

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION,
ELECTRONIC PRIVACY INFORMATION
CENTER, AMERICAN BOOKSELLERS
FOUNDATION FOR FREE EXPRESSION, and
FREEDOM TO READ FOUNDATION,

Plaintiffs

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant.

Civil Action No.
1:03CV02522 (ESH)

(Judge Ellen Segal Huvelle)

**MEMORANDUM IN SUPPORT OF DEFENDANT'S
MOTION FOR PARTIAL OPEN AMERICA STAY**

On December 10, 2004, plaintiffs American Civil Liberties Union (ACLU), the Electronic Privacy Information Center (EPIC), the American Booksellers Foundation for Free Expression (ABFFE), and the Freedom to Read Foundation (FTRF) filed a Complaint for Injunctive Relief, seeking records from the Federal Bureau of Investigation ("FBI") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 to order production of agency records related to Section 215 of the Patriot Act, Pub.L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001) ("The Patriot Act"). Plaintiffs divide their request for agency records in two parts. First, plaintiffs seek a non-redacted copy of a document titled "Business Record Order Requests Since 10/26/2001" ("Business Record document"). The FBI had previously released this document in redacted form in response to plaintiffs' prior FOIA request for this and other documents related to Section 215 of the Patriot Act. ACLU v. DOJ, 265 F. Supp. 2d 20 (D.D.C. 2003) (This Court specifically upheld the information which the FBI withheld in the Business Record document). Second,

plaintiffs seek "any and all records relating to Section 215 of the Patriot Act, including any and all records indicating the number of times Section 215 has been used." October 23, 2003 FOIA request, Ex. 1.

Plaintiffs assert that they are entitled to expedited processing of their FOIA request under 28 C.F.R. § 16.5(d)(1)(ii), the "urgency to inform" standard (see 5 U.S.C. § 552(a)(6)(E)(v)(II)) and under 28 C.F.R. § 16.5(d)(1)(iv), the Department's "media-related" standard. Defendant has filed a motion for partial summary judgment regarding the Business Record document. Expedition with respect to part 1 of plaintiffs' FOIA request is therefore moot. With respect to the remainder of plaintiffs' request for expedition, plaintiffs have not demonstrated that expedited treatment of the records they request at the expense of other, earlier-submitted requests waiting in the FBI's first-in, first-out processing queue is justified.¹

Accordingly, defendant now moves for a partial stay of proceedings on part II of plaintiffs' request under Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976). Although the FBI is exercising due diligence in responding to this part of plaintiff's request under the FOIA, exceptional circumstances have prevented it from completely processing the request within the statutory time limit. While the FBI's Record/Information Dissemination Section ("RIDS") section in Washington, D.C. has reduced its backlog from 16,244 requests in various stages of processing as of December 31, 1996 to 3,733 as of October 1, 2000, it still receives on average over 700 FOIPA requests every month, and 1937 requests remain currently pending in various stages of processing. Hardy Dec., ¶ 17. For instance, over a

¹Defendant incorporates by reference the portion of its memorandum in support of its motion for partial summary judgment, which is filed concurrently and which addresses plaintiffs' request for expedited production.

three year period, one case required the assignment of between 6 to as many as 25 Paralegal Specialists ("PLS") pursuant to court order and settlement agreement to process 272,112 pages. (*Id.* at ¶ 15). In another instance, litigation deadlines required the full-time assignment of approximately 30 PLSs, who processed over 24,000 pages over a three month period. *Id.* In addition, as of September 30, 2003, 415 administrative appeals were pending, as well as, 149 currently pending lawsuits, which require an enormous amount of personnel and resources. *Id.* ¶¶ 14-15. Moreover, in response to the events of September 11, 2001, the RIDS has been affected by diversion of numerous Paralegal Specialists to operational divisions in FBIHQ personnel to assist with the 9/11 investigation and to support the ongoing war on terrorism. *Id.* ¶ 16.

Despite these exceptional circumstances, the FBI has been exercising due diligence in responding to FOIA and other information requests and has undertaken significant efforts to speed the production of documents to requesters. Pursuant to 5 U.S.C. § 552(a)(6)(C), which provides for additional time under these circumstances, the Court should stay these proceedings until the FBI completes processing plaintiff's request, which as explained below, should be completely processed by June 1, 2005.

