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

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| ELECTRONIC FRONTIER FOUNDATION, | ) | |
| Plaintiff, | ) | |
| v. | ) | Civil Action No. 14-760-RMC |
| DEPARTMENT OF JUSTICE, | ) | |
| Defendant. | ) | |

**DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

## INTRODUCTION

Plaintiff, Electronic Frontier Foundation ("EFF" or "Plaintiff"), seeks an extraordinary, emergency injunction compelling Defendant, the Department of Justice ( "the Department"), to complete within ten days the processing of four separate Freedom of Information Act ("FOIA") requests seeking classified documents related to the government's foreign intelligence collection activities. In the wake of last year's unauthorized disclosures of classified information concerning those activities, the government has declassified certain information. Other information concerning the government's foreign intelligence collection remains properly classified and therefore exempt under FOIA. Thus, the processing of Plaintiff's four requests entails a highly-coordinated and time-intensive effort among the various components of the Intelligence Community to ensure that any properly classified information remains so. Accordingly, Plaintiff's request for an order compelling that effort to be confined to ten days is clearly unreasonable but, in any event, is not compelled by FOIA or warranted

under Rule 65 of the Federal Rules of Civil Procedure.

Although styled a motion for preliminary injunction, Plaintiff effectively wants this Court to provide it full relief on the merits. Yet, Plaintiff has not come close to satisfying the heightened standard required for such a mandatory injunction that alters, rather than preserves, the status quo pending the Court's merits determination. Indeed, Plaintiff's request for an injunction is predicated on the mistaken view that, because the Department granted expedited processing for the four subject FOIA requests, EFF is entitled to receive the requested records within a set time frame. Under FOIA, however, such processing only entitles Plaintiff to processing of its requests "as soon as practicable," which the Department has and continues to provide to Plaintiff. Because Plaintiff does not have any evidence to the contrary, Plaintiff is unlikely to succeed on the merits of its claim, which is fatal to its request for a preliminary injunction. On that basis alone, Plaintiff's motion should be denied.

As to the other elements of proof – irreparable injury, balance of interests, and the public interest – Plaintiff fares no better. Plaintiff contends that without the requested injunction, Plaintiff will suffer two alleged irreparable injuries – erosion of its statutory rights under FOIA, and obstruction of Plaintiff's participation in the ongoing legislative debate on surveillance reform. Neither alleged injury, however, is irreparable. The first alleged injury, like Plaintiff's merits arguments, is based on an erroneous statutory interpretation. The second alleged injury is based on Plaintiff's speculation that the requested records contain non-exempt information and that the information is not already in the public domain and has bearing on legislation now pending in Congress. Such unsubstantiated speculation, however, is insufficient to meet Plaintiff's burden here.

Finally, Plaintiff cannot demonstrate that a mandatory injunction is in the public interest or that the balance of interests favors such relief. Here again, Plaintiff rests on its contention that release of the requested records will promote public understanding about the government's surveillance activities and

facilitate public participation in legislative reform related thereto. Underlying that contention is the same speculation about the contents of those records. Moreover, forcing the Department to process Plaintiff's FOIA requests on an artificial timeline, rather than as soon as practicable as required by the statute, would upset Congress's careful balance under FOIA, risk inadvertent disclosure of exempt classified material, and disadvantage those FOIA requesters whose requests were expedited prior to Plaintiff's – all to the detriment of the public interest.

Plaintiff plainly seeks to use the vehicle of a preliminary injunction motion to accelerate artificially – and without justification – the proceedings in this case. The Court should not indulge that improper litigation tactic. Plaintiff's motion accordingly should be denied.

## STATUTORY BACKGROUND

Agencies ordinarily process FOIA requests for agency records on a first-in, first-out basis. In 1996, Congress amended FOIA to provide for "expedited processing" of certain categories of requests. *See* Electronic Freedom of Information Act Amendments of 1996 ("EFOIA"), Pub. L. No. 104-231, § 8, 110 Stat. 3048 (codified at 5 U.S.C. § 552(a)(6)(E)). Expedition, when granted, entitles requesters to move immediately to the front of an agency's processing queue, ahead of requests submitted earlier by other requesters.

As part of EFOIA, Congress directed agencies to promulgate regulations providing for expedited processing of requests for records (i) "in cases in which the person requesting the records demonstrates a compelling need," (5 U.S.C. § 552(a)(6)(E)(i)(I)); and (ii) "in other cases determined by the agency." *Id.* § 552(a)(6)(E)(i)(II). FOIA defines "compelling need" to mean:

> (I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or
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> (II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or

alleged Federal Government activity.

5 U.S.C. § 552(a)(6)(E)(v).[1] The requester bears the burden of showing that expedition is appropriate. *See Al-Fayed*, 254 F.3d at 305 n.4. FOIA provides that "[a]n agency shall process as soon as practicable any request for records to which the agency has granted expedi[tion]." 5 U.S.C. § 552(a)(6)(E)(iii).

