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17 IN THE UNITED STATES DISTRICT COURT  
 18 THE NORTHERN DISTRICT OF CALIFORNIA  
 19 SAN FRANCISCO DIVISION

21 PUBLIC.RESOURCE.ORG., a California non-	)	Case No. 13-cv-02789 WHO
profit organization,	)	
	)	<b>PLAINTIFF’S OPPOSITION TO</b>
22 Plaintiff,	)	<b>DEFENDANT’S MOTION FOR</b>
	)	<b>STAY PENDING APPEAL</b>
23 v.	)	
	)	Hearing noticed for June 10, 2015
24 UNITED STATES INTERNAL REVENUE	)	at 2:00 p.m. before Judge Orrick in
25 SERVICE,	)	Courtroom 2, 17th Floor
	)	
26 Defendant.	)	
	)	

27 Plaintiff Public.Resource.Org (“Public.Resource”) hereby opposes the IRS’s Motion for  
 28 a Stay pending appeal that seeks to indefinitely suspend the IRS’s obligation to produce agency

1 records that this Court ordered released in this case. The stay is necessary, the IRS states, because  
2 the Solicitor General has yet to decide whether the United States should pursue the appeal that the  
3 IRS already filed in this matter. *See* Mot. 2. It has been nearly four months since this Court  
4 issued its ruling, and the government already has had nearly twice the amount of time that the  
5 Court originally allotted for producing the records at issue, under a stipulation to which  
6 Public.Resource agreed.<sup>1</sup> Defendant accordingly has had four months – ample time – to decide  
7 “whether [] a ruling by from the Ninth Circuit, or [] dismissal of the notice of appeal” is the route  
8 the government prefers. *Id.* The instant Motion seeks not only an indefinite “stay ... until the  
9 appeal in this matter is resolved,” *id.* 1; *see also id.* 6, it does not even offer an hint of when the  
10 Court (and Public.Resource) can expect a decision by the government on “whether to proceed with  
11 the appeal or not.” *Id.* 2.

12 This speaks directly to two elements of the showing that the IRS must make to earn  
13 a stay that are among those to which the instant Motion affords the least attention – harm to  
14 Public.Resource, and the public interest.<sup>2</sup> As the IRS admits – and Public.Resource agrees –  
15 this case “involves novel, important, and complicated issues” that surround E-FOIA. *Id.* 2, 4. To  
16 the extent the government is considering whether to allow this Court’s ruling to become settled  
17 law on that point – which it should – Public.Resource and the public have a right to have that  
18 open issue settled sooner rather than later.

19 Indeed, as Public.Resource has already shown in this case, access to the records that the  
20 Court ordered produced in machine-readable format would enable the public, journalists, and  
21 watchdog groups to better understand and monitor the grant and administration of tax-exempt  
22 status to non-profits, and how the IRS carries out this vital function for the federal government.

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24 <sup>1</sup> *See id.* As the IRS recites, Public.Resource also agreed to an additional fixed period –  
25 though not the open-ended invitation the government requested – even in conferring on this latest  
need for further extension.

26 <sup>2</sup> *See id.* 5. *See also id.* 3 (quoting *Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985)  
27 (“propriety of a stay pending appellate review turns on (1) the likelihood that the party seeking  
28 the stay will prevail on the merits ...; (2) the likelihood that the moving party will be irreparably  
harmed ...; (3) the prospect that others will be harmed ...; and (4) the public interest”)) (internal  
quotation marks omitted, ellipses added).

1 *E.g.*, Public.Resource Reply in Support of Cross-Motion for Summary Judgment 11 & n.12 (citing  
2 Public.Resource Cross-Mot. for Sum. J. at 15-17; Noveck & Taggart Decls., and *Kowack v. U.S.*  
3 *Forest Serv.*, 766 F.3d 1130, 1133 (9th Cir. 2014)). As this Court noted, requestors are unlikely  
4 to seek this data in machine-readable format – given how the IRS presently dissuades them from  
5 doing so via “practices that are inconsistent with the E–FOIA amendments,” *Public.Resource.Org*  
6 *v. IRS*, 2015 WL 393736, at \*4 (N.D. Cal. Jan. 29, 2105) – until it is settled that the IRS must  
7 produce the records in machine-readable format. Thus it is not only Public.Resource harmed  
8 by the undue delay, but the other public interest groups and, ultimately, the public as well.

9       Such delay runs directly counter to “faithful adherence to [FOIA’s] statutory mandate” for  
10 “the expeditious release of documents” to serve the “core purpose of shedding light on an agency’s  
11 performance.” *Martins v. USCIS*, 962 F.Supp.2d 1106, 1127 (N.D. Cal. 2013) (quoting *EPIC v.*  
12 *DOJ*, 416 F.Supp.2d 30, 42 (D.D.C. 2006); *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 59  
13 (D.C. Cir. 1977)) (internal quotation marks omitted). Given this, the Court should not simply  
14 grant the government an indeterminate stay without an explanation of when it will decide to  
15 pursue the appeal (which again, of course, already has been filed). Even if the Solicitor General  
16 required some additional time, beyond the one week to which Public.Resource already agreed,  
17 in order to make a decision (and we submit no further time should be necessary), the Court should  
18 establish a date certain by which the IRS must fish or cut bait in this case. Specifically, the Court  
19 should specify a hard deadline for the government to either dismiss its appeal and produce the  
20 documents, or to definitively state that its appeal will go forward.

21 DATED this 19th day of March, 2015.

22 DAVIS WRIGHT TREMAINE LLP

23 By: /s/ Thomas R. Burke  
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25 Attorneys for Plaintiff Public.Resource.Org  
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