

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| JASON LEOPOLD, |) | |
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| Plaintiff, |) | |
| |) | |
| v. |) | Civil Action No. 16-2258-KBJ |
| |) | |
| NATIONAL SECURITY AGENCY, |) | |
| |) | |
| Defendant. |) | |
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DEFENDANT’S MOTION TO STAY PROCEEDINGS

Defendant National Security Agency ("NSA"), through undersigned counsel, hereby moves for a stay of proceedings in order to gain the time needed to appropriately process plaintiff’s Freedom of Information Act request, and further requests that the Court order the Agency to process no more than 400 pages of potentially responsive documents per month. In support of this motion, defendant respectfully submits the attached memorandum in support of defendant’s motion, with a supporting declaration and exhibits, and a proposed Order. Plaintiff has been consulted as required by LCvR 7(m) and has indicated that he will oppose this motion.

Respectfully submitted,

CHANNING PHILLIPS,
D.C. Bar # 415793
United States Attorney
for the District of Columbia

DANIEL F. VAN HORN,
D.C. BAR # 924092
Chief, Civil Division

/s/ Marina Utgoff Braswell
MARINA UTGOFF BRASWELL
D.C. BAR #416587
Assistant United States Attorney
U.S. Attorney's Office
Civil Division
555 4th Street, N.W.
Washington, D.C. 20530
(202) 252-2561
marina.braswell@usdoj.gov

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MEMORANDUM IM SUPPORT OF DEFENDANT’S MOTION TO STAY PROCEEDINGS

PRELIMINARY STATEMENT

In this case brought pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, defendant National Security Agency ("NSA" or "Agency") moves for a stay of proceedings for six (6) months so that the NSA can appropriately process plaintiff’s three (3) broad FOIA requests. The Agency further requests that it be ordered to process no more than 400 pages of potentially responsive documents per month. Although the NSA is exercising due diligence in responding to this request, exceptional circumstances prevent it from processing the request within the statutory time limit, or at the pace requested by plaintiff. Pursuant to 5 U.S.C. § 552(a)(6)(C), which provides for additional time to process FOIA requests under such circumstances, defendant requests that the Court stay the proceedings until the NSA is able to appropriately

process plaintiff's requests, one (1) of which has already begun. In support of its motion, the NSA submits the sworn Declaration of David J. Sherman ("Sherman Decl." or "Sherman Declaration"), Chief of Strategy, Plans, and Policy for the Agency, which explains that the NSA requires a stay of approximately six (6) months, or until September of 2017, to continue processing one of plaintiff's FOIA requests, begin processing the other two (2) requests, and subsequently release any responsive records. Further, the NSA requests the Court order it to process no more than 400 pages of potentially responsive materials per month. See Sherman Declaration, attached.

A stay until September of 2017 is warranted by the facts of this case. The NSA has begun processing one (1) of plaintiff's three (3) requests. The NSA attempted to negotiate with plaintiff to narrow the scope of responsive records, and although plaintiff initially agreed to narrow the scope of one of his requests, he has since indicated through counsel that he desires to pursue the broad parameters of his initial request.

STATEMENT OF FACTS

A. The NSA's FOIA Request Processing System

As Mr. Sherman explains, all FOIA requests submitted to the NSA come to the Freedom of Information Act/Privacy Act (FOIA/PA) Office, which is located organizationally in the Office of

Strategy, Plans and Policy. Sherman Decl., ¶¶ 1, 24. Each FOIA request submitted to NSA must go through a series of reviews, including: 1) initial receipt and perfection; 2) initial determination regarding which processing track is appropriate for the request; 3) searching for and collecting potentially responsive materials; 4) scoping the material for responsiveness; 5) consultation with other agencies, as appropriate; 6) two levels of classification/declassification review, including a line-by-line review of each page, as well as a final management level review; and, 7) final processing of responsive materials for release. These steps must be taken sequentially, as access to the information, which is often classified and involves matters of national security, must be strictly controlled to ensure its integrity. Id. at ¶ 23.