The Department implemented EFOIA by final rule effective July 1, 1998. *See* Revision of Freedom of Information Act & Privacy Act Regulations & Implementation of Electronic Freedom of Information Act Amendments of 1996, 63 Fed. Reg. 29591 (1998), *codified at* 28 C.F.R. Part 16. That regulation, which governs FOIA requests to all Department components, (*see* 28 C.F.R. § 16.1(b)), provides that "[r]equests and appeals" will be "taken out of order and given expedited treatment whenever it is determined that they involve":

> (i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;
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> (ii) An urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information;
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> (iii) The loss of substantial due process rights; or
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> (iv) A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence.

28 C.F.R. § 16.5(d)(1)(i)-(iv). Categories (i) and (ii) implement FOIA's "compelling need"

[1] Both Congress and the D.C. Circuit have recognized that these categories are to be "narrowly applied" because, "[g]iven the finite resources generally available for fulfilling FOIA requests, unduly generous use of the expedited processing procedure would unfairly disadvantage other requesters who do not qualify for its treatment." *Al-Fayed v. CIA*, 254 F.3d 300, 310 (D.C. Cir. 2001) (quoting H.R. Rep. No. 104-795, at 26 (1996), *reprinted in* 1996 U.S.C.A.A.N. 3448, 3469).

standard; categories (iii) and (iv) define additional categories for expedition.[2] *See* 63 Fed. Reg. at 29592.

Within ten calendar days of receiving a request for expedited processing, the component must "decide whether to grant it and . . . notify the requester of the decision." 28 C.F.R. § 16.5(d)(4); *see also* 5 U.S.C. § 552(a)(6)(E)(ii)(I) (requiring notice of decision within ten days of request). If the request is granted, "the request shall be given priority and shall be processed as soon as practicable." 28 C.F.R. § 16.5(d)(4). If the request is denied, "any appeal of that decision shall be acted on expeditiously." *Id.*; *see also* 5 U.S.C. § 552(a)(6)(E)(ii)(II) (requiring "expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing").

**FACTUAL BACKGROUND**

In June 2013, a former government contractor disclosed, without authorization, classified information about the government's foreign intelligence collection activities pursuant to the Foreign Intelligence Surveillance Act ("FISA"), as amended. In the wake of those disclosures, and in order to correct misinformation and to reassure the American public as to the numerous safeguards that protect privacy and civil liberties, the President directed the Director of National Intelligence ("DNI") to determine what additional information regarding the rationale, protections, and nature of those collection activities could be disclosed consistent with the need to prevent further harm to the national security. In particular, the DNI was directed to review opinions of the Foreign Intelligence Surveillance Court ("FISC") and government filings submitted to that court to determine what information could be declassified.

Since then, the Intelligence Community has been engaged in a large-scale, multi-agency review process, led by the Office of the DNI, to review such materials. That review has required

[2] Requests for expedition based on categories (i), (ii), and (iii) must be submitted to the component that maintains the records requested. *See* 28 C.F.R. § 16.5(d)(2). Requests for expedition based on category (iv) – the Department's "special media-related standard," (*see* 63 Fed. Reg. at 29592) – must be submitted to the Director of the Department's Office of Public Affairs. *See* 28 C.F.R. § 16.5(d)(2). That enables "the Department's media specialists [to] deal directly with matters of exceptional concern to the media." 63 Fed. Reg. at 29592.

each component of that community to consider every piece of information identified for possible declassification and to anticipate the ramifications that such declassification might have on the particular component's operations, including the ability to gather intelligence in the future. Such consideration must take into account not only the universe of currently classified information, but all of the information already in the public domain, because any additional disclosure might allow our adversaries to connect pieces of information to create "an even more revealing picture of our nation's intelligence capabilities." Out of this interagency effort, some information has been declassified and made publicly available on a public website (www.icontherecord.tumblr.com). Certain information, however, continues to remain classified.[3]

Against this background, Plaintiff submitted four separate FOIA requests to the Department's National Security Division ("NSD") seeking various opinions and submissions to the FISC. *See generally* Declaration of Kevin G. Tiernan, attached hereto as Exhibit B.

On August 23, 2013, Plaintiff submitted a FOIA request for the following:

> (1) The "separate order" or orders, as described in footnote 15 of the October 3 Opinion quoted above, in which the Foreign Intelligence Surveillance Court "address[ed] Section 1809(a) and related issues"; and,
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> (2) The case, order, or opinion whose citation was redacted in footnote 15 of the October 3 Opinion and described as "concluding that Section 1809(a)(2) precluded the Court from approving the government's proposed use of, among other things, certain data acquired by NSA without statutory authority through its 'upstream collection.'"

