

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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AMERICAN CIVIL LIBERTIES UNION;	)	
ELECTRONIC PRIVACY INFORMATION	)	
CENTER; AMERICAN BOOKSELLERS	)	Civil Action No.
FOUNDATION FOR FREE EXPRESSION;	)	1:02CV2077 (ESH)
FREEDOM TO READ FOUNDATION,	)	
	)	(Judge Ellen Segal Huvelle)
Plaintiffs	)	
	)	
v.	)	
	)	
UNITED STATES DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	

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**DEFENDANT'S OPPOSITION TO  
PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

INTRODUCTION

On October 24, 2002, plaintiffs filed their complaint in this action, which seeks an injunction compelling the defendant Department of Justice ("DOJ") to "immediately" respond to their pending Freedom of Information Act ("FOIA") request. See Complaint for Injunctive Relief at 11 ("Requested Relief") ("Complaint"). Plaintiffs' FOIA request seeks myriad documents related to the government's authority to engage in foreign intelligence surveillance under the USA PATRIOT Act. Id. ¶¶ 10-18. Plaintiffs' Complaint asks the Court to order DOJ "immediately to state which records it intends to disclose in response to plaintiffs' FOIA request," and "immediately to process plaintiffs' FOIA request and to disclose the requested records." Id.

On November 13, 2002, before defendant answered the Complaint, plaintiffs filed a motion for a preliminary injunction which seeks much the same relief sought in the Complaint – immediate processing of their FOIA request – only under a specific timeline and with the added

demand that this litigation be expedited as well. See Motion for a Preliminary Injunction and Proposed Order. Through this motion, plaintiffs seek an order that defendant: (i) within 7 days, state which records it possesses that are responsive to plaintiffs' FOIA request and identify those it intends to release; and (ii) within 20 days, to release the records so identified; and (iii) within 30 days, to move for summary judgment. See Plaintiffs' [Proposed Preliminary Injunction] Order.

The law is clear that preliminary injunctions constitute extraordinary relief, typically meant to preserve the status quo, based on a showing of likely success on the merits and that the moving party will suffer a harm that cannot be remedied later in the litigation. Plaintiffs' motion is based on the theory that processing of their extensive FOIA request, which DOJ agreed to expedite, must, by law, have been completed in less than 20 days. See Memorandum in Support of Plaintiffs' Motion for a Preliminary Injunction at 23-25 ("Pls. Mem."). In addition, plaintiffs claim they would be irreparably harmed if a preliminary injunction is not granted primarily because the delay in processing their request has "obstructed Plaintiffs and the public from evaluating the government's use of new surveillance authority." Id. at 28. Plaintiffs' motion is deeply flawed on several counts. However intense plaintiffs' desire to obtain a final response to their FOIA request – and get on with litigation over it – the circumstances simply do not warrant the imposition of a preliminary injunction.

First, and perhaps most notably, plaintiffs seek emergency injunctive relief claiming they have been "stonewalled" by DOJ for three months when they failed to comply with an express and unambiguous DOJ regulation to submit their request to a DOJ office they knew would have records with respect to foreign intelligence surveillance matters -- the Office of Intelligence

Policy and Review. DOJ's FOIA regulations state that FOIA requests must be sent directly to the department component that maintains the records sought, and actually lists the name and address of each such component, including OIPR. See 28 C.F.R. § 16.3(a) and Appendix I to Part 16. The core subject of plaintiffs' FOIA request is DOJ's implementation of new foreign intelligence surveillance powers, and plaintiffs' counsel are aware that OIPR is a key DOJ component in this area.<sup>1</sup> Yet, inexplicably, plaintiffs never submitted their request to OIPR. It was not until DOJ itself, through the Office of Information and Privacy, called this to plaintiffs' attention that the request was directed to OIPR and received on October 22, 2002. Nonetheless, plaintiffs filed suit two days later, and sought a preliminary injunction on November 13, 2002, even before the time permitted OIPR to respond under the FOIA had run.

This raises substantial jurisdictional flaws with the Complaint. Plaintiffs have filed suit challenging the failure of the Department of Justice to complete its response when, due to their own lack of diligence, one key component has only recently received the request. For FOIA requesters as experienced as ACLU and EPIC to seek a preliminary injunction under these circumstances is unfounded.

Second, plaintiffs key legal argument on the merits -- that, under FOIA, expedited requests must be processed in less than 20 days -- far from being likely to succeed, is unquestionably wrong. The FOIA itself speaks of processing expedited requests "as soon as practicable." See 5 U.S.C. 552 (a)(6)(E)(iii). Plaintiffs argue that, because the FOIA requires that

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<sup>1</sup> Three of the counsel handling this FOIA case for plaintiffs, Ann Beeson and Jameel Jaffer of ACLU, and David L. Sobel of EPIC, were listed as counsel for amicus curiae in In re: Sealed Case, 2002 WL 31546991 (F.I.S.Ct. November 18, 2002), in which the Foreign Intelligence Surveillance Court of Review recently upheld the constitutionality of the PATRIOT Act provisions at issue in plaintiffs' FOIA request.

agencies respond to non-expedited requests within 20 days, see 5 U.S.C. 552(a)(6)(a)(i), "*a fortiori*" expedited requests must be completed sooner. This is specious. Judge Robertson of this court rejected precisely the same argument advanced by plaintiff EPIC in motion for a temporary restraining order two years ago. Electronic Privacy Information Center v. U.S. Department of Justice, Civil Action No. 00-1849 (D.D.C.).<sup>2</sup> As this Court recently recognized, an agency's failure to respond to a FOIA request within 20 days means no more than that a requestor (who has not received a response in the interim) may file suit without further exhausting administrative remedies. See Judicial Watch Inc. v. United States Naval Observatory, 160 F.Supp. 2d 111, 113 (D.D.C. 2001 (Huvelle, J.)). But the 20-day provision does not purport to establish an "outside" time limit on what is "practicable" in responding to an expedited request. All that an agency's grant of expedited processing achieves is to take a FOIA request out of the normal "first-in, first-out" response queue and give it priority treatment. The time in which a response must be completed depends on what is practicable, and this may vary depending on the size, scope, detail, number of offices with responsive records, and potential privilege or classification issues. For this reason, the FOIA does not set a specific deadline for expedited requests to be completed.