STATEMENT

I. CORRESPONDENCE WITH PLAINTIFFS

By letter dated October 23, 2003, plaintiffs' attorney submitted a FOIA request to the FBI. Hardy Dec., ¶ 8, Ex. B. Plaintiffs requested a copy of the Business Record document which had previously been produced by the FBI in redacted form and records relating to Section 215 of the Patriot Act. (*Id.*) Plaintiffs sought expedited processing from the FBI under 28 C.F.R.

§ 16.5(d)(1)(ii), the "urgency to inform" expedition category concerning the use of Section 215, would 'help promote democratic values and government accountability.'" (Id.). On or about October 23, 2003, plaintiff also sought expedited processing from OPA under 28 C.F.R. § 16.5(d)(1)(iv), the Department's media-related standard, stating that their request pertains to "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." (Id.).

By letter dated October 30, 2003, the FBI denied plaintiffs' request for expedition, advising plaintiffs that they had not demonstrated that expedition should be granted under 28 C.F.R.

§ 16.5(d)(1)(ii), the "urgency to inform" standard (see 5 U.S.C. § 552(a)(6)(E)(v)(II)). (Id., ¶ 10, Ex. C). The FBI also informed plaintiffs that their request would be placed in the FBI's regular processing queue. (Id.) By letter dated January 9, 2004, the OPA denied plaintiffs' request for expedition noting that plaintiffs had not demonstrated that expedition should be granted under 28 C.F.R. § 16.5(d)(1)(iv), the Department's "media-related" standard. (Id., ¶ 12.)

II. FBI PROCESSING OF FOIPA REQUESTS

The FBI's RIDS Section has approximately 435 employees who respond to FOIPA requests. See Hardy Dec., ¶ 21. The majority of the RIDS employees are Paralegal Specialists whose shared function is to intake, review, process, and release information in response to FOIA and Privacy Act requests. Id. Under the FBI's processing system, RIDS is comprised of 11 units, each of which has a distinct processing responsibility: the Service Request Unit ("SRU"), handles various initial tasks required to "perfect" a FOIA/Privacy Act request; two Work Process Units ("WPU") prepares SRU's "perfected" requests for transfer to the three Disclosure Units;

three Classification Units ("CU") review documents responsive to, inter alia, FOIA/Privacy Act requests in order to determine whether such material should remain classified or be declassified; three Freedom of Information and Privacy Acts ("FOIPA") Units ("Disclosure Units") perform the actual processing of all records pursuant FOIA and the Privacy Act; the Litigation Support Unit ("LSU"), among other responsibilities, coordinates the progress of the FBI's response to a particular FOIA/Privacy Act request as it progresses through the units described above; and, the Government Response and Prepublication Review Unit ("GRPRU") provides feedback to requests from other federal agencies. FBI designed this structure to increase general efficiency and "in an effort to better serve the needs of requesters who seek information from the FBI." Id., ¶ 20.

To ensure fairness to all requesters and to equitably administer the FOIPA requests received by the FBI, requests are transferred from the SRU and WPU to a "perfected back log" for processing based on the date of receipt on a "first in/first out" basis. Id. at ¶ 22. The FBI uses a three-queue system to track new requests, based on the amount of time and work involved in a particular request. Id. Within the three queues, requests are assigned and handled on a first in/first out basis. Id. The total amount of responsive material determines in which queue a request is placed. The small queue is 500 pages or less, the medium queue is 501-2,500 pages, and the large queue is 2,501 pages or more. Id. These procedures permit requests to be addressed in the order in which they are received, while obviating inequities to requesters whose interests relate to only a small number of documents. Id.

PLSs often work on more than one request at a time because it is not always efficient to finish one request before proceeding to the next. Id. at ¶ 23. Processing of a complex case may

be halted midstream for a variety of reasons, including resolving a classification issue, locating missing records, or consulting with other government agencies with respect to releasing certain information. Id. In the interest of efficiency during this waiting period, other requests may be processed and released. Id. Large requests are often processed in conjunction with smaller ones to ensure that one requester does not consume a disproportionate share of the RIDS Section resources. Id.