*See* Declaration of David L. Sobel in Supp. of Pl.'s Mot. for Prelim. Inj. ("Sobel Decl.") Ex. 1, Aug. 1, 2014, ECF No. 8-2. NSD assigned that request NSD FOIA #13-250. On September 3, 2013, NSD emailed an acknowledgement of that request and also granted EFF's request for expedited processing.

[3] *See generally* the Supplemental Declaration of Jennifer L. Hudson ("Hudson Supp. Decl.") that originally was submitted *ex parte* and *in camera* in support of the government's cross-motion for summary judgment in *EFF v. Department of Justice*, Case No. 12-1441 (D.D.C.). A copy of the publicly filed redacted copy of that declaration is attached hereto as Exhibit A.

By letter dated October 31, 2013, EFF submitted the second of the subject FOIA requests. That request sought:

> (1) The January 10, 2007 order(s) and/or opinion(s) — including, but not limited to, any "foreign content order" or "domestic content order" — of the Foreign Intelligence Surveillance Court, including all legal memoranda, documents, briefings, minimization and targeting procedures, and/or policies incorporated within the Court's January 2007 order(s) and/or opinion(s); and,
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> (2) Any subsequent order(s) and/or opinion(s) of the Foreign Intelligence Surveillance Court reconsidering, reinterpreting, refusing to renew, or otherwise altering the January 10, 2007 orders, and all accompanying documents, including legal memoranda, documents, briefings, minimization and targeting procedures, and/or policies incorporated within the Court's order(s) and/or opinion(s).

Sobel Decl. Ex. 2. NSD assigned that request NSD FOIA #14-028. By letters dated November 29, 2013 and December 11, 2013, NSD, respectively, acknowledged receipt of the request and granted EFF's request for expedited processing.

By separate letter dated February 24, 2014, EFF submitted the third of the subject FOIA requests, which sought:

> (1) All written decisions, opinions, or orders issued by the Foreign Intelligence Surveillance Court of Review ("FISCR");
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> (2) All written decisions, opinions, or orders issued by the Supreme Court in any case or matter appealed from the FISCR.

Sobel Decl. Ex. 3. NSD assigned that request NSD FOIA #14-066. NSD acknowledged receipt of that request by email dated February 26, 2014. By letter dated April 3, 2014, NSD granted EFF's request for expedited processing.

The fourth of the subject FOIA requests was submitted by letter dated March 14, 2014 and requested the following:

> (1) The "Raw Take" order (Dkt No. 02-431), dated July 22, 2002, and captioned "In Re Electronic Surveillance and Physical Search of International Terrorist Groups, Their Agents, and Related Targets;"

(2) The "Large Content FISA" order(s) and/or opinion(s);

(3) The September 4, 2008 FISC order(s) and/or opinion(s) concerning the FISA Amendments Act;

(4) All documents, including legal memoranda, declarations, briefs, or any other document submitted by the government in support of items (1)-(3) above; and

(5) All documents, including legal memoranda, declarations, briefs, or any other document incorporated, adopted within, or issued with items (1)-(3) above.

Sobel Decl. Ex. 4. NSD assigned that request NSD FOIA #14-084. By letter dated March 27, 2014, NSD acknowledged receipt of the request. By letter dated April 10, 2014, NSD granted EFF's request for expedited processing. Although NSD has commenced the search for records responsive to the four subject FOIA requests and certain responsive records are being processed, NSD has not yet produced any responsive information to Plaintiff.

On May 1, 2014, EFF filed the instant FOIA action seeking an order compelling the Department to process the four FOIA requests immediately and to disclose the requested records in their entirety. *See* Compl. for Inj. Relief, May 1, 2014, ECF No. 1. The Department answered the Complaint on June 2, 2014. *See* Answer, June 2, 2014, ECF No. 5. Thereafter, counsel for the parties tried to negotiate a schedule for the continued processing of Plaintiff's FOIA requests. The government offered to process within ninety days a subset of records that EFF prioritized from the four requests, but EFF insisted on interim deadlines within that ninety-day period, including an August deadline for one of the requested FISC opinions. After undersigned counsel advised that the government could not meet the proposed interim deadlines, Plaintiff filed the instant motion for preliminary injunction.

**ARGUMENT**

In determining whether to grant a preliminary injunction, courts typically examine four factors "whether the moving party can demonstrate (1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction is not granted, (3) that an

injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction." *Columbia Hosp. for Women Found., Inc. v. Bank of Tokyo-Mitsubishi Ltd.*, 15 F. Supp. 2d 1, 4 (D.D.C. 1997); *CityFed Fin. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995). "The usual role of a preliminary injunction is to preserve the status quo pending the outcome of litigation." *Cobell v. Kempthorne*, 455 F.3d 301, 314 (D.C. Cir. 2006) (quotations omitted).