As to what is practicable here, the Court must first look to the request, and then to what the agency has done in response. Plaintiffs' FOIA request includes fourteen separate items set forth in three, dense, single-spaced pages, covering multiple topics related to classified foreign intelligence surveillance activities. See Pl. Exh. 1 to Declaration of Jameel Jaffer, ACLU FOIA Request, August 21, 2002. It seeks documents provided to Congress on classified matters

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<sup>2</sup> A transcript of that TRO hearing is attached hereto at Attachment No. 1.

concerning foreign intelligence surveillance, as well as policy directives and guidance related to new surveillance powers granted under the PATRIOT Act, the Foreign Intelligence Surveillance Act, and the Electronic Communications Privacy Act. In addition, multiple requests were made for documents reflecting the number of times such authority has been used by the Department of Justice or Federal Bureau of Investigation in different circumstances. See id. at 1-3.

The accompanying DOJ declarations demonstrate that multiple components of DOJ, including senior level offices and officials, have been involved in processing the plaintiffs' request diligently and in good faith and, indeed, several have completed their response to the request. See Declaration of Melanie Ann Pustay, Department of Justice, Office of Information and Privacy; Declaration of Robert O. Davis, Department of Justice, Office of Intelligence Policy and Review; Declaration of Christine Kiefer, Department of Justice, Federal Bureau of Investigation.<sup>3</sup> Among the documents implicated by the request are current files of senior officials who oversee the most pressing day-to-day work in the Department. See Pustay Decl. ¶ 16. DOJ has identified the universe of documents to be reviewed and is proceeding to consult with components whose information may be at issue, as it must in order to complete processing the request. See Pustay Decl. ¶ 17; Davis Decl. ¶ 8. Under the circumstances, given the scope of the request, the senior offices involved, the classified nature of some of the documents at issue, and the consultations required by regulation, it most certainly was not practicable to complete this request within 20 days, nor has it been practicable for DOJ to make a final response for all components on all requested items (particularly since plaintiffs never sent their request to OIPR). Plaintiffs have demonstrated no likelihood of success on the merits of their claim.

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<sup>3</sup> Notably, the FBI's response to all requests is now complete. See Kiefer Decl. ¶ 11.

More fundamentally, plaintiffs have not demonstrated that their harm is irreparable so as to warrant a preliminary injunction. While the underlying documents concern significant issues, and plaintiffs wish to have them as soon as possible, any harm caused by a delay in completing a response to their request is clearly reparable. The FOIA itself establishes the means by which the Court could remedy the harms plaintiffs allege in the normal course of adjudication of their Complaint, after processing of their request is complete, without resort to emergency, preliminary injunctive relief. See 5 U.S.C. § 552(a)(4)(B). "The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." Wisconsin Gas Co. v. Federal Energy Regulatory Commission, 758 F.2d 669, 674 (D.C. Cir.1985); Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 925 (D.C. Cir.1958). Plaintiffs' motion is little more than a tactical effort to expedite their FOIA request further and to force the Court to consider their claims more quickly. Under FOIA, defendant's answer to the Complaint is due in 30 days, instead of the usual 60 days granted the government under Fed. R. Civ. P. 12(a)(3). See 5 U.S.C. § 552(a)(4)(C). Defendant proposed that the parties confer as to a schedule for completing processing of the request and but was rebuffed in favor of a preliminary injunction motion intended to pressure DOJ, but lacking serious legal merit.

As set forth below, given the scope and significance of the request items, DOJ needs more time to complete consultations and processing of the request. Plaintiffs' proposed preliminary injunction would establish a schedule that is impossible for defendant to meet. Defendant asks the Court to deny this motion, give DOJ the additional time it needs to finish processing the request, schedule a status conference in 30 days for defendant to report on the

progress of the request, and consider plaintiffs' claims through the normal process of litigating FOIA disputes.

### BACKGROUND

Plaintiffs' FOIA request is being processed by three separate components of the Department of Justice, in consultation with numerous other offices within DOJ. Set forth below is the state of processing by DOJ's Office of Information and Privacy, Office of Intelligence Policy and Review, and the Federal Bureau of Investigation.

1. DOJ Office of Information and Privacy

By letter dated August 21, 2002, plaintiffs, American Civil Liberties Union (ACLU), the Electronic Privacy Information Center (EPIC), and the American Booksellers Foundation for Free Expression (ABFFE), submitted a FOIA request to DOJ's Office of Information and Privacy. See Pustay Declaration ¶ 3 and Exhibit A thereto.<sup>4</sup> The request sought records concerning the Department's response to certain questions posed in a letter to the Attorney General dated June 13, 2002, from Representatives Sensenbrenner and Conyers, Chairman and Ranking Member of the House Committee on the Judiciary, regarding the Department's implementation of the USA PATRIOT Act. Plaintiffs also requested certain policy directives or guidance issued by the Department related to the USA PATRIOT Act. Id. & Exhibit A thereto.

Plaintiffs requested expedited processing based on the Department of Justice standard permitting expedition for requests involving "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect

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<sup>4</sup> In their Complaint, plaintiffs state that the Freedom to Read Foundation joined the FOIA request by letter dated October 21, 2002. OIP has never received such letter. Pustay Decl. ¶ 3 n.1.

public confidence.” 28 C.F.R. § 16.5(d)(1)(iv) (2002). Pustay Decl. ¶ 4 and Exhibit A at 6. By separate letter, plaintiffs directed their request for expedited processing to DOJ's Director of Public Affairs, who makes the decision whether to grant or deny expedition under this standard. See id. § 16.5(d)(2). On August 30, 2002, DOJ's Director of Public Affairs advised OIP that she had determined that plaintiffs' request for expedited processing under this standard should be granted. Pustay Decl. ¶ 4.