ARGUMENT

I. PLAINTIFF IS NOT ENTITLED TO EXPEDITED PROCESSING ON PART I OF PLAINTIFFS' REQUEST

As explained above, see supra pp. 2-3, and in defendant's memorandum in support of its motion for partial summary judgment which is incorporated by reference, plaintiffs sought expedition from the FBI under 28 C.F.R. § 16.5(d)(1)(ii), the "urgency to inform" standard. See 5 U.S.C. § 552(a)(6)(E)(v)(II). The FBI's decision denying expedited processing is reviewed de novo. See Al-Fayed, 254 F.3d at 308. Plaintiffs also sought expedition from OPA under 28 C.F.R. § 16.5(d)(1)(iv), the Department's "media-related" standard. OPA's decision denying expedition is reviewed for reasonableness. See Al-Fayed, 254 F.3d at 307 n.7. As explained in defendant's motion for partial summary judgment, plaintiffs have failed to demonstrate that they satisfy the requirements for expedited processing whether viewed under Section 16.5(d)(1)(ii) or Section 16.5(d)(1)(iv). Accordingly, part II of plaintiffs' request must be processed in the ordinary "first-in, first-out" fashion.

II. THE FBI IS ENTITLED TO A PARTIAL STAY OF PROCEEDINGS

Under FOIA, an agency is required to determine within twenty days² of the receipt of a request for records “whether to comply with such request[,]” and to “immediately notify the person making such request of such determination and the reasons therefor.” 5 U.S.C. § 552(a)(6)(A)(i). This time limit can be extended by ten working days if the agency determines that “unusual circumstances” exist. 5 U.S.C. § 552(a)(6)(B).

Exhaustion of administrative remedies is a prerequisite under FOIA. See Stebbins v. Nationwide Mutual Ins. Co., 757 F.2d 364, 366 (D.C. Cir. 1985). As a general rule, however, if an agency does not respond within the statutory time limit, a plaintiff will be deemed to have “constructively” exhausted administrative remedies, and may proceed directly to court, without having to “actually” exhaust. 5 U.S.C. § 552(a)(6)(C).

Nevertheless, FOIA explicitly contemplates the possibility of a stay of judicial proceedings at the district court level. Pursuant to 5 U.S.C. § 552(a)(6)(C)(i):

If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records.

Id.

Effective October 2, 1997, as part of the Electronic Freedom of Information Act Amendments of 1996, Congress amended this provision by adding the following two

² By an amendment to the FOIA, this response time was changed from ten to twenty days, effective October 2, 1997.

subsections:

(ii) For purposes of this subparagraph [i.e., 5 U.S.C. § 552(a)(6)(C)], the term “exceptional circumstances” does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing the request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

See 5 U.S.C. § 552(a)(6)(C)(ii), (iii).³

The leading case construing section 552(a)(6)(C) is Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976). In that case, which involved a FOIA request directed to FBI, the Court of Appeals for the D.C. Circuit held that an agency is entitled to additional time to process a FOIA request under § 552(a)(6)(C) when it

is deluged with a volume of requests for information vastly in excess of that anticipated by Congress, when the existing resources are inadequate to deal with the volume of such requests within the time limits of subsection (6)(A), and when the agency can show that it “is exercising due diligence” in processing the requests.

³ The 1996 Amendments to FOIA upheld the decision in Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976); affirmed the proposition that stays should be granted to agencies deluged with FOIA requests; and clarified that even a “predictable agency workload of requests” constituted “exceptional circumstances” when an agency could demonstrate that it was making progress in reducing its backlog. See, e.g., H.R. Rep. 104-795, 104th Cong., 2d Sess., 1996 U.S.C.C.A.N. 3448, 1996 WL 532690, at *23 (Sept. 17, 1996) (hereinafter “E-FOIA Report”) (noting that the FOIA Amendments were “consistent” with the holding in Open America). Consequently, the 1996 FOIA Amendments did not eliminate the opportunity for overworked federal agencies to obtain a stay of proceedings; instead, the amendments merely modified the showing that was required for such a stay. In light of this language, it would be of no avail for plaintiffs to argue that Open America itself was wrongly decided. It is the law of this Circuit, and the 1996 FOIA Amendments and subsequent case law reflect its continued validity.