The FOIA Office's ("FO") Initial Processing Team reviews and sorts all correspondence and requests for information from the public, Congress, other federal and state agencies, and foreign governments. They also perform various initial tasks required to "perfect" a FOIA/PA request, such as sending acknowledgment letters, requesting identifying information from requesters to ensure that a records search is properly performed, informing requesters when a notarized signature and/or Privacy Act ("PA") waiver is required, and notifying requesters when no responsive records are located, or the

request is outside the purview of the Agency's mission. The request is then assigned a case number, and entered into NSA's FOIA document management system. A request is considered "perfected" when all administrative tasks have been completed and the FO has a clear understanding of the scope and subject matter desired by the requester. Id. at ¶ 24.

Once a request has been perfected, the FO sends an acknowledgment letter to the requester with pertinent information such as the assigned case number, and the status of related requests regarding fees and/or expedited processing. The request is then placed in the appropriate processing queue. Id. at ¶ 25.

The assignment of a request to one of the processing queues depends on the estimated time in which the request can be fully processed. Requests that can be fully processed in 20 days or less are assigned to the "simple" queue. Requests that will require more than 20 days for a complete response are assigned to the "complex" queue. The third queue is for requests that are in litigation. This established "multi-track" system ensures that all requesters are treated equitably by concurrently processing requests within each queue on a "first-in, first-out" basis. This significantly improves the efficiency and effectiveness of the FO by enabling it to process complex and time-consuming requests concurrently with simple

requests, so that one requester does not consume a disproportionate share of FO resources to the detriment of other requesters. Id. at ¶ 26.

Before any NSA records or information is released, it must be reviewed to determine if it contains classified information pursuant to Executive Order 13526, and if so, how that information should be handled. Some requests, like the instant one, return potentially responsive documents that also contain Personally Identifiable Information ("PII") and/or privileged communications. Further, the Office of the Inspector General ("OIG") records, at issue in this matter, often contain information that is exempt from disclosure under one or more applicable FOIA exemptions. For these reasons, documents must be carefully reviewed to prevent the release of information that is currently and properly classified, would constitute an unwarranted breach of personal privacy, or is otherwise exempt from release. This phase of the process is extremely time-consuming, as each responsive document must be reviewed page-by-page, line-by-line, and word-by-word to determine which, if any, FOIA and/or Privacy Act ("PA") exemptions may apply. This includes recommending redactions of exempt material and notating the applicable exemption(s) in the margin of each page, or deleting pages when they are withheld in their entirety. All of this is done electronically, and requires the information to be

transitioned between multiple document management and editing tools. Id. at ¶ 27.

During this phase of the process, the FO refers responsive documents to other government and intelligence agencies, as necessary, for their respective determinations regarding the releasability of information in NSA records that belongs to, or originated with, the other agency. If a document originated with another agency, the NSA may refer those non-NSA records to that other agency for processing and direct response to the requester. Before responsive documents complete this phase of the process, the FO must confirm that all appropriate FOIA and/or PA exemptions have been properly applied, no releasable information has been withheld, no information warranting protection has been released, all necessary classification reviews have been conducted, and other government and intelligence agencies' information has been properly handled. Id. at ¶ 28.

Any requests that result in federal litigation are coordinated between the FO and NSA's Office of the General Counsel's Litigation Group ("LG"). Together, these organizations prepare the administrative record, draft both procedural and substantive declarations, code and Bates stamp documents for release, and draft detailed declarations justifying the application of FOIA and/or Privacy Act

exemptions. The LG also reviews appeal determinations to ensure that the appropriate legal and statutory standards have been applied, and are consistent with prevailing rulings in various jurisdictions. Id. at ¶ 29.

B. Plaintiff's FOIA Request

1. Case No. 79204

By email dated Saturday, September 20, 2014, plaintiff submitted a FOIA request to the NSA seeking:

"...disclosure from the National Security Agency Office of Inspector General a copy of the concluding document report of investigation, final report, closing memo, referral letter) concerning investigations closed in calendar year [sic] 2013 and 2014 concerning misconduct, actual or alleged."

