

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ELECTRONIC PRIVACY)
INFORMATION CENTER)
)
Plaintiff,)
v.)
)
FEDERAL BUREAU)
OF INVESTIGATION)
)
Defendant.)
_____)

Civil Action No. 1:12-cv-00667(CKK)

DEFENDANT’S MOTION FOR AN OPEN AMERICA STAY

Defendant, Federal Bureau of Investigation, hereby moves for a stay of proceedings pursuant to 5 U.S.C. § 552(a)(6)(C) and *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976), and in accordance with this Court’s July 1, 2012 Order, (Dkt. 13). In support of this motion, Defendant respectfully submits the attached memorandum of points and authorities with a supporting declaration (attached as Exhibit 1), and a proposed Order.

Dated: July 30, 2012

Respectfully submitted,

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S
MOTION FOR AN OPEN AMERICA STAY**

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INTRODUCTION

Defendant, Federal Bureau of Investigation (“FBI”), moves this Court for a stay of proceedings pursuant to 5 U.S.C. § 552(a)(6)(C), and *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976). Plaintiff has submitted a request to the FBI under the Freedom of Information Act (“FOIA”) seeking “agency records concerning the government’s use of cell-site simulator, or ‘StingRay,’ technology to track cell phones and other wireless devices.” (Compl. For Injunctive Relief, Dkt. 1, ¶ 2.) Although the FBI is exercising due diligence in responding to Plaintiff’s FOIA request, exceptional circumstances prevent it from processing the request within the statutory time limit. Pursuant to 5 U.S.C. § 552(a)(6)(C), which provides for additional time under such circumstances, Defendant requests that the Court stay the proceedings until the FBI is able to complete the processing of Plaintiff’s request. In support of its motion, Defendant has provided a sworn declaration from David M. Hardy, Section Chief of the Record/Information Dissemination Section, Records Management Division, of FBI Headquarters, which explains that, based on the number of potentially responsive documents that the FBI has located, the FBI requires a stay of approximately twenty-nine months, until October 31, 2014, to complete its production of responsive documents – though the FBI will process a minimum of 1,000 pages a month during this period, and provide Plaintiff’s with any resulting releasable documents on a monthly basis.¹ (*See* Decl. of David M. Hardy (“Hardy Decl.”), attached as Ex. 1.)

¹ While 25,000 pages have been identified as being potentially responsive to Plaintiff’s request, (Hardy Decl. ¶ 4), the FBI may determine as it processes the request that some records are not actually responsive or that records are duplicates, (*id.* ¶ 4 n.2). Indeed, a preliminary assessment has revealed the existence of a number of duplicates within the 25,000 pages. (*Id.*) If this proves to be the case, the FBI will be able to reduce the processing time. (*Id.*) The FBI proposes to file a status report within 120 days of the entry of a stay, and at 120-day intervals thereafter, to update the Court and Plaintiff on the status of Plaintiff’s request and provide updated estimates of the time needed to complete processing.

The FBI acknowledges that it is asking the Court for a lengthy stay. This request, however, meets the standards established under 5 U.S.C. § 552(a)(6)(C) and *Open America*; a stay is warranted in light of the large number of potentially responsive documents, the FBI's existing backlog, the increasing number and size of FBI FOIA requests, and the FBI's diligence in processing Plaintiff's request. The FBI is processing Plaintiff's requests in accordance with established policies that allow for the equitable and orderly processing of FOIA requests on a first-in, first-out basis. Although the FBI has a backlog of pending FOIA requests, it is making substantial efforts to reduce the backlog. Nevertheless, the volume of potentially responsive records in this case, the large number of FBI resources expended on the processing and litigation of numerous complex and large requests, and the limited resources currently available to the FBI for the processing of FOIA requests constitute exceptional circumstances necessitating a stay so that the FBI may complete its review of the records.

STATEMENT OF FACTS

I. The FBI's FOIA Request Processing System

The Record/Information Dissemination Section ("RIDS"), Records Management Division, at FBI Headquarters ("FBIHQ") has the collective mission of effectively planning, developing, directing, and managing responses to requests for access to FBI records and information pursuant to FOIA; the Privacy Act; Executive Order 13526, as amended; Presidential, Attorney General, and FBI policies and procedures; judicial decisions; and Presidential and Congressional directives. (Hardy Decl. ¶ 14.) RIDS also provides prepublication review of material written by current and/or former FBI employees concerning FBI matters, as mandated by the FBI's employment agreement, executes the FBI's historic declassification program, and assists in managing discovery in large counterterrorism criminal

trials. (*Id.*)

As will be discussed more fully below, RIDS handles more than 17,000 FOIA and Privacy Act requests annually and has, on average, 117 FOIA cases in litigation in courts throughout the nation daily. (*Id.* ¶ 13.) Those requests are handled by some 274 personnel, most of whom are Legal Administrative Specialists, who intake, review, process, and release information in response to FOIA and Privacy Act requests. (*Id.* ¶ 14.) This process is actually comprised of five discrete, separate phases: (1) initial receipt and perfection of the request; (2) searching for and collecting potentially responsive material; (3) scoping the material for responsiveness; (4) classification or declassification review, if necessary; and (5) processing responsive material for release. (*Id.* ¶ 13.) To ensure the integrity of government records and the information they contain, these steps are taken sequentially. (*Id.*) Furthermore, while the FBI's electronic FOIA Data Processing System facilitates the storage and movement of material during this process, the vast majority of work on FOIA/Privacy Act requests, whether at the administrative stage or in litigation, requires action by an individual FBI analyst who must conduct a line-by-line review of each and every word on a page to determine whether the information can be released. (*Id.*) RIDS personnel are assigned among ten units within RIDS and two field operational service center units: a Work Process Unit ("WPU"), three Classification Units, five FOIPA/Privacy Act Units ("FOIPA Disclosure Units"), and the Litigation Support Unit.² (*Id.* ¶ 14.)