By letter dated September 3, 2002, OIP acknowledged receipt of plaintiffs' request and advised that plaintiffs' request for expedited processing pursuant to 28 C.F.R. § 16.5(d)(1)(iv) had been granted. Pustay Decl. ¶ 5 and Exhibit B thereto. By memoranda dated September 4, 2002, OIP initiated records searches in the Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, Legal Policy and Legislative Affairs. Pustay Decl. ¶ 6. These Offices were advised that the request had been granted expedited processing. Id. On September 16, 2002, a search was performed in the Office of Legal Policy and one responsive document was located. Id. ¶ 7. By memorandum dated September 23, 2002, the Office of the Associate Attorney General advised OIP that it did not have any records responsive to the request. Id. ¶ 8. On October 9, 2002, OIP received responsive records from the Office of Legislative Affairs ("OLA") and was advised that OLA had further material to be reviewed. Id. ¶ 9. On October 29, 2002, and November 21, 2002, further responsive materials were located in OLA. Id. ¶ 11.

On October 16, 2002, Tricia Wellman of OIP contacted Mr. Jameel Jaffer of the ACLU to discuss the possible narrowing of plaintiffs' request. Pustay Decl. ¶ 10. Mr. Jaffer advised that, while the plaintiffs did not wish to receive publicly available information, they were

otherwise unwilling to narrow the scope of their request. Id. Mr. Jaffer was also advised that some of the material they were seeking may be located in the Office of Intelligence Policy and Review (OIPR). Id. Mr. Jaffer expressed interest in having that Office also process the request, thus Ms. Wellman agreed to forward the request to that Office for processing. Id. By memorandum dated October 16, 2002, OIP forwarded a copy of the request to the OIPR for processing. Id. OIPR received this request on October 22, 2002. See Davis Decl. ¶ 5.

By letter dated October 30, 2002, OIP provided plaintiffs with an interim response to their FOIA request. Pustay Decl. ¶ 12 and Exhibit D thereto. In this interim response, OIP advised plaintiffs that no responsive records were located in the Office of the Associate Attorney General. In addition, OIP advised plaintiffs that one document was located in the Office of Legal Policy, portions of which were responsive to item six of plaintiffs' request. Id. However, because the ACLU had advised that it was not interested in receiving publically available information, and this document was available on plaintiff EPIC's web site, OIP did not provide plaintiffs with a copy of this document. Id. Finally, OIP advised plaintiffs that two classified documents, totaling three pages, had been referred to OIPR for processing and direct response to plaintiffs. Id.

On November 12, 2002, the search was completed in the Office of the Attorney General and no responsive material was located. Pustay Decl. ¶ 13. On November 15, 2002, the search was completed in the Office of the Deputy Attorney General and 67 pages of responsive material was located. Id. ¶ 14. On November 15 and 21, 2002, searches were performed and completed by OIP in the Department Executive Secretariat, which is the official records repository for the Offices of the Attorney General, Deputy Attorney General, and Associate Attorney General, and

no responsive records were located. Id. ¶ 15.

The Offices that were searched for records responsive to this request are the senior leadership offices of the Department of Justice, including the Offices of the Attorney General and Deputy Attorney General. Pustay Decl. ¶ 16. Because the files at issue in plaintiffs' FOIA request concern current matters, they were physically located in the individual offices of senior Department officials. Id. In addition, in order to locate records responsive to this FOIA request, hand searches of large paper files had to be performed, as well as searches of electronic mail (e-mail) files containing thousands of e-mails. Id. Although OIP assisted in these search efforts, because of the need for senior officials to review their own files and computers, it was not possible to process this FOIA request within the twenty days provided by the FOIA, and it was certainly not practicable to do it in some shorter time frame. Id.

All searches by OIP for responsive records in senior DOJ offices have now been completed and OIP has located 163 pages of material responsive to plaintiffs' request. Pustay Decl. ¶ 17. The vast majority of the records located are e-mail messages to and from multiple officials from different components within the Department discussing the Department's responses to the questions from the House Judiciary Committee. Id. Because other components within the Department were involved in responding to the congressional questions and may have an interest in the documents located, OIP must consult with those components before determining whether to disclose the records at issue. Id.; see 28 C.F.R. § 16.4(c)(1) (2002). By memorandum dated November 18, 2002, records were forwarded to the Immigration and Naturalization Service, the Criminal Division, the Civil Division, the Office of Intelligence Policy and Review, the Drug Enforcement Administration, and the Federal Bureau of

Investigation for consultation. Id. All of these components were advised that the request had been granted expedited processing and was currently the subject of a lawsuit, and that therefore the consultation should be handled as expeditiously as possible. Id.

Until these consultations are completed, OIP cannot complete the processing of the documents and make a final response to plaintiffs. Pustay Decl. ¶ 18. Once the consultations are completed, however, the records can then be processed by OIP taking the views of all the relevant components into account. Id. OIP presently estimates that a final response can be provided to plaintiffs within thirty days from the date the last consultation is returned to OIP. Id.

## 2. DOJ Office of Intelligence Policy and Review

DOJ's Office of Intelligence Policy and Review provides legal advice to the Attorney General and the United States intelligence agencies regarding questions of law and procedure that relate to United States intelligence activities. See Declaration of Robert O. Davis, ¶ 3. OIPR performs review functions of certain intelligence activities and prepares and presents applications for electronic surveillance and physical search to the United States Foreign Intelligence Surveillance Court. Id.