The request included instructions to:

- 1) Follow any leads discovered while conducting a search for responsive documents and perform additional searches as necessary;
- 2) Include records that are already publicly available;
- 3) Search both electronic and paper/manual files;
- 4) Search all offices and components;
- 5) Release any photographs or visual materials in their original (or comparable) form;
- 6) Disclose any and all "supposedly 'duplicate' pages" including pages that may have already been released to Plaintiff;
- 7) Include emails relating to the subject matter of the request;
- 8) Search records transferred to, and/or publicly available through, other agencies;
- 9) Include records relating to the destruction of responsive documents; and,

10) To "interpret the scope of this request in the most liberal manner possible short of an interpretation that would lead to a conclusion that the request does not reasonably describe the records sought."

In addition to the above documents, plaintiff requested a fee waiver or, in the alternative, to receive "News Media" status for fee waiver purposes. Id. at Ex. A.

On September 22, 2014, the FO contacted NSA's OIG for assistance interpreting and scoping plaintiff's request. By letter dated September 23, 2014, the FO acknowledged plaintiff's request, assigned it Case No. 79204, stated that his request for a fee waiver has not yet been addressed, and advised him of a significant delay in processing due to the number of requests ahead of his in the queue. Id. at Ex. B.

By reply email on September 24, 2014, the FO contacted plaintiff proposing two options for re-scoping his request: 1) a compiled list/index of investigations that would include information, such as the date the investigation was opened, the category (waste/misuse of resources, time & attendance fraud, etc.), and whether the allegations were substantiated; or, 2) limit the scope of the request to a discrete and specific type of misconduct. By email on September 26, 2014, plaintiff responded that he was willing to narrow his request to only investigations with findings of misconduct. Id. at Ex. C.

However, plaintiff's Complaint in the instant litigation, as well as recent communications with plaintiff's counsel, indicate that plaintiff desires to resurrect the broader scope of his initial request. Id. at ¶ 10, footnote 2.

On June 21, 2016, the FO tasked NSA's OIG to search for documents responsive to plaintiff's request. The OIG's search returned approximately 8,488 pages of potentially responsive documents. Id. at ¶ 11.

By letter dated September 15, 2016, the FO advised plaintiff that his request for a fee waiver was denied because he did not provide adequate information concerning the statutory requirements permitting a fee waiver, but that he was granted "News Media" status for the purpose of calculating fees related to his request. The letter also advised plaintiff that, due to the volume of potentially responsive documents, duplication fees could be as high as \$1,000.00 and requested that he provide a statement regarding his willingness to pay. Id. at Ex. D.

By email dated September 23, 2016 plaintiff responded that he would pay "\$1,000.00 or more" but also advised that he would appeal the FO's denial of his request for a full fee waiver. Id. at Ex. E.

By letter dated October 18, 2016, the FO requested plaintiff pay \$343.00, which represented 50% of the estimated

duplication fees (related to this request only). It further advised that the page count and associated duplication fees would be significantly reduced if plaintiff would accept the final summary memorandum for each investigation in lieu of the entire investigative file. Id. at Ex. F. By letter dated October 24, 2016, plaintiff administratively appealed the denial of his fee waiver request. Id. at Ex. G. Before NSA ruled on his appeal, plaintiff filed the instant litigation. Id. at ¶ 15. To date, the FO has received no payment of estimated fees from plaintiff, and therefore stopped processing this request. Id. at ¶ 14.

2. Case No. 79825

By email dated Sunday, November 30, 2014, plaintiff submitted another FOIA request to the NSA seeking:

"...disclosure from the National Security Agency Office of Inspector General of copies of Semi-Annual Reports for the past 11 years."

The request included instructions to:

- 1) Follow any leads discovered while conducting a search for responsive documents and perform additional searches as necessary;
- 2) Include records that are already publicly available;
- 3) Search both electronic and paper/manual files;
- 4) Search all offices and components;
- 5) Release any photographs or visual materials in their original (or comparable) form;

- 6) Disclose any and all "supposedly 'duplicate' pages" including pages that may have already been released to Plaintiff;
- 7) Include emails relating to the subject matter of the request;
- 8) Search records transferred to, and/or publicly available through, other agencies;
- 9) Include records relating to the destruction of responsive documents; and,
- 10) To "interpret the scope of this request in the most liberal manner possible short of an interpretation that would lead to a conclusion that the request does not reasonably describe the records sought."