Id. at 616 (quoting 5 U.S.C. § 552(a)(6)(C)).⁴ See also Ogelsby v. Department of the Army, 920 F.2d 57, 64 (D.C. Cir. 1990) (“Frequently, if the agency is working diligently, but exceptional circumstances have prevented it from responding on time, the court will refrain from ruling on the request itself and allow the agency to complete its determination.”). Courts “cannot focus on theoretical goals alone, and completely ignore the reality that these agencies cannot possibly respond to the overwhelming number of requests received within the time constraints imposed by FOIA.” Cohen v. FBI, 831 F. Supp. 850, 854 (S.D. Fla. 1993). An agency may rely on the volume of both FOIA requests and non-FOIA information demands to demonstrate “exceptional circumstances:”

Agencies may also make a showing of exceptional circumstances based on the amount of material classified, based on the size and complexity of other requests processed by the agency, based on the resources being devoted to the declassification of classified material of public interest, or based on the number of requests for records by courts or administrative tribunals.

EFOIA Report, at *23; H.R. Rep. No. 106-50, 106th Cong., 1st Sess., 1999 WL 132731, at *13 (Mar. 11, 1999).

Following the decision in Open America, courts in the D.C. Circuit “have interpreted [section (a)(6)(C)] as excusing any delays encountered in responding to a request as long as the agencies are making a good faith effort and exercising due diligence in processing the requests on a first-in first-out basis.” Kuffel v. United States Bureau of Prisons, 882 F. Supp. 1116, 1127 (D.D.C. 1995) (citations omitted); see also Edmond v. United States Attorney, 959 F. Supp. 1, 3 (D.D.C. 1997) (Sporkin, J.) (“Courts have uniformly granted the government reasonable periods

⁴ At the time of the Open America decision, the D.C. Circuit found “exceptional circumstances” where the FBI had a backlog of “only” 5,137 requests. See Open America, 547 F.2d at 609, 613.

of time in which to review FOIA requests when there is a backlog.”); Jiminez v. FBI, 938 F. Supp. 21, 31 (D.D.C. 1996) (quoting Kuffel, 882 F. Supp. at 1127); Emerson v. CIA, 1999 U.S. Dist. Lexis 19511, at *4 (D.D.C. Dec. 16, 1999) (Hogan, J.) Ferguson v. FBI, 722 F. Supp. 1137, 1140 (S.D.N.Y. 1989) (“In the D.C. Circuit, courts generally have granted extensions when presented with evidence of an overburdened agency following necessary procedures”) (citations omitted).⁵

As shown below, because the FBI can demonstrate both exceptional circumstances and due diligence, the Court should stay the proceedings relating to plaintiffs’ FOIA claim to allow the agencies to process plaintiffs’ requests in due course.⁶

⁵ Even if the Court were to find that defendant has not demonstrated that it has exercised due diligence in exceptional circumstances, the Court nonetheless has the power to, and should, grant the defendant additional time to process plaintiffs’ requests. As Judge Leventhal noted in Open America, “there certainly is some room for a court in equity to stay its hand, and to forbear from enforcing a declared right in cases where the defendant is called upon to do the impossible.” Open America, 547 F.2d at 620 (Leventhal, J., concurring). Perhaps recognizing this latitude, even courts which have held “that a great number of requests, insufficient funding, and inadequate staff do not constitute ‘exceptional circumstances,’” have not “ordered immediate responses to the FOIA requests.” Cohen v. FBI, 831 F. Supp. 850, 853 (S.D. Fla. 1993). See also Fisher v. FBI, 94 F. Supp. 2d 213, 217-18 (D. Conn. 2000) (“While delay may effectively deny a request, courts often grant at least some time extension for equitable reasons ‘when presented with evidence of an overburdened agency following necessary procedures.’ . . . Defendants’ affidavits detail the handling of the requests, the nature of such searches, and the exceptional problems defendants have with backlog due to time and budget constraints. Therefore, defendants sufficiently met their initial burden.”) (internal citations omitted); Caifano v. Wampler, 588 F. Supp. 1392, 1394-95 (N.D. Ill. 1984) (no reasonable remedy to address violation of 10-day response limit or to vindicate requester’s rights; court “can only direct that defendants continue to work diligently and expeditiously in a good faith manner to respond to plaintiff’s request”).