The WPU is responsible for reviewing and sorting all correspondence and incoming requests for information from the public, Congress, Presidential Libraries, foreign governments, other federal and state agencies, and other FBI entities. (*Id.* ¶14(a)(I).) The WPU handles the

² An off-site unit in Savannah, Georgia handles FOIA/Privacy requests; a sub-unit in Butte, Montana also handles FOIA requests. (*Id.* ¶ 14 n.4.)

first two steps outlined above, a process known as “perfecting” a FOIA/Privacy Act request. (*Id.*) This includes opening a new request, assigning a FOIA/Privacy Act Request Number, entering the request into the FBI’s electronic tracking system, sending letters to acknowledge the request, and advising a requester to provide identifying data so that an accurate search can be made. (*Id.*) In most cases, WPU personnel then conduct a search of the FBI’s Central Records System (“CRS”) for identifiable records that are potentially responsive to the request. (*Id.* ¶¶ 14(a)(I), 18.) The CRS is an investigative tool primarily managed and used by Special Agents to aid them in investigations. (*Id.* ¶ 18.) The files are indexed by Special Agents with terms useful to an investigation, such as the names of individuals, organizations, companies, publications, activities, or foreign intelligence matters (or programs). (*Id.*) In FOIA cases, the WPU conducts searches of the CRS’s general indices for identifiable, potentially responsive records. (*Id.* ¶ 14(a)(I).) At other times, such as in this case, when a search of the general indices does not produce anticipated results, the WPU drafts an electronic communication called a “search EC” and directs it to those divisions most likely to have potentially responsive material.³ (*Id.* ¶ 14(a)(I) n.5.) Having identified potentially responsive documents, WPU then confirms the responsive documents, stamps files for retention, addresses fee issues (other than fee waiver reviews), retrieves and forwards files scanned into the document processing system, responds to status inquiries from requesters that do not have access to the FBI website, and informs a requester if no responsive records have been located. (*Id.* ¶ 14(a)(I).) A request is considered “perfected” when all administrative tasks have been completed and all potentially responsive documents have been scanned into the document processing system. (*Id.*) Once a request has

³ The search EC identifies a specific time period for the division to respond and provide the WPU with copies of any potentially responsive records. (*Id.* ¶ 14(a)(I) n.5.) Searches that involve a search EC are generally more complex than searches using the general indices and therefore often require additional time. (*Id.*)

been perfected, it is placed in the backlog for assignment to a FOIPA Disclosure Unit for processing. (*Id.*)

After the WPU perfects a request, it is sent to the “perfected backlog.” (*Id.* ¶ 14(a)(II).) To ensure fairness to all requesters and to equitably administer the deluge of FOIA/Privacy Act requests received by the FBI, a request is assigned to one of three queues based on the date of receipt on a “first in/first out” basis from within each of queues. (*Id.*); *see* 28 C.F.R. § 16.5(a). The three-queue system, stabled to fairly assign and process requests on a “multi-track” basis, is based on the amount of time and work involved in handling a particular request: 500 pages or less (“small queue”), 501 to 2,500 pages (“medium queue”), or more than 2,500 pages (“large queue”). (*Id.*); *see* 5 U.S.C. § 552(a)(6)(D)(I); 28 C.F.R. § 16.5(b). The system nevertheless preserves the principle that, within the three queues, requests are still assigned and processed on a first-in/first out basis. (*Id.*) This standard operating procedure, coupled with the FBI’s “first in/first out” policy, permits requests to be addressed in the order in which they are received, while obviating the inequities to other requesters whose interests relate only to a small number of documents. (*Id.*)

The three Classification Units (“CUs”) are responsible for complying with the classification/declassification review of FBI records under Executive Order 13526, as amended, and for conducting mandatory declassification review consistent with Executive Order 13526, as amended. (*Id.* ¶ 14(b).) The CUs review documents responsive to FOIA/Privacy Act requests, criminal and civil discovery requests, Congressional and Presidential mandates, Presidential Library requests, mandatory declassification requests, Office of Inspector General Reports, and other federal agency requests in order to determine whether such material should remain classified or be declassified. (*Id.*) In addition, the CUs review and prepare classified material for

review by the Department of Justice Review Committee. (*Id.*)

There are five FOIPA Disclosure Units. Three of these units have recently assumed responsibility for performing the same tasks performed by WPU. (*Id.* ¶ 14(c).) This change has enabled RIDS to increase efficiency by reducing the time it takes to accomplish WPU functions upon receiving a request. (*Id.*) In addition, all five FOIPA Disclosure Units perform the actual processing of records pursuant to the provisions of the FOIA and Privacy Act. (*Id.*) This includes the process of scoping documents to determine their responsiveness to a FOIA request. Processing also involves a page-by-page, line-by-line review of the responsive documents to determine which, if any, FOIA and Privacy Act exemptions may apply. (*Id.*) This includes redaction of the exempt material and notation of the applicable exemptions in the margins of each page or the preparation of deleted page information sheets when pages are withheld in their entirety, all of which are done electronically in the document processing system. (*Id.*) During the course of their review, the Disclosure Units consult with other government agencies, as necessary, for their determinations as to the releasability of other agencies' information contained within FBI records, or the Disclosure Units refer non-FBI documents to those originating agencies for processing and direct response to the requester. (*Id.*) The Disclosure Units attempt to ensure that FOIA and Privacy Act exemptions have been applied properly, no releasable material has been withheld, no material meriting protection has been released, all necessary classification reviews have been completed by transferring applicable cases to the CUs, and other government agency information or entire documents originating with other government agencies have been properly handled. (*Id.*)