Here, however, Plaintiff seeks an injunction that "would alter, rather than preserve, the status quo," i.e., a mandatory injunction. "[W]here an injunction is mandatory . . . the moving party must meet a higher standard than in the ordinary case by showing 'clearly' that he or she is entitled to relief or that 'extreme or very serious damage' will result from denial of the injunction." *Allina Health Servs. v. Sebelius*, 756 F. Supp. 2d 61, 70 n.5 (D.D.C. 2010); *see also EPIC v. Department of Justice*, 2014 WL 521544, at *5 (D.D.C. Feb. 11, 2014) (same); *Columbia Hosp.*, 15 F. Supp. 2d at 4 (same); *National Conference on Ministry to Armed Forces v. James*, 278 F. Supp. 2d 37, 43 (D.D.C. 2003) (same).[4] Indeed, "[a]s a rule, 'when a mandatory preliminary injunction is requested, the district court should deny such relief "unless the facts and law *clearly favor the moving party*."'" *Allina Health Servs.*, 756 F. Supp. 2d at 70 n.5 (emphasis added). Neither the facts nor the law clearly favor Plaintiff here. Thus, the instant motion should be denied.[5]

[4] Although the D.C. Circuit has not yet addressed this heightened standard, several district courts have applied it to motions for mandatory injunctions. Even under the standard that applies to non-mandatory, preliminary injunctions, such relief is not warranted under the circumstances of this case.

[5] Indeed, courts in this district routinely deny requests for preliminary relief in FOIA cases. *See, e.g.*, *Wadelton v. Department of State*, 941 F. Supp. 2d 120, 124 (D.D.C. 2013); *Landmark Legal Found. v. EPA*, 910 F. Supp. 2d 270, 279 (D.D.C. 2012) (denying PI to expedite processing where agency stated request is already at the top of the queue and requester failed to meet other PI prongs); *Electronic Frontier Found. v. Department of Justice*, 563 F. Supp. 2d 188, 196 (D.D.C. 2008) (granting *Open America* stay after denying PI); *Al-Fayed v. CIA*, 2000 WL 34342564, *6 (D.D.C. Sept. 20, 2000) (finding that "upon consideration of the parties' arguments, the statutory and regulatory context, and the applicable case law," emergency relief was not warranted despite the agency's delay in

## I. PLAINTIFF IS UNLIKELY TO SUCCEED ON THE MERITS OF ITS CLAIM THAT THE DEPARTMENT FAILED TO EXPEDITE THE PROCESSING OF THE FOUR SUBJECT FOIA REQUESTS.

Plaintiff contends that it is likely to prevail on the merits because expedited processing of its FOIA requests should have been completed by now. *See* Mem. in Supp. of Pl.'s Mot. for Prelim. Inj. ("Pl.'s Mot.") at 11, Aug. 1, 2014, ECF No. 8-1. That contention misapprehends FOIA's expedited processing provision and the Department's implementing regulations. FOIA directs agencies to "process *as soon as practicable* any request for records to which [they have] granted expedited processing." 5 U.S.C. § 552(a)(6)(E)(iii) (emphasis added); *see also* 28 C.F.R. § 16.5(d)(4) ("If a request for expedited treatment is granted, the request shall be given priority and shall be processed *as soon as practicable*" (emphasis added)). As explained in the Senate Report accompanying the FOIA amendments that added the expedited processing procedures, the intent of the expedited processing provision was to give certain requests *priority*, not to require that such requests be processed within a specific period of time:

> [Once] the request for expedit[ion] . . . is granted, the agency must then proceed to process that request "as soon as practicable." *No specific number of days for compliance is imposed by the bill* since, depending upon the complexity of the request, the time needed for compliance may vary. *The goal is not to get the request processed within a specific time frame, but to give the request priority for processing more quickly than otherwise would occur.*

S. Rep. 104-272, 1996 WL 262861, at *17 (May 15, 1996) (emphasis added); *see also* H. R. Rep. No. 104-795, *reprinted at* 1996 U.S.C.A.A.N. 3448, 3461 (Sept. 17, 1996) ("[C]ertain categories of requesters would receive priority treatment of their requests . . . ."). Thus, FOIA's expedited processing provision is an ordering mechanism that allows certain FOIA requesters to jump to the head of the line and avoid the ordinary "first in, first out" processing queue. Once a request is at

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responding to FOIA requests). *But see EPIC v. Department of Justice*, 416 F. Supp. 2d 30 (D.D.C. 2006) (granting PI but extending deadline to give agency the time necessary to process request).

the front of the line, however, "practicability" is the standard that governs how quickly a particular request is processed. *See Landmark Legal Found.*, 910 F. Supp. 2d at 279 (denying preliminary injunction to expedite processing where, *inter alia*, agency stated request is already at the top of its queue); *see also American Civil Liberties Union v. Department of Justice*, 321 F. Supp. 2d 24, 38 (D.D.C. 2004) (granting request for expedited processing and ordering that the Department "shall process plaintiffs' requests for all records relating to section 215 consistent with 5 U.S.C. § 552(a)(6)(E)(iii) and 28 C.F.R. § 16.5(d)(4) ('as soon as practicable')"); *Edmonds v. FBI*, 2002 WL 32539613, at *4 (D.D.C. Dec. 3, 2002) (directing defendants to advise the Court "of the date when the request will be processed consistent with 5 U.S.C. § 552(a)(6)(E)(iii) and 28 C.F.R. § 16.5(d)(4) ('as soon as practicable')").

