

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

CITIZENS FOR RESPONSIBILITY AND )  
ETHICS IN WASHINGTON )  
1400 Eye Street, N.W., Suite 450 )  
Washington, DC 20005 )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
CENTRAL INTELLIGENCE AGENCY )  
Washington, DC 20505 )  
 )  
Defendant. )  
\_\_\_\_\_ )

Case No. 1:07CV00620-RMC

**DEFENDANT’S MOTION FOR *OPEN AMERICA* STAY**

Ignoring the reality of the demands on the Central Intelligence Agency’s (“CIA”) Freedom of Information Act (“FOIA”) office, Plaintiff Citizens for Responsibility and Ethics in Washington (“Plaintiff”) complains that the CIA has not completed processing its February 15, 2007 FOIA request. Plaintiff’s rush to court is based not on any compelling need requiring expedited processing of its FOIA request but Plaintiff’s insistence on strict adherence to statutory language affording agencies only twenty working days to process FOIA requests. *See* 5. U.S.C. § 552(a)(6)(A)(i). Such adherence is unwarranted where, as here, the agency has a backlog of FOIA requests but is making reasonable progress in reducing that backlog. The FOIA includes a safety valve (i.e., an *Open America* stay) that allows such an agency additional time to process a plaintiff’s FOIA request while the Court retains jurisdiction over the action. *See* 5 U.S.C. § 552(a)(6)(C). Defendant now invokes that safety valve and respectfully requests that the Court stay this action until November 1, 2007 to allow sufficient time for the CIA to process Plaintiff’s FOIA request.

### FOIA'S TIME-LIMIT PROVISIONS

Upon receiving a FOIA request, an agency “shall determine within 20 days . . . whether to comply with such request” and “shall immediately notify the [requester] . . . of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency.” 5 U.S.C. § 552(a)(6)(A)(i). The agency must process any appeal of its determination within twenty working days. *See* 5 U.S.C. § 552(a)(6)(A)(ii). In unusual circumstances, however, these time limits may be extended by written notice to the requester. *See* 5 U.S.C. § 552(a)(6)(B)(i).

If an agency fails to comply with the statutory time limits, the requester “shall be deemed to have exhausted his administrative remedies” and may file suit in federal district court. *See* 5 U.S.C. § 552(a)(6)(C)(i). The federal district court, while retaining jurisdiction over the action, may “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.” 5 U.S.C. § 552(a)(6)(C)(i). This provision “was put in as a safety valve” in recognition that “the rigid limits of subparagraphs (A) and (B) might prove unworkable.” *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 610 (D.C. Cir. 1976).

As used here, 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.

Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) . . . 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).

### STATEMENT OF FACTS

On February 15, 2007, Plaintiff submitted a FOIA request to the CIA's Information and Privacy Coordinator. Compl. ¶ 16. That request seeks "any and all documents dating from July 6, 2003, to the present of communications between the White House and the CIA regarding Valerie Plame Wilson and/or Joseph C. Wilson." Compl. Ex. A. Plaintiff asked to be informed if the CIA "fores[aw] any problems in releasing fully the requested records within the twenty-day period." Compl. Ex. A. However, Plaintiff "never requested that the CIA expedite the processing of its FOIA request." Compl. ¶ 18.

By letter dated February 27, 2007, the CIA Information and Privacy Coordinator Scott Koch acknowledged receipt of Plaintiff's FOIA request. Compl. Ex. B. Mr. Koch explained that the CIA "handle[s] all requests in the order [] receive[d]" (i.e., "first-in, first-out" basis) and "make[s] exceptions to this rule only when a requester establishes a compelling need." Compl. Ex. B. A compelling need exists "1) when the matter involves an imminent threat to the life or physical safety of an individual, or 2) when a person primarily engaged in disseminating information makes the request and the information is relevant to a subject of public urgency concerning an actual or alleged Federal government activity." Compl. Ex. B. Mr. Koch informed Plaintiff that its request did not satisfy those criteria and therefore would be processed in the order received. Compl. Ex. B.

By letter dated March 13, 2007, the CIA accepted Plaintiff's FOIA request and explained the likely timetable for its processing. Specifically, the letter explained that

The large number of FOIA requests CIA receives has created unavoidable delays making it unlikely that we can respond within the 20 working days the FOIA requires. You have the right to consider our honest appraisal as a denial of your request and you may appeal to the Agency Release Panel. A more practical approach would permit us to continue processing your request and respond to you as soon as we can. You will retain your appeal rights and, once you receive the results of our search, can appeal at that time if you wish. *We will proceed on that basis unless you object.*

Declaration of Scott Koch ("Koch Decl.") Ex. E (emphasis added), attached hereto. Plaintiff never contacted Mr. Koch's office to discuss that more practical approach. *See* Koch Decl. ¶ 33. Plaintiff also did not appeal the agency's decision to the Agency Release Panel. *See* Koch Decl. ¶ 33.

