UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 00-1849 JR
DEPARTMENT OF JUSTICE, et al.,	)	
	)	
Defendants.	)	
	)	

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE COMPLAINT; AND REPLY IN SUPPORT OF ITS MOTION FOR AN ORDER ESTABLISHING A SCHEDULE FOR THE PROCESSING OF RESPONSIVE AGENCY RECORDS

Plaintiff filed this action to compel defendants to expedite the processing of FBI documents relating to the highly controversial Carnivore e-mail surveillance system. Seeking to evade judicial review of their continuing failure to expedite the processing of plaintiff's FOIA request, defendants have moved to dismiss the complaint and opposed plaintiff's motion for an order establishing a processing schedule. Because, as is set forth below, there exists a live controversy between the parties that goes to the heart of Congress' express grant of jurisdiction to this Court, the case should not be dismissed. Plaintiff

thus opposes defendants' motion and reiterates its entitlement to the entry of a scheduling order.

ARGUMENT

I. Defendants' Motion to Dismiss Lacks Merit and Ignores the Clear Mandate of the FOIA and the Precedents of this Court

Seeking dismissal of the complaint, defendants assert that the case is "moot" because defendant DOJ "has already granted plaintiff's request for expedition," and defendant FBI "expeditiously is processing the records requested by plaintiff." Defendants' Memorandum ("Def. Mem.") at 7 (citing Defendants' Status Report filed on 8/16/00).[1]

Asking the Court to elevate form above substance, defendants appear to be arguing that their mere utterance of the magic words "expedition granted" somehow deprives this Court of its clear jurisdiction to subject their actions to judicial review. Defendants' suggestion of mootness would render meaningless the action this Court has

[1] Defendants belatedly "granted" plaintiff's request for expedition after this lawsuit was filed, and advised plaintiff of their decision in writing little more than an hour before a scheduled hearing on plaintiff's motion for a temporary restraining order.

already ordered, and ignores the express dictate of the FOIA and the precedents of this court.

A. The Court-Ordered Status Report

Defendants' argument would render meaningless the Court's request, issued from the bench on August 2, 2000, that defendants file a status report that would detail defendants' understanding of what it means to "expedite" the processing of plaintiff's request. The Court prefaced its request for such a report by noting that "I don't know what [expedition] really means in the context of this case until the FBI has a reasonable chance to evaluate what is before it in terms of the request." Transcript of TRO Hearing at 11 (attached to Def. Mem. as Exhibit A).

In response to the Court's request, defendants filed their status report on August 16, 2000. In it, defendants reported that some 3,000 pages of responsive material have been located, that "[p]reparation of these documents has begun," and that "a classification review of this material is underway." Defendants' Status Report at 4. Thus, defendant FBI has now had "a reasonable chance to evaluate what is before it," and, in the face of defendants' failure

to state a completion date, the Court can proceed to determine what expedited processing "really means." This is clearly the process that the Court contemplated.

B. The Express Language of the FOIA

When it amended the FOIA in 1996, Congress clearly intended that the courts would oversee agency compliance with the Act's expedited processing provisions. The amended FOIA provides, in pertinent part:

> Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4) . . .

5 U.S.C. § 552(a)(6)(E)(iii). The referenced judicial review provision states, in pertinent part:

> On complaint, the district court of the United States in . . . the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, . . . and the burden is on the agency to sustain its action.

5 U.S.C. § 552(a)(4)(B).

It is thus clear that 1) this Court has jurisdiction to review an agency's failure to expedite processing of a request; and 2) such failure is treated as a "withholding [of] agency records."[2] Defendants' formulation would render this statutory grant of jurisdiction meaningless, depriving the Court of the ability to look beyond an agency's *verbal representations* ("granting" request to expedite) and examine the agency's *actual behavior* (refusing to identify a processing completion date). As plaintiff discusses below, this Court routinely engages in the latter type of review, both in those rare cases deemed worthy of expedition, and in the more numerous cases involving the issuance of stays to complete processing under *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976).

In short, as this Court recognized when it directed defendants to file a status report, "expedited processing"

[2] Defendants assert that because they "have not improperly withheld any records . . . plaintiff's request [for relief] is not ripe and should be dismissed." Def. Mem. at 8. However, as noted, the FOIA treats a failure to expedite processing in an appropriate case as a "withholding" for purposes of injunctive relief.

means *something*, and it is not enough for an agency to merely pay lip service to that statutory mandate.

C. This Court's Precedents Support Judicial Review

In numerous cases under the FOIA, this Court has established compliance dates within which agencies were required to complete the processing of FOIA requests. Belying defendants' position here, the Court's handling of *every one* of the few previous case involving the expedited processing of an FOIA request included the establishment of a date certain for the completion of processing.[3] Defendants' steadfast refusal to commit to such a date here clearly constitutes a judicially cognizable "live controversy" of the kind this Court is expressly empowered to resolve.