Plaintiffs did not send their August 21, 2002, FOIA request directly to OIPR as required by DOJ regulations. See Davis Decl. ¶ 5. OIPR is a separate component within the Department of Justice, and as such, it is responsible for receiving and processing Freedom of Information Act requests separate and apart from OIP and FBI. Id. Pursuant to Department of Justice regulations, “a request will be considered received as of the date it is received by the proper component’s FOIA office.” Id. (citing 28 C.F.R. § 16.3(a)). OIPR is listed in Appendix I to 28 C.F.R. Part 16 as a separate DOJ component to which FOIA requests must be sent directly.

OIPR received the plaintiffs' FOIA request by memorandum from the DOJ Office of Information and Privacy dated October 16, 2002. Davis Decl. ¶ 5 and Exhibit B thereto. That referral memorandum further advised that the Office of Public Affairs had granted expedited processing of this request. Id. Plaintiffs' request was received in OIPR on October 22, 2002. Id.

By letter dated November 7, 2002, OIPR acknowledged receipt of plaintiffs' request. Davis Decl. ¶ 6 and Exhibit C thereto. OIPR initiated its search for responsive records immediately upon receipt of plaintiffs' request. Id. In order to locate responsive records hand searches of large paper files had to be performed, as well as searches of electronic mail (e-mail) files containing hundreds of e-mails, and other automated databases. Id.

By memorandum dated October 30, 2002, OIP referred two classified documents to OIPR for its review and direct response as the documents contain equities originated by OIPR. Davis Decl. ¶ 9. These documents are responsive to item #1 of plaintiffs' request. Id. OIPR has completed its review of this material and, by letter dated November 20, 2002, notified plaintiffs that these documents were properly classified in the interest of national security and, therefore, exempt from disclosure pursuant to Exemption 1, 5 U.S.C. § 552 (b)(1). Id. and Exhibit D thereto.

With the exception of one office, all searches for responsive records have now been completed and OIPR has located 53 pages of material responsive to plaintiffs request. Davis Decl. ¶ 7. The vast majority of the records located are e-mail messages to and from multiple officials from different components within the Department discussing the Department's responses to the congressional questions. Id. Because other components within the Department were involved in responding to the congressional questions and may have an interest in the

documents located, OIPR must consult with those components before determining whether to disclose the records at issue. Id. (citing 28 C.F.R. § 16.4(c)(1) (2002)). OIPR has identified 27 pages of records that originated in the Offices of the Attorney General, Deputy Attorney General and Legislative Affairs, and these records are being referred to the Office of Information and Privacy for consultation. Davis Decl. ¶ 8. Until this consultation is completed, OIPR cannot complete the processing of the documents and make a final response to plaintiffs. Id. Once the consultations are completed, however, the records can then be processed by OIPR taking the views of all the relevant components into account. Id. OIPR estimates that a response can be provided to plaintiffs within thirty days from the date the consultation is returned by OIP. Id.

### 3. Federal Bureau of Investigation

The FBI acknowledged receipt of plaintiffs' August 21, 2002, FOIA request on August 28, 2002. See Declaration of Christine Kiefer ¶¶ 4, 5 and Exhibits A and B thereto. By letter dated September 5, 2002, plaintiffs requested that they be advised that the expedited processing granted by the Department of Justice applied to FBI processing, and were so advised on September 18, 2002. Id. ¶¶ 6, 7 and Exhibits C and D thereto.

By letter dated November 4, 2002, the FBI provided plaintiffs with an interim response to their request which indicated that: (i) the FBI was still researching request number 1; (ii) documents responsive to numbers 2-6 were undergoing classification review; (iii) request numbers 7-10 and 13 involved records that the FBI does not maintain; (iv) that the fact of the existence of nonexistence of the records sought in request numbers 11 and 12 is, in and of itself, classified under Executive Order 12,958 and the request was denied pursuant to 5 U.S.C. § 552(b)(1); and (v) no records existed at FBI Headquarters in response to request number 14.

Id. ¶ 8 and Exhibit E thereto. Thus, as of November 4, 2002, only two categories of the request were pending at FBI – a response to request number 1 and a classification review for documents responsive to request numbers 2-6.

By letter dated November 14, 2002, plaintiff was provided 24 pages of documents in response to request numbers 2-6, with redactions made pursuant to FOIA Exemption (b)(7)(C). Id. ¶ 9 and Exhibit F thereto. By letter dated November 20, 2002, FBI indicated that it had no documents in response to request number 1. Id. ¶ 10 and Exhibit G thereto. Thus, other than any referrals that it may receive, the FBI has completed its processing of the plaintiffs' August 21, 2002, FOIA request. Id. ¶ 11(e).

#### ARGUMENT

##### I. PLAINTIFFS ARE NOT ENTITLED TO EMERGENCY RELIEF.

It is well established that granting emergency injunctive relief is an extraordinary and unusual remedy that should be used sparingly in limited circumstances that clearly demand it. Public Citizen v. Nat'l Advisory Comm. on Microbiological Criteria for Foods, 708 F. Supp. 359, 362 (D.D.C. 1988); Marine Transport Lines, Inc. v. Lehman, 623 F. Supp. 330, 334 ( D.D.C. 1985); Public Citizen v. Nat'l Advisory Comm. on Microbiological Criteria for Foods, 708 F. Supp. 359, 362 (D.D.C. 1988). One of the "basic purposes" of a preliminary injunction is to preserve the status quo in order to prevent immediate injury to the plaintiff until such time as their suit could be determined on the merits. See Sullivan v. Murphy, 478 F.2d 938, 964 (D.C. Cir. 1973); District 50, United Mine Workers v. United Mine Workers, 412 F.2d 165, 168 (D.C. Cir.1969). A party can obtain preliminary injunctive relief only when it demonstrates that: (1) it is substantially likely to succeed on the merits of the suit; (2) in the absence of such relief, it will

suffer irreparable harm for which there is no adequate legal remedy; (3) the injunction would not substantially harm other parties; and (4) the injunction would further the public interest. Serono Laboratories, Inc. v. Shalala, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998); Taylor v. RTC, 56 F.3d 1497, 1505 (D.C. Cir. 1995); United States v. Microsoft Corp., 980 F. Supp. 537, 543 (D.D.C. 1997). "These factors interrelate on a sliding scale and must be balanced against each other." Serono Laboratories, 158 F.3d at 1318; Cuomo v. United States Nuclear Regulatory Commission, 772 F.2d 972, 974 (D.C. Cir.1985). Plaintiffs cannot meet their burden for obtaining preliminary relief under these standards.

