

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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AMERICAN CIVIL LIBERTIES UNION, et al., :

Plaintiffs, :

v. :

DEPARTMENT OF DEFENSE, et al., :

Defendants. :

ELECTRONICALLY FILED

04 Civ. 4151 (AKH)

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AMERICAN CIVIL LIBERTIES UNION, et al., :

Plaintiffs, :

v. :

DEPARTMENT OF JUSTICE, AND ITS
COMPONENT OFFICE OF LEGAL COUNSEL, :

Defendants. :

05 Civ. 9620 (AKH)

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**DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

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PRELIMINARY STATEMENT

The Department of Justice, and its component Office of Legal Counsel (“OLC”), by their attorney, Michael J. Garcia, United States Attorney for the Southern District of New York, respectfully submit this memorandum of law in opposition to Plaintiffs’ motion for a preliminary injunction.

Plaintiffs’ motion is predicated upon two factual errors. First, Plaintiffs misunderstand the date OLC commenced its search for records responsive to their January 31, 2005 request under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”). Plaintiffs claim that OLC began searching for unclassified records in March and April 2005 and classified records in June 2005. See Plaintiffs’ Memorandum of Law, dated Oct. 24, 2007 (“Pls. Br.”), at 6-7. In fact, OLC began searching for both classified and unclassified records responsive to Plaintiffs’ request in the first week of February 2005 — immediately after it received Plaintiffs’ request.

Second, Plaintiffs misunderstand when OLC issued the legal opinions that are the subject of this motion. As Plaintiffs make clear, their primary motive for seeking injunctive relief is to compel OLC to process two classified legal memoranda to the Central Intelligence Agency (“CIA”) that were described in an October 4, 2007 New York Times article. See Pls. Br. at 1. Plaintiffs suggest that these memoranda were issued in the beginning of 2005, see id. at 7-8, and thus should have been captured by OLC’s search for responsive records (which they incorrectly assume started after the memoranda were issued). OLC has reviewed the New York Times article at issue and has determined that it in fact described three (not two) classified legal memoranda to CIA, and that all three of these memoranda were issued in May 2005 (the “May 2005 legal opinions”).

OLC's search cut-off date was reasonable because it corresponded to the start of its search for responsive records. Moreover, the classified legal opinions that are the subject of Plaintiffs' motion were issued well after OLC began — and finished — its search for responsive records.¹ Accordingly, the Court should deny Plaintiffs' motion.

STATEMENT OF FACTS

On February 1, 2005, OLC received Plaintiffs' January 31, 2005 FOIA request. Declaration of Special Counsel Paul P. Colborn, dated November 5, 2007 ("Colborn Decl."), ¶ 2. OLC assigned a January 31, 2005 search cut-off date to the request, consistent with OLC's practice at the time to use the date of the request as the search cut-off date for all FOIA requests. Id. There was little difference between the date OLC received Plaintiffs' FOIA request and the date it began searching for documents responsive to the request, because OLC had virtually no backlog of outstanding FOIA requests at that time and began searching for responsive documents the same week it received the request. Id.

During the week that OLC received Plaintiffs' FOIA request (January 31, 2005 was a Monday), OLC focused on two aspects of its search for responsive documents. Id. ¶ 3. First, in accordance with Plaintiffs' demands, it prioritized the search for seven documents listed on an appendix to the January 31, 2005 FOIA request. Id. ¶ 3 and Ex. A. It completed its search for those documents by February 7, 2005, and sent a response with respect to those documents on

¹ Plaintiffs' claim that OLC has somehow hidden these memoranda from judicial review is also incorrect. The memoranda in question are covered by another FOIA request that is currently part of another case pending in the Southern District of New York, Amnesty International USA, et al. v. Central Intelligence Agency, et al., No. 07 Civ. 5435 (LAP). Thus, a decision by OLC to withhold all or part of these memoranda is subject to judicial review in that case, but such review is simply, and properly, not part of this already extensive FOIA action. See infra, Argument Section C.

March 21, 2005. Id. ¶ 3 and Exs. B and C. Second, OLC identified, as a general matter, what records it was likely to possess that might be responsive to the entirety of Plaintiffs' request, and where those records would be located. Id. ¶ 4.

Paul Colborn and Bette Farris were the attorney and paralegal, respectively, who were responsible for supervising the search. Id. ¶¶ 1, 3. Within the first week after receiving Plaintiffs' request, they consulted attorneys in OLC who had worked on detainee issues, including the senior management of the Office — Acting Assistant Attorney General Daniel Levin and Principal Deputy Assistant Attorney General Steven Bradbury. Id. ¶ 4. There was a particular need to confer that week with Mr. Levin, because he was scheduled to leave the Department at the end of the week, February 4, 2005. Id. Mr. Colborn thus sent Mr. Levin an email on February 3, 2005 requesting a meeting before Mr. Levin's departure to discuss Plaintiffs' FOIA request. Id. ¶ 4 and Ex. D. Based on these consultations, Mr. Colborn identified and located the classified documents potentially responsive to the request, which were already collected together and stored in secure facilities within OLC. Id. ¶ 4.