In addition to the above documents, plaintiff requested a fee waiver or, in the alternative, to receive "News Media" status for fee waiver purposes. Id. at Ex. H.

By letter dated December 02, 2014, the FO acknowledged plaintiff's request, assigned it case No. 79825, stated that his request for a fee waiver has not yet been addressed, and advised him of a significant delay in processing due to the number of requests ahead of his in the queue. Id. at Ex. I.

On September 21, 2016, the FO began processing this case. Id. at ¶ 18. By email dated October 06, 2016 plaintiff requested an estimated date of completion for this request. The FO responded by email dated October 11, 2016 that, due to the volume and complexity of the potentially responsive material, plaintiff's request had an estimated completion date in December

2018, advising him that processing had begun, and that documents were in one of the approval queues. Id. at Ex. J.

3. Case No. 85643

By facsimile dated Thursday October 06, 2016, plaintiff submitted another FOIA request to the NSA seeking:

"...disclosure from the National Security Agency Office of Inspector General a copy of the concluding document (report of investigation, final report, closing memo, referral letter) concerning investigations conducted and closed in calendar years 2015 and 2016 thus far concerning any and all misconduct, actual or alleged."

The request included instructions to:

- 1) Follow any leads discovered while conducting a search for responsive documents and perform additional searches as necessary;
- 2) Include records that are already publicly available;
- 3) Search both electronic and paper/manual files;
- 4) Release any photographs or visual materials in their original (or comparable) form;
- 5) Disclose any and all "supposedly 'duplicate' pages" including pages that may have already been released to Plaintiff;
- 6) Include emails relating to the subject matter of the request;
- 7) Search records transferred to, and/or publicly available through, other agencies;
- 8) Include records relating to the destruction of responsive documents; and,
- 9) To "interpret the scope of this request in the most liberal manner possible short of an interpretation that would lead to a conclusion that the request does not reasonably describe the records sought."

In addition to the above documents, plaintiff requested a fee waiver or, in the alternative, to receive "News Media" status for fee waiver purposes. Id. at Ex. K.

By letter dated October 13, 2016, the FO acknowledged receipt of plaintiff's request, assigned it case No. 85643, stated that his request for a fee waiver has not yet been addressed, and advised him of a significant delay in processing due to the number of requests ahead of his in the queue. Id. at Ex. L.

On November 17, 2016, plaintiff filed the instant litigation.

C. Search for Responsive Documents

The NSA has conducted searches to identify documents potentially responsive to plaintiff's requests. Because plaintiff requested all "concluding documents" for OIG investigations during a specific time-frame (01/01/2013 - 10/06/2016), without regard to the category or subject of the investigation, identifying responsive documents was a relatively simple exercise, yet resulted in a voluminous amount of records. Id. at ¶ 30.

As previously noted, NSA's OIG's search returned approximately 8,488 pages of potentially responsive documents for Case No. 79204. The OIG's search in Case No. 79825

identified responsive documents that were already being processed pursuant to two (2) other FOIA requests. Seventeen (17) responsive documents, consisting of 430 pages, for the time frame 09/01/2008 - 09/30/2016, and seven (7) responsive documents, consisting of 76 pages, for the time frame 03/01/2005 - 03/31/2008 have also been identified as potentially responsive. At least one of these documents will require consultation with another agency. Id. at ¶ 32.

Searches pursuant to Case No. 85643 identified that, in the requested time frame, 154 OIG investigations were conducted. This resulted in 137 reports, with approximately 13,240 pages of potentially responsive material.

D. Facts Supporting an Open America Stay

1. Volume and Complexity of Requests

In 2009, the FO received 1,034 direct FOIA and PA requests and processed 1,005 of those, comprising approximately 11,847 pages of responsive materials. By 2012, the number of requests had increased to 1,939, but the FO was still able to process 1,904 of those during the year, comprising 22,408 pages of responsive documents. Id. at ¶ 34.

In June 2013, a former NSA contractor began a series of unprecedented, unauthorized, and unlawful disclosures of classified documents concerning classified NSA programs and activities. By September 2013, the FO had received 3,976 new

FOIA and PA requests, and had over 1,100 pending requests in its overall backlog. This incident has had an ongoing impact on the volume and complexity of FOIA requests received by the NSA and its ability to respond to those requests. Id. at ¶ 35.