Although conceding this statutory language, Plaintiff nevertheless contends that "an agency presumptively violates the 'expedited processing' provisions of the FOIA when it fails to comply with the generally applicable 20-working-day deadline." Pl.'s Mot. at 12. That contention improperly relates two distinct and unrelated provisions of FOIA, the one governing expedited processing and the other triggering the administrative exhaustion requirement. The latter provision provides that an agency shall

> determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination.

5 U.S.C. § 552(a)(6)(A)(i). According to Plaintiff, that twenty-day time limit provides a benchmark because "the phrase 'as soon as practicable,' in the context of a provision of FOIA allowing for *expedited* processing, cannot be interpreted to impose a lower burden on the agency than would otherwise exist." Pl.'s Mot. at 12 (citing *EPIC v. Department of Justice*, 416 F. Supp. 2d 30, 39 (D.D.C. 2006)). Thus, Plaintiff suggests that the consequence of an agency's

failure to complete expedited processing within twenty days is the FOIA requester's entitlement to the immediate production of the requested records. *See* Pl.'s Mot. at 13.

The D.C. Circuit, however, has rejected that suggestion.[6] *See CREW v. Federal Election Commission*, 711 F.3d 180, 188 (D.C. Cir. 2013) (noting that "[u]nder the statutory scheme, a distinction exists between a 'determination' and subsequent production"); *see also Navistar, Inc. v. EPA*, 2011 WL 3743732, at *3-*5 (D.D.C. Aug. 25, 2011) (same). If an agency "does not adhere to FOIA's explicit timelines, the 'penalty' is that the agency cannot rely on the administrative exhaustion requirement to keep cases from getting into court." *CREW*, 711 F.3d at 189. In other words, the recourse is litigation in federal court, not immediate compelled production of the requested records. *See EPIC*, 2014 WL 521544, at *6. More importantly for purposes here, FOIA's twenty-day provision plainly does not establish an outside time limit on what is "practicable" in responding to an expedited FOIA request.

Rather, what is practicable will vary depending on the size, scope, detail, and complexity of issues presented by the request; the number of offices with responsive documents; other agencies or components that must be consulted or to which documents must be referred; and whether the records contain classified information. *See id.* at *7 (identifying as factors bearing on practicability the number of prior requests granted expedited processing, the volume of classified information at issue, and competing national security obligations); *see also* Tiernan Decl. ¶ 13 ("The amount of work that can be completed on a given request depends on a variety of factors, including the complexity of the request, the amount of classified material contained in responsive documents, and how much coordination with other agencies is required."). Here, such

[6] Plaintiff's reliance on *EPIC v. Department of Justice*, 416 F. Supp. 2d 30, 39 (D.D.C. 2006), is misplaced because that decision predates the D.C. Circuit's decision in *CREW v. Federal Election Commission* and thus was not informed by that court's interpretation of FOIA's twenty-day provision. Despite granting a preliminary injunction, the court in *EPIC* recognized that the deadline plaintiff requested was not practical and extended the processing time to accommodate the agency.

considerations belie Plaintiff's claim that the Department has not expedited the processing of the four subject FOIA requests.

Following the unauthorized disclosures of national security information in June 2013, NSD's FOIA office "experienced a surge in the number of FOIA requests received." Tiernan Decl. ¶ 17. At the time that Plaintiff's requests for expedited processing were granted, nine other requests that previously had been granted expedited processing were ahead in line; seven of the nine requests "involve particularly complex issues due to the subject matter, need for coordination with other agencies, or both." *See* Tiernan Decl. ¶ 16. The processing of Plaintiff's requests, because they seek records containing classified national security information, is particularly time-consuming and labor intensive because NSD must coordinate with multiple intelligence community agencies. *See* Tiernan Decl. ¶ 17. When information is classified by another component or agency "applicable law, Executive Order 13526, and Department of Justice regulations, require NSD to consult with th[e] original classifying entity before releasing the information under FOIA." Tiernan Decl. ¶ 15. Moreover, the Office of Intelligence ("OI"), which is searching for and gathering the records responsive to Plaintiff's requests, "has multiple responsibilities critical to national security" and thus the "time that OI employees can spend on plaintiff's FOIA request, including searching for and gathering the responsive records, is [] constrained by the necessity that they perform their critical, and often time-sensitive, national security work." Tiernan Decl. ¶ 18. Likewise, the Intelligence Community components, with whom OI and NSD must consult, are themselves involved in a large-scale, multi-agency undertaking to review and declassify FISC opinions and related materials in response to a directive from the President to "reassess the extent to which there may be information that can be released regarding the legal rational, protections, and nature of the oversight of th[e