During that first week, Mr. Colborn also determined that OLC would need to send a query to all of its attorneys to ensure that it located all other potentially responsive documents. Id. ¶ 5. Accordingly, on February 7, 2005, Ms. Farris sent an email to every attorney in OLC instructing them to determine whether they had documents responsive to Plaintiffs' FOIA request. Id. ¶ 5 and Ex. E. In addition to locating potentially responsive unclassified documents, the February 7, 2005 email was designed to verify that OLC had located all potentially responsive classified documents, as it was sent to attorneys with access to and knowledge of OLC's classified documents. Id.

In the subsequent weeks, OLC followed up on its search efforts. Id. ¶¶ 5-6. On March 18, 2005, Paul Colborn sent an email to a subset of OLC attorneys whom he expected would have documents responsive to the request. Id. ¶ 6 and Ex. F. Mr. Colborn sent this email to ensure that the ongoing searches of attorney files were completed for all of those attorneys in a timely and consistent manner. Id. In March and April 2005, OLC also searched OLC's central files containing all final OLC opinions. Id. ¶ 7. Although the final OLC opinions responsive to Plaintiffs' FOIA request would also have been identified by searching the files of OLC attorneys who had responded to Ms. Farris's February 7, 2005 email, OLC conducted the central file searches to verify that nothing was missed. Id. In April 2005, OLC concluded the search by examining the files of departed OLC attorneys who worked at OLC during the time period of the request. Id. ¶ 8.

The search for documents responsive to Plaintiffs' request revealed a large number of classified and unclassified documents, which were then processed by OLC personnel to determine whether they could be released to Plaintiffs in whole or in part. Id. ¶ 9. In the interest of producing documents as expeditiously as possible, OLC processed unclassified documents first. Id. OLC prioritized unclassified documents because OLC did not anticipate releasing any classified documents. Id. OLC sent Plaintiffs a partial response with regard to the unclassified documents on June 1, 2005, and a final response with regard to the classified documents on September 19, 2005. Id. ¶¶ 10-12 and Exs. G and H.

ARGUMENT

PLAINTIFFS ARE NOT ENTITLED TO A PRELIMINARY INJUNCTION

A. Preliminary Injunction Standard

A preliminary injunction is an “an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.” Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (emphasis in original) (citation omitted); see also Medical Soc’y of State of N.Y. v. Toia, 560 F.2d 535, 538 (2d Cir. 1977) (preliminary injunction is an “extraordinary and drastic remedy which should not be routinely granted”); Circle Line Sightseeing Yachts, Inc. v. Circle Line – Statue of Liberty Ferry, Inc., 195 F. Supp. 2d 547, 549 n.8 (S.D.N.Y. 2002) (same).

The standard for obtaining preliminary injunctive relief is well-settled in this Circuit. In the ordinary case,

a preliminary injunction may be granted only when the party seeking the injunction establishes that 1) absent injunctive relief, it will suffer irreparable harm, and 2) either a) that it is likely to succeed on the merits, or b) that there are sufficiently serious questions going to the merits to make them a fair ground for litigation, and that the balance of hardships tips decidedly in favor of the moving party.

No Spray Coalition, Inc. v. City of New York, 252 F.3d 148, 150 (2d Cir. 2001) (quotations omitted); see also Forest City Daly Housing, Inc. v. Town of North Hempstead, 175 F.3d 144, 149 (2d Cir. 1999) (same). Where, as here, the movant seeks a preliminary injunction “that will affect government action taken in the public interest pursuant to a statutory or regulatory scheme, the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success standard.” No Spray Coalition, 252 F.3d at 150 (quotations omitted); see also Forest

City, 175 F.3d at 149 (same).

B. Plaintiffs Are Unlikely to Prevail on the Merits Because OLC's Search Was Reasonable

1. The Standard for a Search under FOIA

To demonstrate the adequacy of a search, an agency must “show that it made a good faith effort to search for the records requested, and that its methods were ‘reasonably expected to produce the information requested.’” Kidd v. Dep’t of Justice, 362 F. Supp. 2d 291, 294 (D.D.C. 2005); see also Oglesby v. Dep’t of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990) (an agency is not required to search every record system, it only has to show “that it made a good faith effort to conduct a search . . . using methods which can be reasonably expected to produce the information requested”).