In *Cleaver v. Kelly*, 427 F. Supp. 80, 81-82 (D.D.C. 1976), the Court "conclude[d] that an exceptional and urgent need . . . exist[ed] which justifie[d] putting th[e] request ahead of other requests," and ordered the FBI to

[3] The paucity of cases in which expedition has been found to be warranted underscores the fact that it is a rare occurrence that requires special treatment, and one that cannot be said to unduly burden an agency.

complete processing *within 21 calendar days* of the Court's order.[4] Likewise, in *Freeman v. U.S. Department of Justice,* C.A. No. 92-557, slip op.(D.D.C. October 2, 1992) (attached hereto as Exhibit A), this Court found that "expedited processing of plaintiff's FOIA request is appropriate" and ordered defendant FBI to "comply with plaintiff's FOIA request" in less than three months. *Id*. at 6.

Most recently, in *Aguilera v. Federal Bureau of Investigation*, 941 F. Supp. 144 (D.D.C. 1996), the Court first recognized, as did the D.C. Circuit in *Open America*, that requesters should not gain preferential treatment merely by virtue of filing a lawsuit. *Id*. at 152. The Court noted, however, that "[a]t the same time, *Open America* recognized . . . that certain requestors, upon an adequate showing, would be allowed to 'leapfrog' to the front of the line." *Id*. Finding the case before it to be "one of these exceptional cases," the Court ordered the FBI

[4] *Cleaver* was decided several months after the D.C. Circuit's seminal decision on FOIA processing deadlines, *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976), which held that expedited processing is warranted where a requester demonstrates "exceptional need or urgency" for the requested material. *Id*. at 615.

to expedite the processing of plaintiff's request and to complete its review *within 30 days*. *Id*. at 152-153.

While the Court has had relatively few occasions on which to impose compliance dates for the expedited processing of FOIA requests, there have been many cases decided under *Open America* in which agencies have been ordered to complete processing by a date certain. *See, e.g.*, *Bricker v. Federal Bureau of Investigation*, 54 F. Supp. 2d 1, 3 (D.D.C. 1999) (noting previous order denying stay and directing FBI to complete processing within 30 days); *Haddon v. Freeh*, 31 F. Supp. 2d 16, 19 (D.D.C. 1998) (noting previous order granting stay and directing FBI to complete processing within 17 months*); Edmond v. United States Attorney*, 959 F. Supp. 1, 4 (D.D.C. 1997) (denying requested two-year stay but granting one-year stay); *Williams v. United States*, 932 F. Supp. 354, 357 (D.D.C. 1996) (ordering FBI to complete processing in less than 14 months); *Hunter v. Christopher*, 923 F. Supp. 5, 8 (D.D.C. 1996) (ordering several agencies to complete processing within 60 days); *Electronic Privacy Information Center v. Federal Bureau of Investigation*, 865 F. Supp. 1 (D.D.C.

1994) (denying requested three-year stay and ordering FBI to complete processing within 27 days).[5]

These cases demonstrate the falsity of defendants' assertion that a dispute over the timing of the processing of an FOIA request does not constitute a "live controversy." Indeed, such disputes have routinely been resolved by this Court, and the establishment of processing completion dates has been a central component of judicial review of agency compliance with the FOIA.

Were the Court to adopt defendants' position, it would be endorsing an anomolous result in which plaintiff, which purportedly has been "granted" expedited processing, would be entitled to less relief than the many plaintiffs in *Open America* cases who are, at the least, provided with a date certain for the completion of their requests. The Court should not countenance such an outcome; defendants' motion to dismiss the complaint should be denied.

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[5] Other courts have also imposed firm processing deadlines on agencies. *See, e.g.*, *Ray v. Department of Justice*, 770 F. Supp. 1544 (S.D. Fla. 1990) (INS ordered to comply with FOIA's statutory processing deadlines); *Ferguson v. Federal Bureau of Investigation*, 722 F. Supp. 1137 (S.D.N.Y. 1989) (FBI ordered to complete processing within 85 days).

II. The Court Should Order Defendants to Complete the Processing of Plaintiff's Request by a Date Certain

In their opposition to plaintiff's motion for the establishment of a processing schedule, defendants assert that "plaintiff's and the FBI's proposed processing schedules are remarkably similar." Def. Mem. at 2. The only significant difference, of course, is a glaring one: plaintiff proposes the completion of processing by a date certain while defendant FBI proposes a "schedule" that is open-ended and entirely arbitrary. As plaintiff has shown, *supra*, the practice of this Court in FOIA cases is to establish a firm compliance deadline, particularly in cases where the requester is entitled to "expedited processing."

Defendants contend that "Congress could have required that FOIA requests granted expedition be processed within a time certain, but did not." *Id*. at 3. But the absence of such a specific requirement in the statute does not deprive this Court of the ability to provide a meaningful remedy. As the D.C. Circuit has held, "[e]ven when there are no clear statutory guidelines, courts often are still able to discern from the statutory scheme a congressional intention to pursue a general goal." *Robbins v. Reagan*, 780 F.2d 37,

45 (D.C. Cir. 1985*). See also American Methyl Corp. v. EPA*, 749 F.2d 826, 837 (D.C. Cir. 1984) (courts are "unwilling[] to wrest a standardless and open-ended [agency] authority from a silent statute").