government's foreign] surveillance program, consistent with the interests of national security." Hudson Supp. Decl. ¶ 6; *see also id.* ¶ 9 (explaining that "the intelligence community is spread very thin in response to the many issues that have arisen in the wake of the unauthorized disclosures described above, including operational issues"). Thus, notwithstanding that the Department has not produced any records responsive to Plaintiff's FOIA requests, "NSD is devoting appropriate resources and effort to processing plaintiff's FOIA request[s] as soon as practicable."[7] Tiernan Decl. ¶ 19. Plaintiff, therefore, is unlikely to succeed on the merits of its unsubstantiated claim to the contrary. On that basis alone, the Court should deny Plaintiff's motion.

## II. PLAINTIFF HAS NOT DEMONSTRATED THAT IT WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF A MANDATORY INJUNCTION.

"The basis of injunctive relief in the federal courts has always been irreparable harm." *CityFed Fin.*, 58 F.3d at 747 (citing *Sampson v. Murray*, 415 U.S. 61, 88 (1974)). This Circuit has "developed several well known and indisputable principles to guide [courts] in the determination of whether this requirement has been met." *Judicial Watch, Inc. v. United States Dep't of Homeland Security*, 514 F. Supp. 2d 7, 10 (D.D.C. 2007) (quoting *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). The injury "must be both 'certain and great' and 'actual not theoretical.'" *Judicial Watch*, 514 F. Supp. 2d at 10. "Indeed, injunctive relief will not be granted 'against something merely feared as liable to occur at some indefinite time in the future.'" *Id.* Thus, Plaintiff "must show that the injury complained of [is] of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm," (*id.*), "in

[7] *See* Tiernan Decl. ¶ 4 (estimating that the processing of Plaintiff's FOIA request dated August 23, 2013 will be completed in 90 days); *id.* ¶ 7 (estimating that the processing of Plaintiff's FOIA request dated October 31, 2013 will occur on a rolling basis with interim responses provided in 120-day intervals); *id.* ¶ 9 (estimating that NSD will provide a partial response to Plaintiff's FOIA request dated February 24, 2014 within 30 days); *id.* ¶ 11 (anticipating that the processing of Plaintiff's FOIA request dated March 14, 2014 will be on a rolling basis with interim responses provided at intervals).

the sense that it is '*beyond remediation*,'" (*EPIC*, 2014 WL 521544, at *8 (emphasis added)). Plaintiff has not come close to making that demonstration here.

Plaintiff's first alleged irreparable injury – erosion of its statutory rights under FOIA – is predicated on the same flawed premise as Plaintiff's merits arguments, namely, that the Department has not expedited the processing of the four subject FOIA requests. *See* Pl.'s Mot. at 15 (alleging that "DOJ continues to deprive EFF of two statutory rights – its general right to a determination on its FOIA requests within 20 days and the right to expedited processing of those requests"). The uncontroverted evidence in the record, however, demonstrates that the Department has expedited the processing of Plaintiff's FOIA requests. *See* Tiernan Decl. ¶ 12 (noting that "Plaintiff requested that all four requests be granted expedited processing, and all four were given this status" and as such were "given priority status and moved to the front of the NSD request queue"); *see also id.* ¶¶ 4, 6, 9, 11, 19. Although the Department did not meet the twenty-day limit for its determinations, Plaintiff's available recourse is a legal action in this Court and thus that alleged injury is not "beyond remediation," (*EPIC*, 2014 WL 521544, at *8). *See CREW*, 711 F.3d at 284-85 (affirming that if an agency "does not adhere to FOIA's explicit timelines, the 'penalty' is that the agency cannot rely on the administrative exhaustion requirement to keep cases from getting into court"). Thus, Plaintiff's alleged statutory violations hardly constitute an irreparable injury warranting a preliminary injunction.

Plaintiff's other alleged injury – impaired participation in the public debate on surveillance reform – fares no better. That alleged injury is entirely speculative and thus fails to satisfy the requirement that irreparable injury be "certain and great." *Judicial Watch*, 514 F. Supp. 2d at 10. As an initial matter, Plaintiff assumes that the processing of its FOIA requests will result in the release of information. That result is not certain given that the records concern the government's

foreign intelligence collection activities, details of which remain classified. *See The Nation Magazine v. Department of State,* 805 F. Supp. 68, 74 (D.D.C. 1992) (denying motion for preliminary injunction on the ground that plaintiffs had failed to demonstrate irreparable harm because "[e]ven if this Court were to direct the speed up of *processing* of their requests, [plaintiffs] have not shown at this time that they are entitled to the *release* of the documents they seek"). "To the contrary, it is undisputed that at least some of the documents [or, at a minimum, information contained therein] are probably exempt from production under the FOIA." *See id.*; *see, e.g.*, Pl.'s Mot. at 19 (characterizing the four subject FOIA requests as seeking to "uncover only the most significant and *still-secret opinions* governing intelligence community surveillance" (emphasis added)).