The Litigation Support Unit ("LSU") is responsible for providing legal support and administrative assistance to the FBI's Office of the General Counsel in all FOIA/Privacy Act

requests that result in federal litigation. (*Id.* ¶ 14(d).) The LSU coordinates: the progress of the FBI's response to a particular FOIA/Privacy Act request as it progresses through the units described above; the receipt of substantive litigation-related information from involved FBI Special Agents in the field offices and the operational Divisions at FBIHQ; and the referral of documents to other DOJ components and government agencies. (*Id.*) The LSU prepares the administrative record, drafts both procedural and substantive declarations, codes and Bates stamps documents processed by the FOIPA Disclosure Units, and drafts detailed declarations justifying the assertion of all applicable FOIA/Privacy Act exemptions. (*Id.*)

To promote administrative efficiency, FBI Legal Administrative Specialists work on more than one request at a time. (*Id.* ¶ 15). Certain cases may require that the usual processing be halted midstream. (*Id.*) This can occur for a variety of reasons, including the resolution of a classification issue, the location of additional records, or consultation with other government agencies as to the nature and propriety of releasing certain information. (*Id.*) In the interest of efficiency, during this waiting period, the Legal Administrative Specialist may fully process other requests. (*Id.*) Large requests are often processed on parallel tracks with smaller requests in an attempt to ensure that one requester does not consume a disproportionate share of RIDS' resources. (*Id.*)

Consistent with standard administrative procedure, any records referred to the FBI from other DOJ components or other government agencies in response to a particular request are added to that pending FOIA/Privacy Act request. (*Id.* ¶ 16). This process is an equitable way for RIDS to maintain administrative control of FOIA/Privacy Act requests. (*Id.*) Under this system, the same Legal Administrative Specialist assigned to process a particular request will also handle the review of records referred by other DOJ components or government agencies. (*Id.*) By

ensuring continuity in the processing of FOIA requests, this system is not only fair to all persons seeking information under the FOIA, but is also administratively efficient. (*Id.*)

II. Plaintiff's FOIA Request, and the FBI's Processing of that Request to Date

Plaintiff submitted a FOIA request by fax to FBIHQ on February 10, 2012 seeking "Agency records concerning cell site simulator and other cell phone tracking technologies deployed by the [FBI] to covertly locate, target, and track targets of interest." (*Id.* ¶ 5.)

Specifically, Plaintiff requested:

1. All documents concerning technical specifications of the StingRay device or other cell site simulator technologies;
2. All documents concerning procedural requirements or guidelines for the use of StingRay device or other cell site simulator technologies (e.g. configuration, data retention, data deletion);
3. All contracts and statements of work that relate to StingRay device or other cell site simulator technologies;
4. All memorandum regarding the legal basis for the use of StingRay device or other cell site simulator technologies;
5. All Privacy Impact Assessments or Reports concerning the use or capabilities of StingRay device or other cell site simulator technologies.

(*Id.*) Plaintiff also sought expedited processing of its request and responsive documents and to receive "News Media" fee status for fee waiver purposes. (*Id.*)

The FBI acknowledged receipt of the request by letter dated February 16, 2012 and advised that it was searching the general indices of the Central Records System for information responsive to the request. (*Id.* ¶ 6.) It also notified Plaintiff that its fee waiver request was under consideration. (*Id.*) Plaintiff administratively appealed the FBI's failure to make a timely determination regarding Plaintiff's FOIA request to the Office of Information Policy ("OIP"), Department of Justice ("DOJ") on March 19, 2012. (*Id.* ¶ 7.) OIP-DOJ acknowledged receipt of Plaintiff's appeal on April 5, 2012. (*Id.* ¶ 8.) Plaintiff filed the instant lawsuit on April 26, 2012. (Dkt. 1)

Subsequently, the FBI and OIP-DOJ have sent several letters to Plaintiff regarding its FOIA request. By letter dated May 22, 2012, OIP-DOJ informed Plaintiff that it was closing the administrative appeal because the matter was now before the Court. (Hardy Decl. ¶ 10.) The FBI granted Plaintiff's fee waiver request by letter dated June 4, 2012. (*Id.* ¶ 11.) Also by letter dated June 4, 2012, the FBI notified Plaintiff that its request for expedited processing was denied. (*Id.* ¶ 12.) The FBI advised Plaintiff that it had not provided enough information – and specifically had failed to demonstrate an urgency to inform the public about the subject of its FOIA request – sufficient to fall within the statutory requirements permitting expedition. (*Id.*)

In addition to its correspondence with Plaintiff, the FBI used several mechanisms to begin the process of searching for records potentially responsive to Plaintiff's request. (*Id.* ¶ 17.) Due to the breadth and depth of Plaintiff's FOIA request and because it seeks primarily non-investigative records, namely, policy and technology related records, the FBI recognized that the request would not lend itself readily to the searches the FBI routinely conducts in response to FOIA requests. (*Id.*) As discussed above, the FBI's standard search primarily involves using terms indexed in the FBI's Central Records System. (*Id.* ¶ 18.) In this case, however, the index might not contain terms such as "cell-site simulator technologies" as identified in Plaintiff's request. (*Id.*) Indeed, upon reviewing Plaintiff's request, the assigned FBI analyst recognized that a different FOIA requester, in correspondence submitted to the FBI in November 2011, had already requested information very similar to that sought by Plaintiff; the FBI's standard search of its Central Records System pursuant to the November 2011 request failed to locate responsive material. (*Id.* ¶ 19.) Consequently, the search for potentially responsive records in this case would require a more time consuming search than would a search for purely investigative records. (*Id.* ¶ 17.)

