

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

_____)	
ELECTRONIC FRONTIER)	
FOUNDATION,)	
)	
Plaintiff,)	
)	
vs.)	Civil Action No. 06-cv-1773 (RBW)
)	
DEPARTMENT OF JUSTICE,)	
)	
Defendant.)	
_____)	

DEFENDANT’S OPPOSITION TO PLAINTIFF’S MOTION TO STAY PROCEEDINGS

PRELIMINARY STATEMENT

Plaintiff’s Motion to Stay Proceedings (dkt. no. 26) requests that the Court stay proceedings in this litigation pending the Attorney General’s issuance of new Freedom of Information Act (FOIA) guidelines to the heads of executive departments and agencies, and that the Court require the defendant Department of Justice, once the Attorney General has issued the new guidelines, to file a statement with the Court indicating whether the new guidelines have any effect on issues in this litigation.

The Court should deny the plaintiff’s motion because a stay is unlikely to promote judicial economy and will only serve to delay the conclusion of this litigation. The new FOIA guidelines have not yet issued, and it is not known whether the terms of the guidelines, once they issue, will have any implications for FOIA requests, such as plaintiff’s here, that already have been processed. Moreover, it is not yet known whether the new guidelines, once they issue, will have any bearing on the requests at issue in this particular case.

BACKGROUND

This action relates to two Freedom of Information Act (FOIA) requests submitted by the plaintiff, Electronic Frontier Foundation, seeking disclosure of records pertaining to the Federal Bureau of Investigation (FBI)'s Investigative Data Warehouse (IDW), a law enforcement database "that holds hundreds of millions of records containing personal information." See Compl. for Injunctive Relief ¶¶ 11–18 (dkt. no. 1); Answer ¶¶ 11–18 (dkt. no. 3); Defs.' Supplemental Answer (dkt. no. 5). The FBI has completed the processing of the plaintiff's FOIA requests, and the parties are in the process of briefing cross motions for summary judgment according to a briefing schedule agreed to by the parties and approved by the Court by minute order on December 17, 2008. The defendants filed a motion for summary judgment on January 23, 2009. Defs.' Mot. for Summ. J. (dkt. no. 25). The plaintiff is to file a cross-motion for summary judgment and opposition to defendant's motion by February 24, 2009. Each party will then be permitted one additional brief—the defendant, on March 26, 2009; the plaintiff, on April 27, 2009.

On January 21, 2009, the President issued a memorandum to the heads of executive departments and agencies directing that "agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA." See Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683 (Jan. 21, 2009). The President directed the Attorney General "to issue new guidelines governing the FOIA to the heads of executive departments and agencies, reaffirming the commitment to accountability and transparency, and to publish such guidelines in the Federal Register." Id.

In light of this directive, on January 29, 2009, after the filing of the defendant's motion for summary judgment, the plaintiff moved the Court for an order that would stay proceedings in this litigation pending the issuance of new guidelines by the Attorney General and require that, within 30 days of the issuance of the new guidelines, the defendant submit a report stating its position on whether the newly issued guidelines have any effect on this litigation. Pl.'s Mot. to Stay Proceedings. On February 11, 2009, the Court entered an order requiring the defendant to submit a notice within 60 days advising the Court whether the defendant's position has changed, and staying the Court's consideration of the plaintiff's motion to stay the proceedings pending filing of the defendant's notice. Order (dkt. no. 27).¹

ARGUMENT

A court has broad discretion to stay proceedings as part of its inherent power to control the course of proceedings. See Landis v. N. Am. Co., 299 U.S. 248, 254 (1936) (“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”). A stay is unwarranted in this case, however, because staying the litigation would provide no clear benefit to either party, to the Court, or to the public.

As the plaintiff itself acknowledges, the specific implications of the new FOIA guidelines will not be known until the Attorney General issues the guidelines. See Pl.'s Mot. to Stay Proceedings at 3–4. There is no specific basis at this time for concluding that the issuance of the guidelines would require the FBI to revisit any issues in this litigation. The FBI already has

¹ The Court's February 11, 2009, Order stays only its consideration of plaintiff's motion and does not stay any other aspects of the litigation. In accordance with the Order, defendant intends to file a notice on or before April 13, 2009, to advise the Court whether the defendant's position has changed.

completed processing of the requests at issue in this case, and it is not clear that the new guidelines, once issued, will be retrospective to FOIA requests that the agency already has finished processing. Furthermore, plaintiff can only speculate on the possibility that the new guidelines, once issued, will have some bearing on the issues in this litigation, and has no specific reason to conclude that those guidelines would include any changes or directives that are relevant to the processing of the particular FOIA requests at issue in this case. Importantly, as explained in detail in the defendant's summary judgment papers and earlier filings, the FBI already conducted a thorough search for responsive documents, processed the responsive documents with a goal of achieving maximum disclosure, released all reasonably segregable portions of responsive materials, and withheld materials based only on the exemptions enumerated in the statute. See, e.g., (First) Decl. of David M. Hardy ¶¶ 35–37 (dkt. no. 7); Fifth Decl. of David M. Hardy ¶¶ 19–20 (dkt. no. 25). The exemptions the FBI invoked in this case are the exemptions that authorize withholding of classified information (Exemption 1, 5 U.S.C. § 552(b)(1)), internal agency information (Exemption 2, 5 U.S.C. § 552(b)(2)), confidential commercial information (Exemption 4, 5 U.S.C. § 552(b)(1)), privileged information (Exemption 5, 5 U.S.C. § 552(b)(5)), private personal information (Exemption 6, 5 U.S.C. § 552(b)(6)), and law enforcement information (Exemption 7, 5 U.S.C. § 552(b)(7)). Each of these exemptions, fully supported by the declaration submitted, embodies a judgment by Congress that “legitimate governmental and private interests could be harmed by release of certain types of information,” FBI v. Abramson, 456 U.S. 615, 621 (1982), and that FOIA must strike a balance “between the public’s right to know and the government’s legitimate interest in keeping certain information confidential,” Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice, 331 F.3d 918, 925 (D.C. Cir. 2003). There is simply no indication that the new guidelines, once

issued, would affect the FBI's processing of plaintiff's requests or its application of these statutory exemptions. The mere possibility that some as yet unknown aspect of the guidelines might be relevant to the documents at issue in this litigation is speculative and does not warrant entry of a stay.

Furthermore, now is an awkward time to suspend this litigation. The parties are in the process of briefing cross motions for summary judgment, and the defendant already has filed a motion for summary judgment and a submission under Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973). The plaintiff's opposition and cross-motion are due on February 24, 2009. In this case, and in every case, the Department of Justice intends to proceed consistent with the principles expressed in the President's January 21, 2009, memorandum on the FOIA, and also with due regard for the legitimate confidentiality interests of the Executive Branch and the national security interests of the United States. Applying these principles, however, does not require government agencies to suspend their processing of FOIA requests or mandate a halt to ongoing FOIA litigation.

CONCLUSION

For the reasons above, the Court should deny the plaintiff's motion for a stay.

Dated: February 12, 2009

Respectfully submitted,

MICHAEL F. HERTZ
Acting Assistant Attorney General

JEFFREY A. TAYLOR
United States Attorney

ELIZABETH J. SHAPIRO
Deputy Director

/s/ JAMES C. LUH

JAMES C. LUH

Trial Attorney

United States Department of Justice
Civil Division, Federal Programs Branch

20 Massachusetts Ave NW

Washington DC 20530

Tel: (202) 514-4938

Fax: (202) 616-8460

E-mail: James.Luh@usdoj.gov

Attorneys for Defendant