaining estimate of 51,000 pages, the more realistic number would be approximately 1820 pages. As such, the *total* number of responsive pages (2570) would barely qualify for placement in the Bureau’s “large” FOIA request processing queue.¹

¹ The FBI employs a three track system for processing FOIA requests: small (500 pages or less); medium (501-2500 pages); and large (2501 pages or more). DOJ Reference

3. The FBI appears to be backtracking on its initial representations concerning the rate at which it would process material responsive to plaintiff's requests. When it moved for a stay of proceedings in April, the Bureau asserted that it "will be able to process approximately 800 pages every four (4) weeks, and therefore anticipates that it will require approximately 68 months for responsive documents to be processed and released to plaintiff." Memorandum in Support of Motion for *Open America* Stay at 12 (citation omitted). Now that it is clear that the universe of "responsive" documents is far smaller than the FBI initially claimed, the Bureau is strangely silent on the question of its processing rate. It is unclear, for instance, why only 200 of the 750 pages of responsive material described in the government's submission "will be released to EFF on or before September 28, 2007." Def. Opp. at 8. Indeed, if (as now appears likely) fewer than 3000 pages of material are actually responsive to plaintiff's requests, a processing rate of 800 pages per month would result in the completion of all processing in less than four months. These "expedited" requests have now been pending for more than a year, and it is time for processing to be completed.

4. Defendant DOJ implies that plaintiff should not be heard to complain about the processing delay at issue in this case because "the FBI has recently had to direct much of its processing capacity to meeting court-imposed schedules for accelerated processing of two other FOIA requests filed by EFF." *Id.* at 10 (citation omitted). Plaintiff acknowledges that it has submitted several FOIA requests to the FBI, many of which seek the disclosure of timely and potentially controversial information. Indeed, a front page article in yesterday's edition of the New York Times was based upon documents

Guide: Attachment C, Descriptions of DOJ Components, *available at* <http://www.usdoj.gov/oip/attachmentbmay99.htm>.

concerning the Bureau's use of National Security Letters that were recently released to plaintiff pursuant to this Court's order in *Electronic Frontier Foundation v. Department of Justice*, No. 07-cv-656 (D.D.C.). Eric Lichtblau, *F.B.I. Data Mining Reached Beyond Initial Targets*, NY Times, September 9, 2007 at A1 (attached hereto as Exhibit 1).

While the Bureau may chafe under the requirements of expediting the processing of FOIA requests that are legally entitled to such handling, there can be no question that plaintiff's use of disclosed material serves the public interest and achieves precisely the result that Congress intended when it established a right to expedition.

CONCLUSION

For the foregoing reasons and those set forth in plaintiff's opening memorandum, plaintiff's motion for a preliminary injunction should be granted and defendant's motion for a stay of proceedings until February 2013 should be denied.

Respectfully submitted,

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