Plaintiff moreover assumes that any information NSD releases after processing the four subject FOIA requests will be new and add to the public debate on surveillance. But, in the wake of the unauthorized disclosure in June 2013 of classified information concerning the government's foreign intelligence activities, the government "ordered the declassification of certain information regarding [its] collection program[s]." Hudson Supp. Decl. ¶ 5. Thereafter, at the direction of the President, the Intelligence Community has continued to review information, including FISC opinions and filings such as those sought by Plaintiff, to determine what information can be "declassified and released, consistent with the national security, for the purposes of restoring public confidence, fostering public debate, and providing the public with a clear understanding of the legal rationale and protections surrounding such programs."[8] *See id.* ¶ 7. Throughout that process, the government has added information to the public debate. *See generally* www.icontherecord.tumblr.com. Thus, any additional disclosure of information on the

[8] Plaintiff erroneously attributes the government's prior release of information concerning its foreign intelligence collection to two lawsuits brought by Plaintiff. *See* Pl.'s Mot. at 3-4.

government's foreign intelligence collection programs "might allow our adversaries to fit new pieces of information together with those already in the public domain to create an even more revealing picture of our nation's intelligence capabilities." Hudson Supp. Decl. ¶ 8. For that reason, it is far from certain that any disclosures yielded by Plaintiff's FOIA requests will be new, as opposed to cumulative. In an effort to bolster its claim, Plaintiff invokes the fact that on July 29, 2014, the Chairman of the Senate Judiciary Committee "introduced a comprehensive surveillance reform bill in the Senate." Pl.'s Mot. at 5. Plaintiff, however, does not contend – let alone demonstrate – that any of the requested documents directly bear on any provision of that proposed legislation.

Finally, Plaintiff's suggestion that the "contributive value" of the requested records will be diminished or stale if released later is undermined by Plaintiff's own evidence. *See* Pl.'s Mot. at 17 (contending that this "risk is not merely hypothetical" rather "EFF recently witnessed, first hand, the effect of delay on the value of information to a legislative debate"). According to Plaintiff, in *EFF v. Department of Justice*, 12-01441-ABJ, the government produced responsive records after Congress reauthorized legislation to which they pertained. Nevertheless, according to Plaintiff, those records "have been widely reported by major media outlets," "have added critical information to the public debate," and "[a]s a result of this ongoing national debate, significant legislative changes to the nation's surveillance laws appear imminent." Pl.'s Mot. at 4. Thus, the contributive value was not lost by any failure of the government to produce records on Plaintiff's preferred timetable. As another district court observed, under similar circumstances, Plaintiff's "contention that it will be irreparably harmed unless it receives the requested records quickly so that the public can participate fully in the ongoing debate is not only unproven, it is also fundamentally flawed because it ignores the well-established statutory FOIA process, which

permits government agencies to withhold certain requested documents and to engage in subsequent litigation over them, without regard to the resulting production delay." *EPIC*, 2014 WL 521544, at *9. Plaintiff thus has failed to demonstrate the requisite irreparable injury necessary for a preliminary injunction to issue.

## III. THE MANDATORY EMERGENCY INJUNCTION PLAINTIFF SEEKS WOULD HARM THE PUBLIC INTEREST.

In support of the remaining elements of its proof here, Plaintiff recycles its argument that the requested injunction would enforce FOIA's statutory requirements and facilitate the public's participation in the surveillance reform process, (*see* Pl.'s Mot. at 18, 19). *But see Wadelton*, 941 F. Supp. 2d at 124 ("Plaintiffs argue that a preliminary injunction will be in the public interest, based on little more than the core purpose of FOIA being to 'allow the public to be informed about "what their government is up to"' . . . . This explanation does nothing to distinguish plaintiffs' FOIA request from any other FOIA request. Therefore, the Court finds that plaintiffs fail to satisfy the public interest prong." (citations omitted)). Plaintiff's effort to impose an artificial time frame on the Department's processing of the four subject FOIA requests plainly ignores the realities attendant to that processing, including the "extensive coordination with multiple agencies." Tiernan Decl. ¶ 17; *see also id.* ¶ 15 (explaining that because "[m]ost if not all of the records responsive to plaintiff's requests contain classified national security information," NSD must "consult with th[e] original classifying entity before releasing [] information under FOIA").