⁶ Indeed, a “first-in, first-out” system is itself evidence of an agency’s due diligence. See Cohen v. FBI, 831 F. Supp. 850, 854 (S.D. Fla. 1993) (“[R]esponding to requests on a ‘first-come, first-served basis,’ satisfies the ‘due diligence’ requirement unless the plaintiff has some exceptional or urgent need for the information”).

A. FBI Is Entitled to a Partial Stay.

1. FBI is Operating Under Exceptional Circumstances.

The burdens on the FBI's information processing resources are extreme. Each month the FBI receives averages over 700 FOIPA requests. See Hardy Decl., ¶ 17 . Due to this continual influx, and to the appeals and litigation that arise from it, the FBI's RIDS section faces a continuing and unrelenting demand. Id. Nonetheless, the FBI has been successfully paring down the backlog of pending requests. For example, requests in the FOIPA Section in various stages of processing between December 31, 1996 and October 1, 2000 dropped from 16,244 to 3,733, resulting in a reduction of 12,511 requests. Id. This is admirable progress, but given the relentless demand, as of January 31, 2004, RIDS still had 1937 requests in various stages of processing throughout the Section. Id. While this backlog alone easily could consume the RIDS Section, employees must split their time with other, ever-increasing duties. For example, handling administrative appeals consumes substantial amounts of FOIPA staff time, taking employees away from their regular processing efforts. During the past Fiscal Year (FY 2003), and through the beginning of FY 2004, the FBI received a total of 1145 administrative appeals. Id., ¶ 14 As of January 31, 2004, 415 administrative appeals were pending resolution. Id. at ¶ 38. Id.

Moreover, the RIDS Section has assumed significant litigation responsibilities, which also take employees away from basic processing duties. Id. at ¶ 15. At the present time, the FBI is involved in approximately 149 pending lawsuits in various federal courts throughout the United States. Id. Individual cases may require an inordinate amount of personnel and resources. Id. In addition, in response to the events of September 11, 2002, the FBI has diverted

manpower to assist with the ongoing investigation of the terrorist attacks and to prevent future attacks. Id. at ¶ 16. The FBIHQ and RIDS Section have been affected by this diversion of personnel, as many of the Section's employees have been reassigned (often for indeterminate periods of time) to other divisions to provide assistance. Id. This has prolonged the FBI's response time to FOIPA requests and litigation and further contributed to the resource constraints in RIDS. Id.

For all of these reasons, the FBI faces “exceptional circumstances” warranting an Open America stay. See, e.g., Summers v. CIA, Civ. A. No. 98-1682, slip op. at 1-2 (D.D.C. July 26, 1999) (Roberts, J.) (attached hereto as Ex. 2) (granting stay because “[t]he FBI has demonstrated through its affidavits that exceptional circumstances do exist, the agency is exercising due diligence in processing requests, and it is making reasonable progress in reducing its backlog”); Haddon v. Freeh, 31 F. Supp. 2d 16, 19 (D.D.C. 1998) (Urbina, J.) (noting that court had granted Open America stay until January 1998 on request submitted to FBI nearly four years before); Judicial Watch of Florida, Inc. v. DOJ, Civ. A. No. 97-2869, slip op. at 6-9 (D.D.C. Aug. 25, 1998) (Urbina, J.) (attached hereto as Ex. 3) (granting stay lasting nearly two years to the FBI); Grecco v. DOJ, Civ. A. No. 97-0419 (D.D.C. Aug. 24, 1998) (Johnson, C.J.) (attached hereto as Ex. 4) (order granting partial stay to the FBI lasting over two years); Narducci v. FBI, Civ. A. No. 98-0130 (D.D.C. Jul. 17, 1998) (Jackson, J.) (attached hereto as Ex. 5) (granting approximately three-year stay because the FBI “is deluged with a volume of requests for information vastly in excess of that anticipated by Congress”); Guzzino v. FBI, Civ. A. No. 95-1780, 1997 WL 22886, at *2 (D.D.C. Jan. 10, 1997) (Sporkin, J.) (granting more than four-year stay because “[t]he FBI has shown that even though it is exercising due diligence, because of

inadequate resources it is unable to respond to plaintiff's request within the statutory 10-day limit").