A. Plaintiffs Have Not Demonstrated a Substantial Likelihood of Success on the Merits as to Whether Expedited Processing Under the FOIA Must Be Completed Within 20 Days or Whether Processing Their Request More Quickly Was Practicable.

Plaintiffs' claim on the merits is that, having been granted expedited processing of their FOIA request, they have not yet received a final response thereto and, as such, defendant DOJ is in violation of the FOIA. See Complaint ¶¶ 30-35. In their motion for a preliminary injunction, plaintiffs argue that they are likely to succeed on the merits because DOJ granted expedition of their request, "three months have passed," and, since DOJ did not respond within the 20 days permitted for non-expedited requests, "[a] *fortiori*, Defendant is in violation of the time limits that apply to expedited requests." See Pls. Mem. at 23-24.<sup>5</sup> Plaintiffs cite the provision on expedited processing, which provides that such matters "will be taken out of order and given expedited treatment" and "shall be given priority and shall be processed as soon as practical." See

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<sup>5</sup> Black's Law Dictionary defines "*a fortiori*" as follows: "With stronger reason, much more. A term used in logic to denote an argument to the effect that because one ascertained fact exists, therefore another which is included in it, or analogous to it, and which is less improbable, unusual, or surprising, must also exist." Black's Law Dictionary, Sixth Edition 1990.

28 C.F.R. 16.5(d)(1) and (4). Then, without citation to any authority, plaintiffs argue that, "[w]hatever these provisions mean, they clearly contemplate more advantageous treatment of expedited requests than non-expedited requests." In short, plaintiffs base the likelihood of success on the merits of their claim on the theory that all FOIA requests granted expedited processing must be completed in less than 20 days.

Far from likely to succeed, this contention has no merit at all. First, the 20-day time limit under FOIA for responding to requests has no bearing on when expedited processing must be completed. An agency's failure to respond within the 20-day period means that a requestor may, before a response has been made, file suit and may be found to have constructively exhausted administrative remedies. See Oglesby v. United States Dep't of Army, 920 F.2d 57, 64 (D.C. Cir. 1990); Judicial Watch Inc. v. United States Naval Observatory, 160 F. Supp. 2d 111, 113 (D.D.C. 2001) (Huvelle, J.); Judicial Watch Inc. v. United States Department of Energy, 191 F. Supp. 2d 138, 140 n.3 (D.D.C. 2002) (Friedman, J.). Plaintiffs' reliance on this authority for the proposition that "where an agency has failed to respond to a request for records within the applicable statutory time period, "the court may . . . order the agency to respond to the request," is misplaced. See Pls. Mem. at 21. These cases primarily address the constructive exhaustion issue. See Oglesby, 920 F.2d at 62, 64; Judicial Watch v. DOE, 191 F. Supp. 2d at 140 n.3; Judicial Watch v. U.S. Naval Obs., 161 F. Supp. 2d at 113. None of them involved a preliminary injunction ordering the agency to complete processing records within a specific time frame.<sup>6</sup>

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<sup>6</sup> In Oglesby, the claim was dismissed against five agency defendants for failure to exhaust, since the agency had responded before suit was filed. See 920 F.2d at 140. Likewise, this Court dismissed Judicial Watch v. U.S. Naval Obs. because the agency had timely responded to the request and plaintiff failed to exhaust. See 160 F. Supp. 2d at 113. In Judicial Watch v. DOE, the court did not issue a preliminary injunction but set a schedule that was based on the

Moreover, courts have specifically held that an agency's failure to comply with the statutory deadline neither requires nor empowers a court to ignore the agency's right to invoke applicable statutory exemptions or summarily to order disclosure of any or all information sought. See Barvick v. Cisneros, 941 F. Supp. 1015, 1019 (D. Kan. 1996) (rejecting plaintiff's argument that "in a case of untimely denial, . . . the statute eliminates the court's discretion and that the court must order production of any withheld and redacted information"); see also M.K. v. United States Department of Justice, No. 96-1307 (SHS), 1996 WL 509724, at \*3 (S.D.N.Y. Oct. 1, 1996) ("the government's failure to respond to M.K.'s request within the statutory 10-day time limit does not give M.K. the right to obtain the requested documents; it merely amounts to an exhaustion of administrative remedies and allows M.K. to bring this lawsuit"). Thus, failure to comply with the statutory response date would not entitle plaintiffs to "immediate" release of the requested records as they demand. See Complaint at 11 (seeking order that defendant immediately "disclose the requested records").

Next, the FOIA provision governing expedited requests provides no specific time frame but requires only that they must be completed "as soon as practicable." 5 U.S.C. § 552(a)(6)(E)(iii). This provision creates a statutory basis to give priority treatment to some requests. But there is no reason, in law or logic, why the response to such requests must be in less than 20 days. Certainly, the *statute* does not say that. Congress was perfectly capable of designating a time limit for expedited requests, as it has for the response time provision, but chose instead to let practicability govern. Indeed, the 20-day response time itself is not a rigid requirement. Under the FOIA, a court may grant an extension to allow the agency to finish

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state of processing and representations of counsel. See 191 F. Supp. 2d at 141.

reviewing the request where the agency has been unable to meet the deadline because of exceptional circumstances. See 5 U.S.C. § 552(a)(6)(c); see also Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 615 (D.C. Cir. 1976); Oglesby v. United States Dep't of Army, 920 F.2d at 62 and n.3; The Nation Magazine v. Department of State, 805 F. Supp. 68, 72 (D.D.C. 1992). Such circumstances make the 20-day deadline "not mandatory but directory." Id. (citing Open America, 547 F.2d at 616). As such, the 20-day requirement can hardly be found to establish a mandatory deadline as to the "practicability" of responding to expedited requests.