The agency is required to conduct a search “reasonably designed to identify and locate responsive documents,” but need not “take extraordinary measures to find the requested records.” Garcia v. United States Dep’t of Justice, Office of Information and Privacy, 181 F. Supp. 2d 356, 368 (S.D.N.Y. 2002) (internal quotation omitted). The agency can meet its burden of showing a good faith search by supplying affidavits from appropriate officials setting forth facts indicating that a reasonable search was conducted. Id. at 366 (citing Weisberg v. United States Dep’t of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984)). To establish the sufficiency of its search, the agency’s affidavits need only explain the “scope and method of the search” in “reasonable detail.” Kidd, 362 F. Supp. 2d at 295 (citing Perry v. Block, 684 F.2d 121, 127 (D.C. Cir. 1982)). The reasonableness of an agency’s search for responsive documents is judged on the basis of the particular facts of the case at hand. See Steinberg v. Department of Justice, 23 F.3d

548, 551 (D.C. Cir. 1994). The validity of an agency's search cut-off is analyzed under the same reasonableness standard. See McGehee v. Central Intelligence Agency, 697 F.2d 1095, 1101 (D.C. Cir. 1983) (noting that "same standard of reasonableness that has been applied to test the thoroughness and comprehensiveness of agency search procedures is equally applicable to test the legality of an agency rule establishing a temporal limit to its search efforts" and depends on the facts of the case), modified on reh'g, 711 F.2d 1076 (D.C. Cir. 1983); Blazy v. Tenet, 979 F. Supp. 10, 17 (D.D.C. 1997) (reasonableness standard applies to search cut-off date), aff'd, 1998 WL 315583 (D.C. Cir. May 12, 1998).

2. OLC's Search Cut-Off Was Reasonable Because It Corresponded to the Start of OLC's Search

OLC's January 31, 2005 temporal cut-off satisfies FOIA's reasonableness standard because it corresponded to the start of OLC's search. See McGehee, 697 F.2d at 1104 (suggesting that date-of-search cut-off would be reasonable under FOIA); Defenders of Wildlife v. United States Dep't of the Interior, 314 F. Supp. 2d 1, 12 n.10 (D.D.C. 2004) (endorsing date-of-search cut-off). As Mr. Colborn explains, there was virtually no difference between the January 31, 2005 date of the request and the date OLC commenced its search because OLC began searching for records the same week it received Plaintiffs' request. Colborn Decl. ¶¶ 3-5; see also id. ¶ 2 (explaining that in February 2005 there was no back-log of FOIA requests, and thus the date of the request was essentially the same as the date the search was commenced). If there were any doubt about the date the search was commenced, it is resolved by Mr. Colborn's February 3, 2005 email to Mr. Levin, which documents that the search was ongoing as of that date. Id. ¶ 4 and Ex. D. Thus, OLC's January 31, 2005 cut-off date was reasonable because it

corresponds to the start of the search. See Pls. Br. at 14 (“reasonable temporal cut-off date for FOIA search was the date upon which the search for documents commenced”) (citing Van Strum v. EPA, 1992 WL 197660, at *2 (9th Cir. Aug. 19, 1992)); see also Pls. Br. at 13 (citing 28 C.F.R. § 16.4(a) (DOJ regulation establishing general rule of cut-off on the day a FOIA search is commenced)).²

Plaintiffs’ argument that OLC’s search was conducted in “March and April of 2005” misinterprets the Third Bradbury Declaration. See Pls. Br. at 14. As that declaration makes clear, OLC conducted a search of its central files in March and April 2005 in addition to its searches of attorney working files. See Third Declaration of Steven G. Bradbury, dated June 7, 2007, ¶ 44. OLC began its searches of attorney files within the first week of receiving Plaintiffs’ request. Colborn Decl. ¶ 5. Thus, Plaintiffs err when they suggest that a significant time passed between the date of their request and OLC’s commencement of its search. See Pls. Br. at 14.³

Plaintiffs also err in arguing that OLC did not in fact use a January 31, 2005 cut-off date because documents that post-date January 31, 2005 were included in two Government indices.

² Plaintiffs’ suggestion that there were two different searches — one for unclassified records and one for classified records — is also incorrect. See Pls. Br. at 6. OLC identified and located the potentially responsive classified records the first week after receiving Plaintiffs’ request. Colborn Decl. ¶ 4. Mr. Colborn’s June 1, 2005 letter did not signal the start of a new search for classified documents, but rather was intended to inform Plaintiffs that OLC had not begun processing the potentially responsive classified records that had already been identified. Id. at ¶ 10. Thus, the processing of the two categories of responsive documents was done at different times, but the search for both began in early February 2005.