Moreover, Plaintiff's requested relief threatens to compromise the delicate balance that Congress struck in FOIA between, on the one hand, the general interest in disclosing information about government activities, and, on the other hand, the necessity of ensuring that certain types of documents (i.e., those exempt under FOIA) not be produced. The exemptions listed in FOIA's

Section 552(b) embody a judgment by Congress that the public interest would best be served by allowing the agencies to withhold certain records – for example, those records whose disclosure would interfere with other vital public interests such as national security, (5 U.S.C. § 552(b)(1)); efficient and frank intra- and inter-agency deliberations and attorney-client communications, (5 U.S.C. § 552(b)(5)); or effective law enforcement, (5 U.S.C. § 552(b)(7)). Congress specifically noted that even with respect to expedited requests, in certain cases, depending on the subject matter of the request, additional time might be required to ensure that the public's interest in preventing public disclosure of exempt documents is not compromised. *See* H. R. Rep. No. 104-795, at 23 (1996), 1996 U.S.C.A.A.N. at 3466 ("In underscoring the requirement that agencies respond to requests in a timely manner, the Committee does not intend to weaken the interests protected by the FOIA exemptions. Agencies processing some requests may need additional time to adequately review requested material to protect those exemption interests. For example, processing some requests may require additional time in order to properly screen material against the inadvertent disclosure of material covered by the national security exemption"). As Congress acknowledged, those concerns are only heightened in a case such as this one, where numerous classified documents are at issue, and the Department has independent obligations under federal regulations and Executive Order to ensure that no unwarranted disclosure occurs. *See id.* Thus, an order requiring the Department to disclose documents on Plaintiff's artificial timetable (rather than "as soon as practicable") would harm the balance of such competing public interests. *See Judicial Watch,* 514 F. Supp. 2d at 11 (observing that "[g]iven the finite resources of these agencies, requiring them to search for documents that may ultimately be found to be protected, or to have already been produced, is clearly contrary to the public's interest").

Finally, and not insignificantly, Plaintiff's requested relief would disadvantage those FOIA requesters granted expedited processing before Plaintiff, as compliance with a mandatory injunction would require that resources be diverted from those other requests, thereby disturbing their rightful place in NSD's expedited queue. *See EPIC*, 2014 WL 521544, at *10 (observing that "[g]iven that there are only so many NSD staffers to process existing requests, allowing EPIC to jump to the head of the line would upset the agency's processes and be detrimental to the other expedited requesters, some of whom may have even more pressing needs"). Plaintiff therefore has not, and indeed cannot, meet its burden on the remaining elements of a mandatory injunction.

## IV. PLAINTIFF'S REQUESTED MANDATORY INJUNCTION IS IMPROPER BECAUSE IT WOULD AFFORD PLAINTIFF FULL RELIEF, NOT INTERMEDIATE RELIEF.

Preliminary injunctive relief is not intended to provide plaintiffs with a means to bypass merits litigation. Therefore, a preliminary injunction should not work to give a party essentially the full relief it seeks on the merits. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) ("[I]t is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits."); *Dorfmann v. Boozer*, 414 F.2d 1168, 1173 n.13 (D.C. Cir. 1969) ("[A] preliminary injunction should not work to give a party essentially the full relief he seeks on the merits."). As evident from Plaintiff's actions here, however, that is precisely what it seeks: an injunction compelling the immediate production of responsive documents to Plaintiff. *Compare* Pl.'s Mot. at 21 (contending that "[u]nder these circumstances, the appropriate form of relief is clear: the Court should order the government to reach a determination on disclosure, followed shortly thereafter by disclosure of the requested records") *with* Compl. at 5-6 ("Requested Relief"). Because that is an inappropriate use of a preliminary injunction, the Court should not allow it and deny Plaintiff's motion on that alternative ground.

## CONCLUSION

For the foregoing reasons, the Department respectfully requests that the Court deny Plaintiff's Motion for Preliminary Injunction.

Dated: August 8, 2014

Respectfully submitted,

STUART F. DELERY
Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Branch Director
Civil Division

/s/ Jacqueline Coleman Snead
JACQUELINE COLEMAN SNEAD (D.C. Bar 459548)
Senior Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave, NW
Washington, D.C. 20530
Telephone: (202) 514-3418
Fax: (202) 616-8470
E-mail: Jacqueline.Snead@usdoj.gov

**Counsel for the Department of Justice**

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

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| ELECTRONIC FRONTIER FOUNDATION, | ) | |
| Plaintiff, | ) | |
| v. | ) | Civil Action No. 14-760-RMC |
| DEPARTMENT OF JUSTICE, | ) | |
| Defendant. | ) | |

**PROPOSED ORDER**

Upon consideration of Plaintiff's Motion for Preliminary Injunction, the opposition thereto, and the complete record in this case, it is hereby

ORDERED that Plaintiff's motion is DENIED.

SO ORDERED.

Date: _____

_____
United States District Court Judge