Moreover common sense suggests why the FOIA does not establish a specific deadline for expedited requests. The practicability of responding to FOIA requests turns on, among other things, the scope and complexity of the request, the number of component offices involved, and the potential for classification or privilege issues. For these reasons, Judge Robertson of this court not long ago rejected precisely the same argument raised by plaintiffs when it was raised by counsel for plaintiff EPIC in another case in connection with a motion for a temporary restraining order.<sup>7</sup> In that TRO hearing, Judge Robertson stated as to the timing of expedited requests:

I think the question being presented here is a purely practical question about what is practicable and what is not practicable for the [agency.] Now, I don't think it means immediate, and I don't think it means as soon as possible. And I don't know what it actually means in the context of this case until the [agency] has a reasonable chance to evaluate what is before it in terms of the request.

Transcript, Attachment No. 1 at 7.

Here, DOJ has provided the context of its processing and demonstrated that completion

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<sup>7</sup> Electronic Privacy Information Center v. U.S. Department of Justice, Civil Action No. 00-1849 (D.D.C.). A transcript of that TRO hearing is attached hereto at Attachment 1.

of the plaintiffs' request in its entirety was not practicable within 20 days, and that it requires additional time to complete consultations on the matter. Pustay Decl. ¶¶ 17-18; Davis Decl. ¶ 7-8. Plaintiffs' contention to the contrary is unsupported. Plaintiffs requested 14 different items as to which multiple DOJ components may have had responsive documents, on matters involving numerous provisions of law (The PATRIOT Act, Foreign Intelligence Surveillance Act, the Electronic Communications Privacy Act). As indicated by the Office of Information and Privacy, its processing of the request involved five senior DOJ offices (the offices of the Attorney General, Deputy Attorney General, Associate Attorney General, Legislative Affairs, and Legal Policy), as well as the DOJ Executive Secretariat which also maintains records for senior offices. Pustay Decl. ¶ 6 and 15. In particular, OIP notes that this request implicates the current files of senior DOJ officials, including in the Offices of the Attorney General and Deputy Attorney General.

The officials in these offices oversee the most significant work taking place at the Department. Because these files were current, they were physically located in the individual offices of senior Department officials. Most of these officials personally conducted the search for any responsive records that they might possess. While the officials in these Offices make every effort to respond to our search memoranda in a timely fashion, it is not always possible for senior Department officials to stop their pressing day-to-day duties -- which include spearheading the investigation into the September 11 attacks and overseeing the Department's efforts to avoid future terrorist attacks -- in order to immediately perform a search for records responsive to a FOIA request.

Pustay Decl. ¶ 16.

In order to locate records responsive to this FOIA request, hand searches of large paper files had to be performed, as well as searches of electronic mail (e-mail) files containing

thousands of e-mails. Id. Although OIP assisted in these search efforts, because of the need for senior officials to review their own files and computers, it was not possible to process this FOIA request within the twenty days provided by the FOIA, and it was certainly not practicable to do it in some shorter time frame. Id.

Nonetheless, even under these circumstances, searches by OIP for responsive records in senior DOJ offices have been completed and OIP has located 163 pages of material responsive to plaintiffs' request. Pustay Decl. ¶ 17. However, as an added issue of practicability, the vast majority of the records located are e-mail messages to and from multiple officials from different components within the Department discussing the Department's responses to the congressional questions. Id. OIP is required by regulation to consult with those components before determining whether to disclose the records at issue. Id.; see 28 C.F.R. § 16.4(c)(1) (2002). This process has begun, and DOJ components involved in the consultation have been advised that the request has been granted expedited processing and is currently the subject of a lawsuit and, therefore, should be handled as expeditiously as possible. Id. Until these consultations are completed, OIP's own processing cannot be completed.

These facts amply support the conclusion that it has not been practicable for OIP to complete this FOIA request any sooner, let alone in less than 20 days as plaintiffs claim is required by law. Processing FOIA requests, particularly expedited ones, obviously implicates the allocation of agency resources. Where multiple components are involved, and it is apparent that the agency is working diligently on the matter, courts should refrain from issuing strict scheduling injunctions and grant agencies some latitude in completing the task. See Heckler v. Chaney, 470 U.S. 821, 831-32 (1985).

With respect to DOJ's Office of Intelligence Policy and Review, plaintiffs' claim that processing should have been completed by now is even less meritorious because plaintiffs failed to comply with DOJ regulations and send their request directly to OIPR. As a result, OIPR itself has only been working on the matter since October 22, 2002 – not August 21, 2002, as plaintiffs' motion suggests. DOJ regulations expressly provide that a FOIA requestor "may make a request for records of the Department of Justice by writing directly to the Department component that maintains those records." See 28 C.F.R. § 16.3(a). The regulation provides further that "[y]our request should be sent to the component's FOIA office at the address listed in the Code of Federal Regulations." Id. Appendix I to 28 C.F.R. Part 16 specifically lists the "Office of Intelligence Policy and Review" as a DOJ component to which a FOIA request must be separately addressed. See 28 C.F.R. Part 16, App. I. Where the regulations specifically list a component separately and require that the request be sent to it, service on the DOJ Office of Information and Privacy is inadequate. Id. See Brumley v. Department of Labor, 767 F.2d 444, 445 (8th Cir. 1985) (FOIA requires that requests be made in accordance with agency rules, including requirement that the request be sent directly to components with custody of requested records).