2. FBI is Exercising Due Diligence in Processing Plaintiffs' Request and Is Making Reasonable Progress in Reducing Its Backlog of Pending Requests.

In addition to demonstrating "exceptional circumstances," the FBI RIDS Section is exercising due diligence in responding to plaintiffs' FOIA requests and has made reasonable progress in reducing its backlog, despite the tremendous burdens on its resources. The agency's recent progress has been significant. As of December 31, 1996, the FBI's FOIPA Section had 16,244 FOIA and PA requests in various stages of processing. See Hardy Dec., ¶ 17. Although this figure represents the high watermark for the agency, the backlog has decreased steadily since then. That figure has dropped to 3,733 in October 2000 to 1,937 requests as of January 31, 2004. Id. These concrete results plainly constitute "reasonable progress" for purposes of Section 552(a)(6)(C)(ii).

Furthermore, the FBI is taking other available steps to streamline the processing of FOIA requests. The RIDS Section has begun to conduct on-line (instead of manual) searches to locate responsive records, the utilization of forms which eliminates delays associated with word processing delays, employs special teams to target and deal with specific backlog issues, alternate ways to simplify the handling of referral consultations of documents that contain other government agency information, and the formation of the FOIPA Litigation Support Unit, which handles all FOIA/Privacy Act Litigation in RIDS. Id., ¶ 18. The FBI has also begun processing records electronically, using the FOIPA Document Processing System ("FDPS"), rather than redacting information by hand, as is traditional. Id., ¶ 19. As with any completely new system,

unforeseen computer glitches have occurred which are currently being corrected by software specialists. Id.

In addition, the FOIPA Section's current three-queue, first-in, first-out system, is an improvement on the two-track, first-in, first-out system the D.C. Circuit expressly recognized as supporting the due diligence requirement. See Open America, 547 F.2d at 616. As explained above, the move to a three-tiered system has greatly increased the efficiency and fairness with which the FBI processes the thousands of FOIA requests it receives each year.

Not only is the FBI's records management system efficient, but its hiring of 129 new processors in FY 1997, along with an additional 239 employees in the FY 1998, see Hardy Dec., ¶ 17, is clear evidence of the agency's determination to reduce its backlog. See Open America, 547 F.2d at 618 (a factor in determining "due diligence" is whether an agency has applied for funds to meet an upsurge in requests) (Leventhal, J., concurring). As the statistics discussed above suggest, these employees have made substantial progress in reducing the agency's backlog, and should continue to do so despite the reassignment and other demands on RIDS resource constraints. See Hardy Dec., ¶ 17.

The FBI has identified approximately 1900 pages of documents potentially responsive to part II of plaintiffs' requests. Id. at ¶ 29. In these circumstances, it is not surprising that it will take the FBI many months to process these documents. See, e.g., Jimenez v. FBI, 938 F. Supp. 21, 24, 31-32 (D.D.C. 1996) (issuing Open America stay until March 2000, five years after request filed, so FBI could process 700 pages); Ohaegbu v. FBI, 936 F. Supp. 7, 8 (D.D.C. 1996) (granting stay until July 1997, over three years after request filed, to permit FBI to process 175 pages); Cecola v. FBI, No. 94 C 4866, 1995 WL 549066, at *1-2 (N.D. Ill. Sept. 8, 1995)

(dismissing case without prejudice to permit FBI until November 1999 to complete processing of over 1,500 pages responsive to a request filed over six years before); Fox v. DOJ, No. CV-94-4622 JMI, 1994 WL 923072, at *2 (C.D. Cal. Dec. 14, 1994) (granting FBI motion for stay until 1999 to process 300 pages of documents responsive to a request filed six years before). The requested period of approximately 15 months is perfectly reasonable in this case. The estimated 1900 pages of responsive documents located to date puts plaintiffs' request in the medium queue. Hardy Dec., ¶ 29. Ninety-one (91) requests are currently in front of plaintiffs', awaiting processing. Id. In addition, because documents are likely to involve classified information for which review is required by the FBI's Classification Review Board an additional nine months must be built into the normal minimum processing time. Id.