The FO immediately took steps to streamline its work, including the use of form letters, the formation of specific teams to address backlog issues, consultations and referrals to other agencies, and simplifying its multi-track processing system from six (6)¹ concurrent tracks down to the three-track system described above. Id. at ¶ 36.

Despite these efforts, the number of requests increased so suddenly, and so dramatically, that by the time additional resources were identified and trained, a significant backlog of requests, many of which were very complex, had already developed. In CY 2012, the NSA received a total of 1,809 FOIA/PA requests, or an average of 151 requests per month, and had 664 pending requests at the end of the year. In CY 2013, the total number of FOIA/PA requests rose to 4,328, or an average of 361 requests per month, and the backlog rose to 930 pending requests at the end of the year. In CY 2014, the NSA received a total of 2,990 FOIA/PA requests, or an average of 249 requests per month, but its backlog grew to 1,326 by the end of

¹ For detailed information on NSA's former 6-track system, see 32 C.F.R. § 299.5.

the year. In CY 2015, the NSA received a total of 1,767 FOIA/PA requests, or an average of 147 requests per month, with a backlog of 1,566 requests. And in CY 2016, the NSA received a total of 1,881 FOIA/PA requests, or an average of 157 requests per month, with a backlog of 1,630 requests. Although the volume of requests has returned to a level more consistent with prior years, that brief but significant spike in requests in 2013 and 2014, and the event that precipitated it, have had a broad and lasting impact on NSA's FOIA program. Id. at ¶ 37.

The NSA FO's workload today is significantly more complex and demanding than it was before the unauthorized disclosures of June 2013. After the unauthorized disclosures revealed classified details of NSA's foreign surveillance program, the NSA began receiving significantly more individual requests for its records on specific persons. And while each of these requests requires fewer resources than the instant requests by plaintiff, taken together, these individual requests have nevertheless had an impact on limited resources. Further, current issues of significant public interest such as candidate Hillary Clinton's email investigation, reports of Russian involvement in the recent election, and the continued unauthorized public release of classified NSA information, continue to result in an increase in the number and complexity of requests received. As other federal agencies have reported,

the FOIA/PA landscape has dramatically changed in recent years such that responding to information requests demands increasing amounts of time and effort and continues to tax finite resources. Id. at ¶ 38.

It is noteworthy that the documents responsive to plaintiff's requests in the instant litigation have a page count of 22,218, which is roughly equivalent to the 22,408 pages processed by NSA's FO in all of CY 2012. And while plaintiff's request has returned an exceptionally large number of potentially responsive pages, it is representative of the growing trend that requests are increasing in complexity and thus in the size of potentially responsive materials.

For example, ACLU Foundation v. CIA, 16-CV-1256 (EGS), is litigation pursuant to a request that was submitted to 18 different government entities for 6 different categories of information relating to the prepublication processes of Intelligence Community agencies. From NSA's perspective, the scope and complexity of this request was significant, since all NSA civilians, military employees, and contractors are required to have any writings relating to NSA (such as resumes, cover letters, biographies, etc.) reviewed through NSA's prepublication process prior to dissemination, as a condition of their employment. In that case, the parties successfully negotiated to narrow the scope of the request, which

significantly reduced the overall number of potentially responsive materials.

The total number of potentially responsive pages has a proportional impact on the complexity of the processing of those materials. All potentially responsive materials require internal reviews, declassification considerations, and the time associated with page-by-page, line-by-line, and word-by-word reviews to determine what can be released and/or withheld. Since OIG investigations and reports are the subject of the instant requests, these potentially responsive documents will also contain PII and/or privileged communications of witnesses, complaints, and others related to investigations and other information that is exempt from disclosure under the FOIA pursuant to 5 U.S.C. §§ 552 (b)(3), (b)(5), (b)(6), and/or (b)(7). For these reasons, documents must be carefully reviewed to prevent the release of information that is currently and properly classified, would constitute an unwarranted breach of personal privacy, or is otherwise exempt from release. In addition, the increased complexity and volume of a request proportionately increases the need for consultations with/referrals to other government and intelligence agencies, and the need for subject-matter experts to provide guidance as determinations are made at each step in the process. Id. at ¶ 39.