Because plaintiffs failed to comply with this provision, OIPR did not receive their FOIA request until October 22, 2002 – two months after it was originally submitted. Davis Decl. ¶ 5. Considering that OIPR is the DOJ component principally involved in foreign intelligence surveillance matters at issue in the FOIA request, and that plaintiffs did not even send their request to that office as the regulations require, the core of plaintiffs' claim on the merits that DOJ should have completed its processing evaporates. It is not as if plaintiffs are unsophisticated FOIA requesters or were somehow unaware that OIPR handles foreign

intelligence surveillance matters. Indeed, the very counsel handling this case for the ACLU and EPIC have been involved as amicus curiae in a major case, recently decided by the United States Foreign Intelligence Surveillance Court of Review, upholding the very foreign intelligence surveillance powers under the PATRIOT Act at issue in plaintiffs' FOIA Request. See In re: Sealed Case (No. 02-001), 2002 WL 31546991 (F.I.S.Ct. November 18, 2002). It is plaintiffs' own lack of diligence in following the regulations and bringing their request to the attention of OIPR that substantially delayed DOJ's completion of their FOIA request. To have sought an emergency injunction under these circumstances is inappropriate.

For these reasons, plaintiffs cannot demonstrate a likelihood of success on the merits of their claims.<sup>8</sup>

B. Plaintiffs Will Not Suffer Irreparable Harm if the Relief Sought is Not Granted

Irreparable harm is the touchstone of emergency injunctive relief. Sampson v. Murray, 415 U.S. 61, 88 (1974). For an alleged injury to constitute irreparable harm, "it must be both certain and great . . . [and] actual not theoretical." Wisconsin Gas Co. v. FERC, supra, 758 F.2d at 674. Mere speculative harms are not enough to satisfy plaintiff's burden; rather, plaintiff "must show that 'the injury complained of [is] of such imminence that there is a "clear and present" need for equitable relief to prevent irreparable harm.'" Id. (quoting Ashland Oil, Inc. v. FTC, 409 F. Supp. 297, 307 (D.D.C.), aff'd, 548 F.2d 977 (D.C. Cir. 1976)). Moreover, the harm must not be susceptible to remedy later in the ordinary course of legal proceedings. Id.

Plaintiffs argue that, because their request was expedited, DOJ has "effectively conceded"

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<sup>8</sup> As noted, the FBI's processing of the request is complete and plaintiffs' Complaint and motion with respect to the FBI is moot.

that they are suffering irreparable harm. See Pls. Mem. at 26. They also argue that "without the requested information, the public simply cannot evaluate the impact of the government's vast new surveillance authority." Id. see also id. at 28. In addition, plaintiffs contend that defendant's "failure to state even which records it intends to disclose in response to Plaintiffs' requests has foreclosed plaintiff's from challenging the classification of information that Plaintiff's believe has been improperly withheld from the public." Id. at 28. None of these assertions demonstrate that plaintiffs have suffered irreparable harm that warrants emergency injunctive relief.

The fact that DOJ deemed the FOIA request worthy of expedited processing was in no way a concession that plaintiffs are suffering irreparable harm during the processing period. DOJ granted expedition on the ground that the request involves "[a] matter of widespread and exceptional media interest in which there exists possible questions about the government's integrity which affect public confidence." See Letter dated September 3, 2002, from Melanie Ann Pustay of the Department of Justice, Office of Information and Privacy, to Ann Beeson, American Civil Liberties Union, Exhibit A to Pustay Declaration (citing 28 C.F.R. § 16.5(d)(1)(iv)). DOJ did not grant expedition on the basis of other criteria for expediting requests, set forth in the FOIA and DOJ regulations, which concern "an imminent threat to the life or physical safety of an individual," or an "urgency to inform the public" about a government activity. See 5 U.S.C. § 552a(6)(E)(v)(I) & (II); 28 C.F.R. § 16.5(d)(1)(i), (ii).

As such, granting expedition here cannot reasonably be regarded as an acknowledgment that the requestor would suffer harm, let alone irreparable harm, while the request was pending. Expedition merely enabled DOJ to treat the request on a priority basis outside of the normal first-in, first-out FOIA processing queue. Moreover, if a requestor could automatically establish

irreparable harm whenever expedited processing was granted under this standard, courts would routinely face preliminary injunction motions based solely on the delay in completing a response.<sup>9</sup> It is noteworthy that, in cases where requesters have sought an injunction to expedite a request, "[o]nly 'rarely have courts found the existence of exceptional need or urgency' [in FOIA cases] and the few cases in which courts have ordered an agency to abandon its first-in first-out processing usually involved parties facing deportation or a criminal trial involving murder or another serious felony." The Nation Magazine, 805 F. Supp. at 73.<sup>10</sup>

In addition, that the underlying documents requested concern a matter of "widespread and exceptional media interest", 28 C.F.R. § 16.5(d)(1)(iv), likewise does not establish irreparable harm while processing is pending. Even assuming that a delay in plaintiffs' ability to "evaluate" the impact of the government's new surveillance authority constitutes a harm, see Pls. Mem. at 26, 28, it is not irreparable but can be cured at a later date. Wisconsin Gas Co., 758 F.2d at 674 ("[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm") (quoting Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958)). Again,

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<sup>9</sup> Such a result would also establish a significant disincentive for agencies to grant expedited processing.

<sup>10</sup> See, e.g., Aguilera v. Federal Bureau of Investigation, 941 F. Supp. 144, 152 (D.D.C. 1996) (plaintiff's FOIA request for documents to be used in post-conviction evidentiary hearing met standard for expedition; plaintiff, who had been sentenced to twenty-five years to life, "demonstrated that he faces grave punishment . . . and has made an strong showing of exceptional and urgent need"); Cleaver v. Kelley, 427 F. Supp. 80, 81 (D.D.C. 1976) (criminal defendant, facing possible "loss of freedom or life" in imminent state prosecution, demonstrated "exceptional and urgent need to obtain any and all information that could prove exculpatory"); Ferguson v. Federal Bureau of Investigation, 722 F. Supp. 1137, 1143 (S.D.N.Y. 1989) (prisoner's liberty interest warranted expedition of FOIA request).

if FOIA requesters could establish irreparable harm simply where the documents at issue were of widespread and immediate interest, absent any other showing of injury, courts would routinely face emergency motions to strictly schedule a FOIA response, even where the alleged harm could be remedied later – either through the agency's response or in the normal course of litigation.