The FBI's diligence extends to processing of plaintiffs' request. However, the nature of the current FOIA request does not lend itself readily or naturally to the searches that the FBI routinely conducts in response to FOIA requests seeking access to FBI investigative files. This is particularly the case where, as is the case here, the subject matter of the request is relatively recent, and responsive records may not have yet been indexed to the FBI's Central Records System ("CRS"). Id., ¶ 25. On October 31, 2003, the RIDS staff initiated a search in the CRS for records responsive to plaintiffs' request. Id., ¶ 26. The scope of the search included the Automated Data Base ("ADB") and the Secure Data Information System ("SDIC"). The search sought main files and cross-references, whether security or criminal. Id. RIDS personnel have contacted those FBIHQ offices most likely to possess responsive documents, including: the Office of Congressional Affairs; the Office of Public Affairs; the National Security Law Branch, OGC; and the Investigative Law Unit, OGC. Id., ¶ 27. In addition, RIDS has prepared and

circulated an Electronic Communication ("EC") to all FBIHQ divisions and offices requesting all personnel to conduct a thorough search of any documents in their possession, including tickler copies and e-mails, responsive to plaintiffs' FOIA request. *Id.*, ¶ 28. In sum, the efforts by the FBI constitute the "due diligence" necessary to obtain a stay. *See Freeman v. DOJ*, 822 F. Supp. 1064, 1066 (S.D.N.Y. 1993) (the court is "satisfied that [the FBI] is doing the best it can do within its physical limitations to process all requests in a timely manner.").

Accordingly, because the FBI is "making a good faith effort and exercising due diligence in processing [plaintiff's] requests on a first-in first-out basis," *see Kuffel*, 882 F. Supp. at 1127, its request for a stay until June 1, 2005 is reasonable and should be granted. *See, e.g., Summers v. CIA*, Civ. A. No. 98-1682, slip op. at 1-2 (D.D.C. July 26, 1999) (Roberts, J.) (attached hereto as Ex. 2) (granting stay because "[t]he FBI has demonstrated through its affidavits that exceptional circumstances do exist, the agency is exercising due diligence in processing requests, and it is making reasonable progress in reducing its backlog"); *Judicial Watch of Florida, Inc. v. DOJ*, Civ. A. No. 97-2869, slip op. at 7 (D.D.C. Aug. 25, 1998) (Urbina, J.) (attached hereto as Ex. 3) ("In this case, the FBI has demonstrated due diligence by assigning and processing all requests, including the plaintiff's, on a first in/first out basis."); *Ohaegbu v. FBI*, 936 F. Supp. 7, 8 (D.D.C. 1996) ("In view of this two-track system and the large volume of documents expected to be responsive to plaintiff's request, this Court 989-90 (D.D.C. 1990) (Revercomb, J.) (granting FBI's motion for stay).⁷

⁷ *See also Grecco v. DOJ*, Civil Action No. 97-0419, slip op. at 2 (D.D.C. Aug. 24, 1998) (Johnson, C.J.) (attached hereto as Ex. 4) (granting two year stay for FBI); *Narducci v. FBI*, Civ. A. No. 98-0130 (D.D.C. Jul. 17, 1998) (Jackson, J.) (attached hereto as Ex. 5) (granting approximately three-year stay because the FBI "is deluged with a volume of requests for information vastly in excess of that anticipated by Congress" and "has made 'reasonable progress

Respectfully submitted,
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in reducing its backlog' of pending requests") (citation omitted); Guzzino v. FBI, Civ. A. No. 95-1780, 1997 WL 22886, at *2 (D.D.C. Jan. 10, 1997) (Sporkin, J.) (granting more than four-year stay because "[t]he FBI has shown that even though it is exercising due diligence, because of inadequate resources it is unable to respond to plaintiff's request within the statutory 10-day limit"); Reed v. DOJ, Civil Action No. 97-2150-PHX, slip op. at 2 (D. Ariz. Nov. 10, 1998) (attached hereto as Ex. 6) (granting stay where "defendant has made a showing of exceptional circumstances and due diligence").