2. Workflow Management, Limited FOIA Resources, and Litigation Demands

Despite best efforts, some requests become the subject of judicial complaints. Currently NSA has approximately 18 pending FOIA litigations. Although NSA's FO continuously strives to comply with the FOIA's statutory and regulatory requirements for responsiveness and processing times, this requires a careful allocation of its limited personnel resources. The same individuals who are working to comply with numerous litigation deadlines are simultaneously handling a constantly high volume of administrative requests, appeals, consultations, and referrals. Any increase in the number of personnel that must be allocated to process documents pursuant to a court-ordered production schedule means a commensurate reduction in the number of personnel processing documents for requesters who have chosen not to litigate. Given NSA's limited number of FOIA personnel, if the Court orders defendant to process plaintiff's requests at a rate greater than 400 pages per month, the individuals who filed the 1,603 pending requests in NSA's current backlog, many of which were filed well before plaintiff's, will be disadvantaged. Id. at ¶ 41.

Further, recent changes to the FOIA statutes pursuant to the FOIA Improvement Act of 2016 (See 5 U.S.C. § 552) are likely to increase the demand on the FO's limited resources. Some of

the changes expand the time during which requesters can administratively appeal agency determinations, while others prohibit agencies from charging fees if a request is not processed in the statutorily required time period, which can be as short as 20 days. Id. at ¶ 42.

3. **Large Number of Requests Filed by Small Group of Requesters, Many of Whom Quickly Resort to Litigation**

In addition to the increased volume, complexity, and litigation demand discussed above, NSA has experienced a significant increase in the number of requests by a small group of requesters. These requesters also levy complex, multi-part, multi-subject requests simultaneously on various government agencies. Then these individuals often commence judicial action immediately after statutory requirements for exhausting administrative remedies have been satisfied. They presumably intend to jump to the front of the queue, ahead of requesters who have chosen not to litigate, many of whom almost certainly lack the necessary financial resources. Id. at ¶ 43.

For example, plaintiff Jason Leopold is "a self-styled 'FOIA terrorist'" who, according to a recent press release by his new employer, BuzzFeed.com, makes his living "by deluging the federal government with Freedom of Information Act requests." (<https://pynter.org/2017/buzzfeed-hires-foia-terrorist-jason-leopold-from-vice-news/444034>.) He proudly

claims to have "brought more FOIA lawsuits by himself than any other news organization except the New York Times." Sherman Decl. at ¶ 44.

Further, plaintiff has refused to modify his request at all, much less in a reasonable fashion, to reduce its sweeping scope, despite defendant's requests to focus the request on time-frames and/or subject matter in which he is most interested. Id. at ¶ 45. Plaintiff has not claimed that his life, safety, or substantial due process rights would be jeopardized if his request is not processed immediately; and even if, arguendo, NSA was able to process plaintiff's requests at his requested pace of 750 pages per month, he would still wait almost 2.5 years to receive all of the information, due to the significant number of potentially responsive pages. Thus, plaintiff has failed to make a particularized showing of exceptional need or urgency which would justify moving his request to the front of the litigation queue, and in effect, disadvantaging other requesters. Id. at ¶¶ 45, 46.

ARGUMENT

A. Legal Standard For a Stay of Proceedings

An agency receiving a FOIA request generally must determine whether to comply with the request within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i). Once the initial twenty days has passed without an agency determination on the request, the FOIA

requester "shall be deemed to have exhausted his administrative remedies," Id. at § 552(a)(6)(C)(I), and the requestor can file suit in federal court. The Court may, however, "allow the agency additional time to complete its review of the records" upon a showing that "exceptional circumstances exist and that the agency is exercising due diligence in responding to the request." Id. § 552(a)(6)(C)(i).

Effective October 2, 1997, as part of the Electronic Freedom of Information Act Amendments of 1996, Congress amended 5 U.S.C. § 552(a)(6)(C)(i) by adding the following two subsections:

(ii) For purposes of this subparagraph [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).