Because the subject matter of Plaintiff's request did not lend itself to a search of the general indexes, the FBI decided to conduct a more individualized inquiry of certain FBI divisions and offices that it determined were reasonably likely to have potentially responsive records. (*Id.* ¶ 19.) However, because the FBI had circulated an Electronic Communication ("EC") in February 2012 to entities likely to have records responsive to the November 2011 request (which concerned the same general subject matter as Plaintiff's request), the FBI analyst assigned to Plaintiff's case decided to wait to see if any material obtained in response to the November 2011 FOIA request might also be responsive to Plaintiff's request. (*Id.*) If the responsive records were indeed the same, both FOIA cases could be pre-processed together for a concurrent release. (*Id.*) The FBI then determined that it would send a search EC specifically related to Plaintiff's request on May 23, 2012. (*Id.* ¶ 20.) As of July 30, 2012, RIDS had received approximately 25,000 potentially responsive pages, and all but one office had responded to the original search EC. (*Id.* ¶¶ 20, 21.) Additionally, in early June 2012, the FBI identified an additional FBI office that might potentially have responsive records and sent a second search EC on June 29, 2012. (*Id.*) RIDS received a response from the additional office on July 20, 2012. (*Id.*) Because one FBI office is still reviewing its records for potentially responsive material, the final page count may increase. (*Id.* ¶ 21.)

The FBI sought to work with Plaintiff to narrow the request so that it could be processed more quickly. (*Id.* ¶ 4 n.3.) Specifically, the FBI identified two categories of documents that, if excluded from Plaintiff's request, could reduce the time required to process Plaintiff's request: (1) classified material; and (2) operating manuals. (*Id.*) Counsel for the FBI contacted Plaintiff's counsel on June 26, 2012 to ask whether Plaintiff would consider excluding these categories from its request, as the FBI could reduce its proposed processing time by as much as

six months if one category of documents was excluded or by as much as twelve months if both categories were excluded. (*Id.*) Neither the FBI nor its counsel received a final response from Plaintiff regarding the proposal to limit the two categories of documents, leading the FBI to the conclusion that Plaintiff had rejected the proposal.⁴ (*Id.*)

RIDS is actively working on the approximately 25,000 pages that are potentially responsive to Plaintiff's FOIA request. (*Id.* ¶ 29.) On June 18, 2012, RIDS uploaded approximately 10,000 pages into its document processing system via the "perfected" large queue. (*Id.*) The remaining approximately 15,000 pages will be uploaded into the document processing system shortly, but scoping for responsiveness for all 25,000 pages has been completed. (*Id.*) Any other material subsequently received from the remaining FBI office as potentially responsive to Plaintiff's request will be uploaded as soon as possible. (*Id.*) Due to the sensitivity of much of the material in this case, several layers of internal review will be required within the FBI before any of it can be released. (*Id.*) Additionally, a preliminary assessment of the first group of 10,000 pages demonstrated that many of the documents, possibly as much as twenty-five percent of the 25,000 potentially responsive pages, will be subject to classification/declassification review if they are determined to be responsive. (*Id.*)

RIDS is, and will, make every effort to move the material through the FOIA processes described above as quickly as possible. (*Id.*) The FBI is proposing that it perform any necessary

⁴ While Plaintiff did not respond to the FBI's proposal to limit classified materials and operating materials, Plaintiff's counsel indicated it might consider excluding documents related to active investigations. Counsel for the FBI responded that it could not yet identify the volume of documents that would arise from active investigations. Rather than wait until the FBI could provide more information so that the request might be narrowed at that point, Plaintiff instead sought to require production of all 25,000 pages by August 27, 2012. (Dkt. 12 at 2.) Nonetheless, in light of the fact that Plaintiff's request seeks technical specifications, procedural requirements and guidelines, contracts, legal memoranda, and Privacy Impact Statements/Reports, it seems logical to conclude that few records would arise from active investigations.

classification reviews and process a minimum of 1,000 pages a month in the instant case, with the first release of responsive material by September 30, 2012 and continuing monthly thereafter until completion on October 31, 2014. (*Id.* ¶ 31.) This timetable seeks to strike a balance between Plaintiff's and other requester's right to timely access to FBI records, all of which are affected by the FBI's high volume of administrative and litigation related to its FOIA work and the exceptional demands on RIDS's finite resources. (*Id.*)