Finally, the actions taken by DOJ to process plaintiffs request further demonstrate that preliminary injunction would be unwarranted. DOJ components have diligently processed this request. The FBI's response is now complete. The Office of Information and Privacy has worked with multiple senior DOJ offices and officials to obtain documents, and has now gathered the responsive universe for review and consultation. See Pustay Decl. ¶ 16. It is quite reasonable to have expected that working with senior officials to review current files, as was required in this case, would involve some additional processing time because of the pressing day-to-day responsibility of these officials. Id.

In addition, for the reasons noted above, plaintiffs' claim of irreparable injury and motion for emergency injunctive relief is particularly meritless with respect to the Office of Intelligence Policy and Review because plaintiff failed to comply with DOJ regulations and send its request directly to OIPR. Plaintiffs cannot claim irreparable harm when they failed at the most basic first step in a FOIA request: sending it to the right office.<sup>11</sup>

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<sup>11</sup> Plaintiffs' assertion that "courts have consistently recognized that preliminary injunctive relief is appropriate where 'time is of the essence'", see Pl. Mem. at 26, relies on authority wrenched out of context. Both cases cited by plaintiffs were anti-trust matters involving tender offers in a merger acquisition. In United States v. BNS, Inc., 858 F.2d 456, 465 (9th Cir. 1988), the appellate court limited the scope of a preliminary injunction issued by the district court against completion of the tender offer. In Martin Marietta Corp. v. Bendix Corp., 690 F.2d 558, 568 (6th Cir. 1982), the companies making the tender offer sought a preliminary injunction to allow their offer to proceed under state anti-trust law. The accurate quotation in both cases is that "[i]n the context of a tender offer, time is of the essence" because delay in the

In sum, there is no "status quo" to preserve here, and no alleged harm to plaintiffs that cannot be addressed by the Court through the normal process for litigating a FOIA complaint. Viewed in its proper perspective, plaintiffs' motion is largely an effort to expedite litigation. The Court is being asked to hear plaintiffs' claims on an emergency basis and to order, as a matter of preliminary relief, the ultimate relief sought in the Complaint – a response to the FOIA request – when the normal litigation process would have sufficed to address and, if necessary, rectify plaintiffs' alleged injury.<sup>12</sup> Plaintiffs' proposed injunction, which would require the completion of processing within 7 days, document production within 20, and summary judgment within 30 days, is impossible for defendant. See Pustay Decl. ¶ 18; Davis Decl. ¶ 8. The Department of Justice asks the Court for a reasonable opportunity to complete processing this request, including required consultations, without the constraint of the unrealistically compressed deadlines. The FOIA requires that the government answer a complaint within 30 days, instead of the usual 60 days granted the government under Fed. R. Civ. P. 12(a)(3). See 5 U.S.C. § 552(a)(4)(C).

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completion of the offer may result in the loss of millions of dollars. BNS, 858 F.2d at 465; Martin-Marietta, 690 F.2d at 568. This authority is inapposite to a case involving alleged delay in processing a FOIA request.

<sup>12</sup> In the context of non-expedited FOIA requests, courts have regularly found that litigation should not be used as a mechanism to gain preference in processing. See Aguilera v. Federal Bureau of Investigation, 941 F. Supp. 144, 152 (D.D.C. 1996) (processing requests based on the “priority of filing a lawsuit . . . would undermine the entire FOIA statute”); Caifano v. Wampler, 588 F. Supp. 1392, 1394 (N.D. Ill. 1984) (prioritizing requests where lawsuits have been filed would “unfairly prejudice” those who did not seek judicial relief); see also Cohen v. Federal Bureau of Investigation, 831 F.Supp. 850, 854 (S.D. Fla. 1993); Fiduccia v. United States Dep't of Justice, 185 F.3d 1035, 1040-41 (9th Cir. 1999); Schweihs v. Federal Bureau of Investigation, 933 F. Supp. 719, 722 (N.D. Ill. 1996) (rejecting contention that filing a suit should create a preference for FOIA requestor). By analogy, there is no reason why a lawsuit should be permitted to further compel an agency that has already agreed to expedite a request and is processing the matter diligently.

Defendant's answer is due on November 25, 2002. Defendant asks the Court to deny this motion, give DOJ the additional time it needs to finish processing the request, schedule a status conference in 30 days for defendant to report on the progress of the request, and consider plaintiffs' claims through the normal process of litigating FOIA disputes. A proposed order is attached.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for a preliminary injunction should be denied.

Respectfully Submitted,

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November 22, 2002

Attorneys for Defendant.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
AMERICAN CIVIL LIBERTIES UNION;	)	
ELECTRONIC PRIVACY INFORMATION	)	
CENTER; AMERICAN BOOKSELLERS	)	Civil Action No.
FOUNDATION FOR FREE EXPRESSION;	)	1:02CV2077 (ESH)
FREEDOM TO READ FOUNDATION,	)	
	)	(Judge Ellen Segal Huvelle)
Plaintiffs	)	
	)	
v.	)	
	)	
UNITED STATES DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	
_____	)	

ORDER DENYING PRELIMINARY INJUNCTION

Upon consideration of plaintiffs' motion for a preliminary injunction, defendant's opposition thereto, and the record of this motion and this case, it is

HEREBY ORDERED THAT plaintiffs' motion shall be and hereby is DENIED; and it is

FURTHER ORDERED THAT the defendant shall provide a status report on the FOIA request at issue in this action at a status conference to be held on \_\_\_\_\_.

SO ORDERED:

DATE: \_\_\_\_\_

\_\_\_\_\_  
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this November 22, 2002, I caused the foregoing Defendant's Opposition to Plaintiffs' Motion for a Preliminary Injunction to be served via first class mail, postage prepaid, addressed to plaintiffs' counsel of record as follows:

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