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), which involved the issue of an agency's backlog of FOIA requests preventing it from even starting to work on the

plaintiff's FOIA request. In that case, which involved a FOIA request directed to the FBI, the Court of Appeals for this 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. Id. at 616 (quoting 5 U.S.C. § 552(a)(6)(C)). See also Oglesby 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.").

The importance of the Open America decision is that the Court of Appeals recognized that there may be circumstances in which an agency simply cannot reasonably process a FOIA request within the statutory timetables. Under such circumstances, if the agency is exercising due diligence in its efforts, a stay of proceedings is warranted to allow the agency the time needed to process the FOIA request. 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).

“[E]xceptional circumstances” therefore include “any delays encountered in responding to a request as long as the agencies are making good-faith efforts and exercising due diligence in processing requests” Appleton v. FDA, 254 F. Supp.2d 6, 8-9 (D.D.C. 2003).

Courts have frequently issued orders extending the time to respond to FOIA requests. See e.g., National Security Archive v. SEC, 770 F. Supp.2d 6, 8-9 (D.D.C. 2011); Electronic Frontier Foundation v. Department of Justice, 517 F. Supp.2d 111, 120-121 (D.D.C. 2007); Piper v. U.S. Department of Justice, 339 F. Supp.2d 13, 16 (D.D.C. 2004) (discussing a stay of two years given to the FBI); Appleton, 254 F. Supp.2d at 11 (granting FDA’s motion for stay pending completion of search and production of documents); Williams v. FBI, 2000 WL 1763680, at *3 (giving the FBI until May 2, 2001, to review records requested prior to August 21, 1998); Judicial Watch of Florida, Inc. v. U.S. Department of Justice, 102 F. Supp.2d 6, 9 & n.1 (D.D.C. 2000) (discussing an order giving the FBI until June 8, 2000, to respond to a request dated July 15, 1997); Edmond v. United States Attorney, 959 F. Supp. 1, 4 (D.D.C. 1997) (giving the U.S. Attorney’s Office until April 1, 1998 to respond to a request filed August 14, 1992); Rabin v. U.S. Department of

State, 980 F. Supp. 116, 123-24 (E.D.N.Y. 1997) (permitting Department of State over three years to process plaintiff's FOIA request); Jiminez v. FBI, 938 F. Supp. 21, 31 (D.D.C. 1996) (granting FBI's request for stay and permitting it over four years to respond to plaintiff's FOIA request); Ohaegbu v. FBI, 936 F. Supp. 7, 8-9 (D.D.C. 1996) (granting request for stay and permitting July 1997 response to FOIA request submitted in July 1995).

As shown below, because the NSA can demonstrate both exceptional circumstances and due diligence in handling plaintiff's request, the Court should stay the proceedings until September 2017 to allow the NSA time to appropriately process plaintiff's requests at the rate of 400 pages of potentially responsive materials per month.

B. The NSA Is Entitled to a Stay

1. Plaintiff's Refusal to Sufficiently Narrow the Scope of His Request Weighs in Favor of Granting a Stay

An important consideration in determining whether or not a stay is warranted is the extent to which a requester cooperated with the agency by agreeing to modify or narrow the request. FOIA expressly provides that the "[r]efusal 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) . . . after being given the 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" 5 U.S.C. § 552(a)(6)(C)(iii). This factor weighs heavily in favor of granting a stay in this matter.

Given the large volume of potentially responsive documents to plaintiff's FOIA request, the NSA requested that plaintiff limit the scope of the documents requested. Plaintiff initially agreed to do so only in part, but has since indicated his desire to return to the broad scope of his original request. Ex. C; See also, Sherman Decl. at ¶ 10, footnote 2.

Plaintiff submitted three (3) extremely broad FOIA requests, each with the explicit instruction to "interpret the scope of this request in the most liberal manner possible short of an interpretation that would lead to a conclusion that the request does not reasonably describe the records sought." He then refused to reasonably narrow the scope, and should therefore not be allowed to complain when the NSA requires additional time to process the extraordinarily large number of pages that are potentially responsive to plaintiff's request. Id. at Ex. A, H, & K.

2. The NSA's Need for the Stay is Amply Supported by the Sherman Declaration

Most reported cases in which a stay has been sought involve an agency that has a back-log of requests and has not yet been able to start processing the plaintiff's request. In the instant case, the agency has begun actively working on one of plaintiff's three requests, but because the volume of potentially responsive pages is so significant, and the review required to ensure that sensitive information is appropriately released or withheld, a significant amount of additional time is required to begin processing plaintiff's other two requests. Further, defendant is only able to process responsive documents at the rate of 400 pages per month without disproportionately disadvantaging other FOIA requesters. Thus, in this case, it is clear that exceptional circumstances include both the NSA's existing backlog, which increased significantly following the unauthorized disclosures of classified information in 2013, as well as the extraordinary number pages that are potentially responsive to plaintiff's requests, and NSA's limited FOIA resources available to process plaintiff's requests without disadvantaging other requesters. As shown, the NSA has made good-faith progress in processing its backlog on a first-in, first-out basis in its three concurrent queues, and on processing plaintiff's requests.

Approximately 22,200 pages of information potentially responsive to plaintiff's requests have been identified. These documents must be reviewed on a page-by-page, line-by-line, and word-by-word basis to determine whether any information is subject to any of the exemptions under FOIA. Sherman Decl., ¶¶ 23, 27. In light of the potentially sensitive nature of the documents requested, the NSA anticipates that FOIA reviewers will need to coordinate with subject matter experts ("SMEs") in order to properly review and process the documents. These SMEs, however, have other agency duties to perform in the regular course of their work, which does not constitute FOIA reviews, and thus they will not be available full-time to work on plaintiff's requests. Moreover, because the requested documents are the result of OIG investigations, the material is likely to contain information exempt from disclosure under one or more FOIA exemptions, as well as PII, and information that must be coordinated with other government agencies. Processing these documents will be both complex and time-consuming. Id. at ¶ 39.

In light of the existing demands on NSA's finite FOIA resources, it estimates that it can process 400 pages of potentially responsive materials per month. This pace would accomplish constant progress against plaintiff's requests, while preserving the rights of other requesters to receive information pursuant to their requests, many of which were submitted before

plaintiff's requests. Altering its policy of processing requests on a first-in, first-out basis in each of its three (3) queues, would be neither feasible, nor an efficient use of the NSA's finite FOIA resources. Id. at ¶¶ 47, 48.

The Sherman Declaration demonstrates that the NSA faces exceptional circumstances in connection with processing plaintiff's broad FOIA requests and the sensitive information that will be included in the responsive documents. The declaration also shows that the NSA is exercising due diligence in processing plaintiff's FOIA requests. Under such circumstances, the stay requested by the NSA is fully warranted.

CONCLUSION

In view of the foregoing, defendant NSA respectfully requests that an Order be issued staying the pending proceeding for six (6) months, or until September of 2017, and that the Court order it to process no more than 400 pages of potentially responsive materials per month. The NSA suggests that it submit status reports every three months to inform the Court and plaintiff of the progress of its processing efforts.

Respectfully submitted,

CHANNING PHILLIPS,
D.C. Bar # 415793
United States Attorney
for the District of Columbia

DANIEL F. VAN HORN,

D.C. BAR # 924092
Chief, Civil Division

/s/ Marina Utgoff Braswell
MARINA UTGOFF BRASWELL
D.C. BAR #416587
Assistant United States Attorney
U.S. Attorney's Office
Civil Division
555 4th Street, N.W.
Washington, D.C. 20530
(202) 252-2561
marina.braswell@usdoj.gov

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| |) | |
| SUSAN B. LONG, <u>et al.</u> , |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | Civil Action No. 15-1734 (TSC) |
| |) | |
| CENTRAL INTELLIGENCE AGENCY, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

ORDER

UPON CONSIDERATION of defendant's motion for a stay, plaintiff's opposition, and the entire record in this case, it is hereby

ORDERED that defendant's motion to stay is granted; and it is further

ORDERED that this case is stayed until September ____, 2017; and it is further

ORDERED that defendant shall process 400 pages of potentially responsive materials per month; and it is further

ORDERED that defendant shall file a status report every three months from the date of this Order.

UNITED STATES DISTRICT JUDGE