III. The Circumstances Justifying a Stay

Historically, the FBI repeatedly sought additional funding for the creation of new FOIA positions. (*Id.* ¶ 22.) For example, Congress appropriated funds in the 1997 fiscal budget providing for 129 additional employees, and in the 1998 fiscal budget, providing for 239 additional employees. (*Id.*) In 2003, the FBI moved from paper processing to data processing, and many of the additional employees transitioned to document scanning to support the FBI's new automated FOIA process. (*Id.*) Despite these staffing constraints, RIDS made significant strides in reducing its backlog of FOIA and Privacy Act requests. (*Id.*) For perspective, at the end of FY 1998, there were 10,816 pending requests in various stages of processing. (*Id.*) By the end of FY 2005, the number of pending requests had been reduced to 1,786. (*Id.*) In order to achieve this reduction in its backlog level, RIDS implemented various steps designed to streamline its work. (*Id.*) These steps include the utilization of direct on-line computer searches to locate responsive records, use of form letters, formation of specific teams to address backlog issues, processes to handle consultations and referrals to other Government agencies, and the creation of the Litigation Support Unit to handle all FOIA/Privacy Act litigation in RIDS. (*Id.*) RIDS also implemented the use of its FOIPA Document Processing System ("FDPS") to electronically process requests. (*Id.*) All of the units responsible for responding to FOIA and

Privacy Act requests, as well as the Office of the General Counsel's FOIA Litigation Unit, DOJ's Office of Information Policy, and certain other employees in the FBI have access to FDPS, which also reduces the amount of time spent physically transferring documents throughout the processing of a request, and is another time-saving step implemented by the FBI. (*Id.*) In addition to these efforts, RIDS's ability to reduce the backlog was aided by a steady decline in the number of FOIA and Privacy Act requests received by the FBI from FY 2001 through FY 2005. (*Id.*) (Intake fell as low as an average of 906 requests per month in FY 2004 and an average of 911 requests per month in FY 2005. (*Id.*))

Beginning in 2009, however, the FBI has faced several challenges that have impeded efforts to completely clear the backlog. In 2009, as a result of new DOJ FOIA guidelines, the average size of an FBI FOIA request jumped from 500 pages to over 1,000 pages, in effect doubling the work required to complete a request. (*Id.* ¶ 23.) The FBI was able to fund 35 contract employees to assist the FOIA program. (*Id.*) Thus, despite the increase in the size of each FOIA request, at the end of FY 2011, the number of pending FOIA requests was only 1,179. (*Id.* ¶ 24.) However, the FBI is now facing a significant increase in the number of FOIA requests; the increase in the number of requests combined with the doubling of the size of the average FOIA request has impeded the FBI's progress on its backlog.

Not only has the size of the FBI's FOIA requests increased, but also the number of requests received by the FBI has steadily risen. (*Id.*) For example, the FBI received an average of 911 FOIA requests in FY 2005. (*Id.*) In FY 2011, the FBI received a total of 17,755 FOIA and Privacy Act requests, or an average of 1,480 requests per month. (*Id.*) And with two months left in FY 2012, the FBI has already exceeded its FY 2011 intake. (*Id.*) For FY 2012 thus far (October 2011 through today), the FBI has received 17,927 FOIA and Privacy Act requests, or

an average of 1,793 requests per month. (*Id.*) There are approximately 2.6 million pages of information currently assigned to the five FOIPA Disclosure Units for review, and the number of pending requests has risen to 3,718. (*Id.*) Among the requests currently pending processing by the FOIPA Disclosure Units are 81 large-queue requests, each of which involve in excess of 8,000 pages of potentially responsive records. (*Id.*)

RIDS is continually considering and implementing procedures and processes to more efficiently address workload issues. (*Id.* ¶ 25.) One example of a shift in procedure designed to achieve additional efficiency is described above, *supra* p.6, – *i.e.*, three FOIPA Disclosure Units have assumed “cradle to grave” responsibility for responding to FOIA and Privacy Act requests, which entails responsibilities including completing initial tasks necessary to perfect requests, searching for responsive records, reviewing records, redacting exempt information and applying exemptions (other than Exemption 1/classification review), and preparing letters and records for release to requesters. (*Id.*) This “one stop shopping” approach will allow RIDS to move FOIA and Privacy Act requests more efficiently through the various stages of processing. (*Id.*)

Also as part of its on-going effort to continually improve its efficiency and effectiveness, RIDS has been planning an upgrade to its FOIPA Document Processing System (“FDPS”). (*Id.* ¶ 26.) The upgrade, currently scheduled to take place from mid-August to mid-September 2012, will add some important features that will maximize processing and improve efficiency. (*Id.*) The upgrade will involve installation of the next generation version of the FDPS software program. (*Id.*) However, RIDS’s ability to review and process material responsive to the requests in Plaintiff’s lawsuit, as well as other pending requests, will be impacted by this upgrade to FDPS. (*Id.*) At this time, the FBI anticipates the installation process will take approximately thirty days to complete fully, and will require a complete shutdown of the system for at least five

full days, although the FBI will have a more accurate estimate once the upgrade process begins. (*Id.*) During this time, all FOIA work in RIDS will, of necessity, completely cease. (*Id.*) It is also quite possible that at other times during this continuous 30-day period, FDPS access will be considerably degraded or virtually impossible, so productivity will be affected significantly. (*Id.*)