On April 2, 2007, Plaintiff filed the instant action alleging that the CIA had violated the FOIA by "failing to release" the requested records. Compl. ¶ 2[3].

#### **ARGUMENT**

This Circuit has recognized that in fixing rigid time limits for processing FOIA requests and affording requesters the right to bring suit when those time limits are not met, Congress did not intend "to grant an automatic preference by the mere action of filing a case in United States district court." *Open America*, 547 F.2d at 615. That, however, is precisely the result that Plaintiff urges here. Although informed that a backlog of FOIA requests would prevent the CIA from processing Plaintiff's FOIA request within twenty working days and encouraged to arrange an alternative timetable for that processing, Plaintiff filed this action demanding an immediate response to its FOIA request. The law, however, does not require the CIA to move Plaintiff to

the head of the line. *See id.* Rather, the CIA’s “good faith effort and due diligence . . . to comply with all lawful demands under the Freedom of Information Act in as short a time as is possible by assigning all requests on a first-in, first-out basis . . . is compliance with the Act.” *Id.* at 616. In keeping with that view, FOIA provides that “[i]f the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records.” 5 U.S.C. 552(a)(6)(C)(i). The CIA can demonstrate such circumstances and therefore requests that the Court stay this action until November 1, 2007 to allow the agency sufficient time to complete its processing of Plaintiff’s FOIA request.<sup>1</sup>

**I. THE CIA CAN DEMONSTRATE THAT EXCEPTIONAL CIRCUMSTANCES WARRANT THAT IT HAVE ADDITIONAL TIME TO PROCESS PLAINTIFF’S FOIA REQUEST.**

Exceptional circumstances require that the CIA have additional time to process Plaintiff’s February 15, 2007 FOIA request. FOIA makes clear that “exceptional circumstances” include “a delay that results from a predictable agency workload of requests . . . [where] the agency demonstrates reasonable progress in reducing its backlog of pending requests.” 5 U.S.C. 552(a)(6)(C)(ii). Courts in this Circuit have interpreted that provision as “excusing any delays encountered in responding to a request as long as the agencies are making a good faith effort and exercising due diligence in processing the requests on a first-in first-out basis.” *Kuffel v. United States Bureau of Prisons*, 882 F. Supp. 1116, 1127 (D.D.C. 1995); *see also Appleton v. Federal*

---

<sup>1</sup> This Court alternatively may refrain from ruling on this motion and allow the CIA time to complete its processing of Plaintiff’s FOIA request. *See Oglesby v. Department of Army*, 920 F.2d 57, 64 (D.C. Cir. 1990) (“Frequently, if the agency is working diligently, but exceptional circumstances have prevented it from responding on time, the court will refrain from ruling on the request itself and allow the agency to complete its determination.”).

*Drug Admin.*, 254 F. Supp. 2d 6, 9 (D.D.C. 2003) (same); *Jimenez v. Federal Bureau of Investigation*, 938 F. Supp. 21, 31 (D.D.C. 1996) (same).

As demonstrated by the attached declaration of Scott Koch, CIA's Information and Privacy Coordinator, the CIA is making reasonable efforts and exercising due diligence in processing its backlog of FOIA requests. "When considering a request for an *Open America* stay, '[a]gency affidavits are accorded a presumption of good faith, which cannot be rebutted by purely speculative claims . . . .'" *Electronic Frontier Found. v. Department of Justice*, 2007 WL 1334973, at \*4 (D.D.C., May 7, 2007). Applying that presumption here, the Court should conclude that the CIA has demonstrated exceptional circumstances.

**A. The CIA Has a Substantial Backlog of FOIA Requests That the Agency Has Made Reasonable Efforts to Reduce.**

As explained to Plaintiff by letter of February 27, 2007, the CIA processes FOIA requests on a first-in, first-out basis. *See* Koch Decl. ¶ 31; *see also* Koch Decl. ¶ 22. The agency also uses two tracks for processing requests. The majority of requests are on the first track for "complex" requests because they "have to be tasked to one or more CIA directorates for search and review."<sup>2</sup> *See* Koch Decl. ¶ 22. The second track is for requests that "concern previously requested information," "information previously reviewed, declassified and released," or "information the existence of which would be a classified fact." *See* Koch Decl. ¶ 22. Certain popular collections of agency records are maintained on the CIA's website [www.foia.ucia.gov](http://www.foia.ucia.gov). *See* Koch Decl. ¶ 25. Despite such efficiency measures, the CIA has a backlog of FOIA requests.

---

<sup>2</sup> The decentralization of the CIA's records is critical to the agency's counterintelligence measures. Records are maintained in four directorates: the National Clandestine Service, the Directorates of Intelligence, Science & Technology, and Support and independent offices that report directly to the CIA Director, collectively know as the D/CIA area. *See* Koch Decl. ¶ 7.

*See* Koch Decl. ¶¶ 35 & 37.

The CIA, however, historically has reduced its backlog each year in the past decade. *See* