

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 TO STAY PROCEEDINGS**

Plaintiff Electronic Frontier Foundation (“EFF”) has moved for a stay of proceedings in this Freedom of Information Act (“FOIA”) case pending issuance of “new guidelines governing the FOIA” by the Attorney General, as directed by President Obama on January 21, 2009. Defendant Department of Justice (“DOJ”) has filed an opposition that warrants a brief reply.<sup>1</sup>

1. DOJ has failed to identify any “actual harm potentially caused by the stay” EFF requests. *Feld Entm’t, Inc. v. ASPCA*, 523 F. Supp. 2d 1, 4 (D.D.C. 2007). The agency does not even attempt to explain how it would be injured by a relatively brief stay in this case, which has been pending for more than two years while the agency completed its processing of EFF’s FOIA request – a process that DOJ initially said would require a stay

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<sup>1</sup> On February 11, 2009, the Court ordered defendant DOJ to file a Notice within 60 days “advising the Court as to whether the defendant’s position has changed,” and further ordered that “the Court’s consideration of the plaintiff’s motion to stay the proceedings is stayed pending filing of the defendant’s Notice.” Order, dated February 11, 2009 (dkt. no. 27) at 1. While plaintiff assumed that the Court did not intend for the parties to file additional submissions concerning the question of a stay, defendant appears to have had a different understanding and plaintiff thus submits this reply.

of almost six years. Memorandum in Support of Motion for *Open America* Stay (dkt. no. 7) at 2.

2. DOJ asserts that the new FOIA policy announced by the President, and the Attorney General's impending issuance of new guidelines implementing that policy, do "not require government agencies to suspend their processing of FOIA requests or mandate a halt to ongoing FOIA litigation." Defendant's Opposition to Plaintiff's Motion to Stay Proceedings (dkt. no. 28) ("Def. Opp.") at 5. That position, however, does not appear to be consistently held within the Justice Department. Since EFF filed its pending motion, DOJ attorneys in another pending FOIA case agreed with EFF that postponing proceedings until the Attorney General's guidelines are issued "will serve the interest of judicial economy and possibly preclude unnecessary litigation." Joint Motion to Stay Proceedings & Amend Briefing Schedule at 3, *Electronic Frontier Foundation v. Office of the United States Trade Rep.*, No. 08-1599-RMC (D.D.C.) (attached to Plaintiff's Motion for Extension of Time (dkt. no 29) as Exhibit A).<sup>2</sup> In that case, Judge Collyer has stayed proceedings until thirty days after the Attorney General issues the new guidelines, but no later than June 30, 2009. Order, dated February 3, 2009 (attached to

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<sup>2</sup> Notably, the Government in that case is represented by DOJ's Office of Information and Privacy ("OIP"), which "develops and provides guidance to agencies on questions relating to application of the FOIA" and "manages the Department's responsibilities related to the FOIA." U.S. Department of Justice, Office of Information and Privacy (available at <http://www.usdoj.gov/oip/oip.html>). The Director of OIP has declared that President Obama's "memorandum was effective immediately and supersedes former Attorney General Ashcroft's Memorandum on the FOIA dated October 12, 2001." "Department of Justice Email to FOIA Professionals" (available at [http://thefoiablog.typepad.com/the\\_foia\\_blog/2009/01/departments-of-justice-email-to-foia-professionals.html](http://thefoiablog.typepad.com/the_foia_blog/2009/01/departments-of-justice-email-to-foia-professionals.html)). It thus remains unclear what, if any, guidance on FOIA implementation is currently in force pending issuance of new Attorney General guidelines. As OIP recognizes, it is prudent to await the new guidelines before proceeding with the litigation of pending FOIA cases.

Plaintiff's Motion for Extension of Time as Exhibit B). A contrary result here would run afoul of the principle that FOIA should be applied consistently throughout the Government. *See, e.g., Al-Fayed v. CIA*, 254 F.3d 300, 307 (D.C. Cir. 2001).

3. Finally, DOJ argues that a stay would be somehow inappropriate because “the specific implications of the new FOIA guidelines will not be known until the Attorney General issues the guidelines.” Def. Opp. at 3 (citation omitted). That, however, is precisely the point – in the absence of any harm that might result from the requested stay, the interests of judicial economy would be best served by awaiting the issuance of the guidelines to determine whether they *do* effect the disposition of the material at issue here. As DOJ's own FOIA experts at OIP recognize, a brief delay in pending FOIA cases while awaiting issuance of the new guidelines may “possibly preclude unnecessary litigation.” The alternative – litigating FOIA issues now and then having requesters re-submit their requests once the new guidelines are issued – would clearly be a wasteful exercise. *See, e.g., Trans-Pacific Policing Agreement v. U.S. Customs Serv.*, 177 F.3d 1022, 1023 (D.C. Cir. 1999) (“[T]here is really nothing of substance to be gained by requiring appellants to file a new FOIA request at the administrative level; it is also clear that a new lawsuit will be costly in terms of additional time, expense, and wasted judicial resources.”).

### **CONCLUSION**

For the foregoing reasons, and those set forth in EFF's initial submission, plaintiff's motion to stay proceedings should be granted.

Respectfully submitted,

/s/ David L. Sobel

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