In addition to the workload demands on its finite resources described above, the FBI's ability to complete the processing of material responsive to Plaintiff's request is directly affected by competing litigation resource requirements. (*Id.* ¶ 27.) The aggregate volume of work in RIDS directly impacts the availability and allocation of resources to requests in litigation. (*Id.*) With finite resources and an extremely high FOIA workload, RIDS constantly strives to adhere to and comply with the FOIA's statutory and regulatory requirements for responsiveness and processing times, to the maximum extent possible. (*Id.*) This requires a careful balancing of resources and priorities among both litigation and administrative requests because the same RIDS personnel who are working to comply with numerous litigation deadlines, such as those discussed below, simultaneously handle a constantly high volume of administrative requests and appeals. (*Id.*) As of today, the FBI is involved as a defendant in 121 pending FOIA lawsuits nationwide. (*Id.*) A number of these cases – including Plaintiff's case – involve large volumes of records, and will continue to require that RIDS devote significant resources in order to comply with federal district court orders or agreed-upon, court-entered deadlines. (*Id.*) Examples of some of these cases include, but are not limited to:

- (a) *Lardner v. FBI, et al.*, Civ. A. No. 03-CV-0874 (D.D.C.) – 60,000 pages

must be re-processed by June 2013;⁵

(b) *Garrett M. Graff v. FBI, et al.*, Civ. A. No. 09-CV-2047 (D.D.C.) – 6,000 pages must be processed by May 2013; and

(c) *Corey Davis v. DHS, et al.*, Civ. A. No. 11-CV-203 (E.D.N.Y.) – the FBI has agreed to process 500 pages per month until the remaining 12,500 pages and 16 DVDs are completed.

(*Id.*)

Finally, RIDS personnel also work closely with staff from OIP to review and assist with OIP's adjudication of administrative FOIA appeals. (*Id.* ¶ 28.) As of today, the FBI has 334 pending administrative appeals. (*Id.*) Addressing these appeals results in additional demands – and direct competition with – the same RIDS resources being expended on review and processing of pending requests. (*Id.*)

ARGUMENT

I. Legal Standard for a Stay of Proceedings

An agency receiving a FOIA request generally must determine whether to comply with the request within twenty 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,” 5 U.S.C. § 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.* This provision

⁵ The records in this case, which are quite old, are being re-processed by order of the Court and as a result, we are able to process more pages per month than we would be able to if we were to be processing these records for the first time.

“was designed and inserted specifically as a safety valve for [FOIA].” *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 610 (D.C. Cir. 1976).

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 [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.

5 U.S.C. § 552(a)(6)(C)(ii), (iii).⁶

The leading case construing § 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 the 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.

Id. at 616 (quoting 5 U.S.C. § 552(a)(6)(C)).⁷ See also *Oglesby v. U.S. Dep’t of the Army*, 920 F.2d 57, 64 (D.C. Cir. 1990) (“Frequently, if the agency is working diligently, but exceptional

⁶ 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 faced with a large volume of 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. No. 104-795, at 24, *reprinted in* 1996 U.S.C.C.A.N. 3448, 3467 (noting that the FOIA Amendments were “consistent” with the holding in *Open America*).

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.”).

“[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 on a first-in, first out basis.” *Appleton v. FDA*, 254 F. Supp. 2d 6, 8-9 (D.D.C. 2003). In addition, “exceptional circumstances” include delays encountered when an agency 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 . . . [5 U.S.C. § 552(a)(6)(A)], and when the agency can show that it is ‘exercising due diligence’” in processing the requests. *Edmonds v. FBI*, No. 02-cv-1294, 2002 WL 32539613 at *1 (D.D.C. Dec. 3, 2002) (quoting *Open America*, 547 F.2d at 616).⁸ Finally, “the [1996 FOIA] amendments clearly contemplate that other circumstances, such as an agency’s efforts to reduce the number of pending requests, the amount of classified material, the size and complexity of other requests processed by the agency, the resources being devoted to the declassification of classified material of public interest, and the number of requests for records by courts or administrative tribunals, are relevant to the court’s determination as to whether exceptional circumstances exist.” *Gov’t Accountability Project v. U.S. Dept. of Health and Human Servs.*, 568 F.Supp.2d 55, 59 (D.D.C. 2008).

Courts have frequently issued orders extending the time to respond to FOIA requests, including orders granting stays of several years in length or otherwise permitting agencies

⁷ In 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.

⁸ “Exceptional circumstances” permitting the granting of additional time do not include delays resulting from a “predictable workload” of FOIA requests, “unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.” 5 U.S.C. § 552(a)(6)(C)(ii).

several years to process documents under exceptional circumstances. *Judicial Watch v. Nat'l Archives & Records Admin.*, No. 07-1989 (D.D.C.) (Court has stayed FOIA request from September 2008 through the present day so that agency may continue to process responsive documents); *Piper v. U.S. Dep't of Justice*, 339 F. Supp. 2d 13, 16 (D.D.C. 2004) (FBI showed need for stay of two years); *Williams v. FBI*, No. 99-cv-3378, 2000 WL 1763680, at *3 (D.D.C. Nov. 30, 2000) (FBI showed need for stay of two and a half years); *Judicial Watch of Fla., Inc. v. U.S. Dep't of Justice*, 102 F. Supp. 2d 6, 9 & n.1 (D.D.C. 2000) (FBI showed need for stay of three years); *Rabin v. U.S. Dep't of State*, 980 F. Supp. 116, 123-24 (E.D.N.Y. 1997) (State Department showed need for stay of three years).

As shown below, because the FBI can demonstrate both exceptional circumstances and due diligence in handling the Plaintiff's requests, the Court should stay the proceedings with respect to the FBI until October 31, 2014, when the FBI anticipates that will be able to complete production of documents responsive to Plaintiff's request. Nonetheless, the FBI is hopeful that the time required to process the Plaintiff's requests will be reduced once processing begins. The FBI is prepared to submit a status report within 120 days of the entry of the stay, and at 120-day intervals thereafter, to advise the Court and Plaintiff of the status of the Plaintiff's request and provide any available revised estimates of the time required to complete processing.