Here, defendants argue in support of a "standardless and open-ended" application of the FOIA's expedited processing provisions. The Court, however, is easily "able to discern from the statutory scheme a congressional intention to pursue a general goal" -- to provide qualifying requesters with meaningful expedited processing, subject to judicial review. In the face of agency intransigence, that goal can only be achieved though judicial establishment of a processing deadline.

In proposing a completion date of December 1, 2000, plaintiff noted the pendency of an independent review of the Carnivore system that defendant DOJ plans to have completed by early December. Plaintiff's Motion for an Order Establishing a Schedule ("Pl. Mot.") at 8-9. Suggesting that the "newspaper article" plaintiff cites may be inaccurate (despite its quotation of a senior DOJ official), defendants assert that such a review "has

nothing at all to do with the FBI's processing of plaintiff's FOIA request." Def. Mem. at 5. Defendants are wrong for two reasons.

First, as plaintiff has already explained, Pl. Mot. at 8-9, defendants will be providing the independent Carnivore review team with a great deal of documentation concerning the system. Much of that information is likely to be duplicative of the material covered by plaintiff's FOIA request. An expedited independent review process, conducted at the behest of defendant DOJ, clearly has a bearing upon defendants' ability to expedite the processing of plaintiff's FOIA request.

More importantly, the pendency of the independent review establishes a timeframe in which to gauge the utility of the expedited processing to which plaintiff is entitled. The ground for expedition at issue here -- requests for information pertaining to the government's integrity for which there is widespread and exceptional media interest[6] -- is closely tied to the *timeliness* of the

[6] *See* Plaintiff's request for expedited processing, attached to Declaration of David L. Sobel as Exhibit 2 (filed with Plaintiff's Motion for a Temporary Restraining Order).

release of information relating to a matter of public policy. As this Court has recognized, "[t]he Department of Justice . . . adopted [that] ground for expedition so as to 'permit the public to make a prompt and informed assessment of the propriety of the government's actions in exceptional cases.'" *Aguilera*, 941 F. Supp. At 149 n. 11 (quoting an internal DOJ memorandum).

Defendant DOJ recently published a request for proposals ("RFP") to conduct the independent review of the Carnivore system. The Executive Summary of that RFP (attached hereto as Exhibit B) states, in pertinent part:

> Recent congressional inquiries and reports in the news media reflect considerable public concern over use by the Federal Bureau of Investigation of a relatively new investigative tool known as "Carnivore." . . .
>
> [T]he results of the contractor's review of the Carnivore system are expected to inform ongoing legal and policy discussions . . . .
>
> Given the Attorney General's request for a thorough but prompt review of the Carnivore system and the intent to inform a broader public and legislative discussion of related legal and privacy issues, the Department desires that the draft technical report be submitted by November 17, 2000. . . .

> The Department desires that the final technical report be submitted by December 8, 2000.

Executive Summary, Independent Technical Review of the Carnivore System, at 1-2.

It is thus clear that *defendants themselves* have identified early December 2000 as the latest point at which information concerning Carnivore might be used "to inform a broader public and legislative discussion of related legal and privacy issues." If, as defendant DOJ's policy requires, the information at issue in this case is going to "permit the public to make a prompt and informed assessment of the propriety of the government's actions," that information must be made public at the time that defendants intend to disclose the results of the "Independent Technical Review." Any other result would, instead, permit defendants to expedite the release of information they wish to make public while delaying the disclosure of the information sought by plaintiff. Plaintiff submits that such an outcome would stand the FOIA's legislative intent on its head.

As a final matter, plaintiff wishes to note that defendants' groundless motion to dismiss has set back the proceedings in this case and delayed the Court's resolution of plaintiff's request for meaningful expedition of its request. On August 16, defendants represented that they would begin releasing responsive information in 45 days, or by October 2, 2000. Plaintiff has proposed that releases begin within 30 days of the entry of the Court's order. But under no circumstance should defendants be permitted to begin disclosing information any later than October 2, 2000. Any later date would further diminish plaintiff's right to expedited treatment of its request, which was submitted to defendant FBI on July 12, 2000.

CONCLUSION

The Court should grant plaintiff's motion and order defendants to begin making interim releases to plaintiff beginning on October 2, 2000, and to make further releases every 30 days until the completion of processing no later than December 1, 2000.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of plaintiff's opposition to defendants' motion to dismiss the complaint; and reply in support of its motion for an order establishing a schedule for the processing of responsive agency records has been served on Lisa Barsoomian, Assistant U.S. Attorney, 555 4th Street, N.W., 10th Floor, Washington, DC 20001, by hand-delivery this 1st day of September, 2000.

DAVID L. SOBEL