³ Even if OLC had begun its search in “March and April 2005,” as Plaintiffs incorrectly maintain, that search would not have uncovered the legal opinions Plaintiffs now seek, as they were not issued to CIA until May 2005. Colborn Decl. ¶ 14. Moreover, there were no OLC legal opinions issued to CIA concerning detainee interrogation from January 31, 2005 through May 9, 2005. Id.

Pls. Br. at 7 n.4 and 12-13. As a threshold matter, four of the documents in question were actually dated before January 31, 2005. Colborn Decl. ¶ 13. The remainder of the documents were inadvertently included in the indices, which covered over 1,750 documents. Id. ¶¶ 12-13. The fact that Plaintiffs were inadvertently provided with more information than they should have received is irrelevant to the reasonableness of OLC's search, and is not a basis for relief where the facts clearly establish that OLC commenced its search during the first week of February 2005.

Plaintiffs also err in arguing that their FOIA request placed ongoing obligations on OLC to process records. Pls. Br. at 14 (arguing that May 2005 opinions should be processed because their request "seeks information concerning ongoing activity by OLC") (emphasis in original). As another district court noted in Church of Scientology of Texas v. IRS, FOIA does not obligate an agency to conduct ongoing searches for current documents. 816 F. Supp. 1138, 1148 (W.D. Tex. 1993) (holding that it would be "unreasonable to expect an agency to locate and determine the disclosability of documents generated subsequent to the date specified in a request"). To hold otherwise "would require the agency to make numerous searches — one when the request is filed, one after reviewing the documents responsive to the request, and if this last search locates any records, at least one more after determining whether those records are subject to disclosure." Id. at 1148. Similarly, in Judicial Watch v. Clinton, the court rejected the argument that the Government must conduct ongoing searches up until it responds to a FOIA request because such an obligation "would impose significant administrative burdens as agencies struggled to respond to requests while concurrently searching for new documents to include up to the moment of the response." 880 F. Supp. 1, 10 (D.D.C. 1995), aff'd, 76 F.3d 1232 (D.C. Cir. 1996). It is thus reasonable to place a temporal limit on Plaintiffs' FOIA request. Otherwise, OLC's obligation to

respond to the request — and this Court’s obligation to resolve Plaintiffs’ inevitable challenges to those responses — will never end.

For all of these reasons, OLC’s January 31, 2005 cut-off was reasonable and appropriate because it corresponded to the start of OLC’s search. Plaintiffs are mistaken to suggest that the search was commenced at a later date.

C. Plaintiffs Will Suffer No Irreparable Injury Because the May 2005 Opinions Are Covered By Another FOIA Case Pending in This District

Plaintiffs incorrectly argue that they will be irreparably injured if their injunction is denied because they will be denied access to the May 2005 legal opinions. See Pls. Br. at 10-11.⁴ While the May 2005 OLC memoranda are beyond the scope of Plaintiffs’ FOIA requests in this case because they were issued well after OLC’s cut-off date and the date it commenced its search, the opinions are included within the scope of the FOIA requests at issue in Amnesty International USA, et al. v. Central Intelligence Agency, et al., No. 07 Civ. 5435 (LAP), another FOIA case pending in the Southern District of New York.⁵ Colborn Decl. ¶ 15. One of the plaintiffs in this case — the Center for Constitutional Rights — is also a plaintiff in the Amnesty

⁴ An October 4, 2007 New York Times article reported that OLC issued two classified legal opinions in 2005 to CIA relating to the interrogation of detainees in CIA custody. Colborn Decl. ¶ 14 and Ex. I. The Times reported that one opinion was issued in “February 2005,” and the other was issued “[l]ater that year.” Id. OLC has reviewed its opinions from that time frame and has determined that there were in fact three opinions issued to CIA relating to the interrogation of detainees in CIA custody. Id. ¶ 14. Two of the opinions were issued on May 10, 2005. Id. The third was issued on May 30, 2005. Id. OLC has not located any legal opinions issued to CIA from January 31, 2005 through May 9, 2005 that relate to the interrogation of detainees in CIA custody. Id.

⁵ Certain documents responsive to the FOIA requests that are the subject of that litigation were created by OLC and have been referred to OLC for processing. Colborn Decl. ¶ 15. The documents referred to OLC include the three May 2005 legal opinions identified in footnote 4, supra.

International matter. OLC is currently processing the May 2005 legal opinions to determine whether any portions of those opinions may be produced to the Amnesty International plaintiffs. Id. If any portions of those documents are withheld, OLC's withholding determinations will be subject to judicial review as part of the Amnesty International case. Id. Therefore, Plaintiffs will suffer no irreparable injury if their application for an injunction is denied.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion for a preliminary injunction compelling Defendant Office of Legal Counsel to process additional documents not previously deemed responsive to Plaintiffs' FOIA request.

Dated: New York, New York
November 5, 2007

Respectfully submitted,

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