II. The FBI Has Met the Criteria for an *Open America* Stay

A. The FBI Is Operating Under Exceptional Circumstances

There are five conditions that demonstrate that the FBI is facing exceptional circumstances with respect to its FOIA requests. First, in recent years, the FBI has seen a marked increase in the number of FOIA requests that it receives and the breadth of those requests. (Hardy Decl. ¶¶ 23, 24.) For example, the FBI received an average of 911 FOIA and

Privacy Act requests in FY2005. (*Id.* ¶ 24.) In FY2011, the FBI received a total of 17,755 FOIA and Privacy Act requests, an average of 1,480 per month. (*Id.*) For FY2012 (October 2011), the FBI has received 17,927 FOIA and Privacy Act requests, an average of 1,793 requests per month. (*Id.*) Thus, in only seven years, the number of requests has nearly doubled (there has been a ninety-seven percent increase); and the FBI has experienced a twenty-one percent increase over the course of just one single year. Furthermore, beginning in 2009, the FBI has seen the size of its FOIA requests jump from 500 pages to over 1,000, meaning that the average FBI FOIA request now takes twice the work to complete as it did just three years ago. (*Id.* ¶ 23.) As a result of these significant changes in the number and breadth of its requests, the FBI now has 2.6 million pages of information assigned to the five FOIPA Disclosure Units for review and a backlog of 3,718 requests. (*Id.* ¶ 24.)

Second, the number and complexity of requests currently awaiting processing at the FBI demonstrates exceptional circumstances. At this moment, the FBI has 81 large-queue requests involving in excess of 8,000 pages of potentially responsive records. (*Id.*) Furthermore, as discussed immediately above, the size of the average FBI request has doubled in a few short years such that the average of the 17,927 cases the FBI has received this year is now 1,000 pages. (*Id.* ¶¶ 23, 24.)

Third, this case potentially involves a substantial amount of classified material which will greatly increase the amount of time necessary to process Plaintiff's request. When the FBI approached Plaintiff about narrowing its request, it noted that as much as twenty-five percent of the 25,000 pages of potentially responsive documents may be subject to classification/declassification review. (*Id.* ¶ 4 n.3) Should the FBI have to process this many classified documents, it will require as much as six months of processing time. (*Id.*)

Fourth, the FBI is faced with the exceptional circumstances of an exceptionally large number of cases in litigation, including many that are complex and require the production of significant numbers of documents. As of today, the FBI is a defendant in 121 pending FOIA lawsuits nationwide. (*Id.* ¶ 27.) Many of these cases, including Plaintiff's, involve large volumes of records that will require significant RIDS's resources in order to comply with court orders or agreed-upon, court-entered deadlines. (*Id.*) For instance, the FBI is currently re-processing 60,000 pages, and must complete this process by June 2013, in one FOIA case, Joint Status Report at 1, *Lardner v. FBI*, No. 03-0874 (D.D.C. April 24, 2012); in another, the FBI identified 6,000 pages of potentially responsive documents and agreed to process 500 pages per month for twelve months, concluding in June 2013, Consent Mot. for an Enlargement of Time to Process Responsive Docs. at 1, *Graff v. FBI*, No. 09-2047 (D.D.C. April 10, 2012); and in a third case, the FBI has been processing a minimum of 500 pages a month since January 2012 and will continue to do so until the approximately 16,000 pages of potentially responsive records are processed, Status Report at 2, *Davis v. FBI*, No. 11-203 (E.D.N.Y. Jan. 6, 2012). (*Id.*) These cases require a significant devotion of RIDS resources.

Finally, this Court also can take into consideration that Plaintiff rejected two opportunities to narrow the request that could have reduced the time required to process Plaintiff's request by as much as a year. The FBI sought to work with Plaintiff to narrow the request so that it could be processed more quickly. (*Id.* ¶ 4 n.3.) Specifically, the FBI identified two categories of documents that, if excluded from Plaintiff's request, could reduce the time required to process Plaintiff's request: (1) classified material; and (2) operating manuals. (*Id.*) Counsel for the FBI contacted Plaintiff's counsel on June 26, 2012 to ask whether Plaintiff would consider excluding these documents from its request, as the FBI could reduce its proposed

processing time by as much as six months if one category of documents was excluded or by as much as twelve months if both categories were excluded. (*Id.*) Neither FBI nor its counsel received a final response from Plaintiff regarding the proposal to limit the two categories of documents, leading the FBI to the conclusion that Plaintiff had rejected the request. (*Id.*)

For all of these reasons, the FBI faces “exceptional circumstances” warranting an *Open America* stay. Other courts have granted stays several years in duration when warranted under the circumstances. *See, e.g., Edmonds*, 2002 WL 32539613, at *2 (FOIA staff’s time spent on “administrative appeals, litigation and large projects” contributed to finding of exceptional circumstances); *Jimenez v. FBI*, 938 F. Supp. 21, 31 (D.D.C. 1996) (four-year stay granted to process 700 pages); *Haddon v. Freeh*, 31 F. Supp. 2d 16, 19 (D.D.C. 1998) (noting that court had granted stay until January 1998 on request submitted to FBI nearly four years before); *Guzzino v. FBI*, No. 95-cv-1780, 1997 WL 22886, *2 (D.D.C. Jan. 10, 1997) (granting stay of more than four years 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 [] limit.”); *Schweihs v. FBI*, 933 F. Supp. 719, 721-22 (N.D. Ill. 1996) (finding exceptional circumstances justified over four years from date of request to process plaintiff’s FOIA request); *Cecola v. FBI*, No. 94-cv-4866, 1995 WL 549066, at *2 (N.D. Ill. Sept. 8, 1995) (finding that exceptional circumstances justified more than six years from date of request to process 1500 pages and dismissing action without prejudice).

B. The FBI Is Exercising Due Diligence in Processing Plaintiff’s Request

In addition to having demonstrated “exceptional circumstances,” the FBI is exercising due diligence in responding to Plaintiff’s FOIA request. As discussed above, each year the FBI receives thousands of FOIPA requests and has faced double digit annual increases in requests

over the past seven years. (Hardy Decl. ¶ 24.) Due to this continual influx, and to the appeals and litigation arising from it, the FBI faces a backlog of 2.6 million pages of documents to be processed in response to pending requests. (*Id.*) The FBI, however, has demonstrated its commitment to reducing the backlog of information requests that confront it and continually strives to achieve reductions. (*Id.* ¶ 25.)

For instance, three FOIPA Disclosure Units have assumed “cradle to grave” responsibility for responding to FOIA and Privacy Act requests received by RIDS, to include completing initial tasks necessary to perfect requests, searching for responsive records, reviewing records, redacting exempt information and applying exemptions (other than Exemption 1/classification review), and preparing letters and records for release to requesters. (*Id.*) This “one stop shopping” approach will allow RIDS to move FOIA and Privacy Act requests more efficiently through the various stages of processing. (*Id.*)

In addition, as part of its on-going effort to continually improve efficiency and effectiveness, RIDS has been planning an upgrade to its FOIPA Document Processing System (“FDPS”); the upgrade will add some important features that will maximize processing and improve efficiency. (*Id.* ¶ 26.) However, RIDS’s ability to review and process material responsive to the requests in Plaintiff’s lawsuit, as well as other pending requests, will be impacted by this upgrade to FDPS. (*Id.*) The upgrade is currently scheduled to take place from mid-August to mid-September 2012. (*Id.*) The upgrade will involve installation of the next generation version of the FDPS software program. (*Id.*) At this time, the FBI anticipates the installation process will take approximately 30 days to complete fully, and will require a complete shutdown of the system for at least five full days, although the FBI will have a more accurate estimate once the upgrade process begins. (*Id.*) During this time, all FOIA work in

RIDS will, of necessity, completely cease. (*Id.*) It is also quite possible that at other times during this continuous 30-day period, FDPS access will be considerably degraded or virtually impossible, so productivity will be affected significantly. (*Id.*) Nonetheless, the FBI believes that this brief delay will facilitate improved efficiency and processing going forward.

The FBI has likewise exercised due diligence in responding to the Plaintiff's FOIA request. The FBI has identified approximately 25,000 pages of documents potentially responsive to the Plaintiff's request. (*Id.* ¶ 29.) The FBI is in the process of reviewing those documents pursuant to standard procedures. (*Id.*) Given the volume of potentially responsive documents, and the fact that processing involves a page-by-page, line-by-line review of the responsive documents to determine what, if any, FOIA and/or Privacy Act exemptions may apply, it is not surprising that it will take the FBI many months to process these documents. *See, e.g., Jimenez*, 938 F. Supp. at 24, 31-32 (permitting a total of more than five years from the date of the request, for processing of a request that produced an estimated 700 pages of responsive records); *Fox v. U.S. Dep't of Justice*, No. 94-cv-4622, 1994 WL 923072 (C.D. Cal. Dec. 14, 1994) (granting FBI motion for stay until 1999 to process 300 pages of documents responsive to a request filed in July 1993).⁹ Nevertheless, the FBI has still committed to processing a minimum of 1,000 pages a month of documents potentially responsive to Plaintiff's FOIA request. (Hardy Decl. ¶ 31.)

Thus, because the FBI is making a good faith effort and exercising due diligence in processing requests on a first-in first-out basis, its request for a stay should be granted. *See Exner v. FBI*, 542 F.2d 1121, 1123 (9th Cir. 1976) (upholding FBI's use of a first-in, first-out system); *see also Kuffel v. U.S. Bureau of Prisons*, 882 F. Supp. 1116, 1127 (D.D.C. 1995);

⁹ In these prior cases, the courts granted stays lasting for several years to permit the FBI to process hundreds of pages of documents. The present case, by contrast, involves a request that requires the review of many times that amount of material.

Rabin, 980 F. Supp. at 123 (finding that the “defendant State Department has shown the . . . ‘due diligence’ that courts have required . . . The Department presently faces an overwhelming backlog of requests for information, processes them in the approximate order received unless there is an urgent need for the information and appears to be attempting to comply with requests.”); *Lisee v. CIA*, 741 F. Supp. 988, 989 (D.D.C. 1990) (holding that agencies’ processing of FOIA requests on a first-in, first-out basis satisfied the “exceptional circumstance” and “due diligence” requirements for stay).

CONCLUSION

For the foregoing reasons, the FBI respectfully requests that the Court grant this motion, and stay proceedings in this case with respect to Plaintiff’s request until October 31, 2014.

Dated: July 30, 2012

Respectfully submitted,

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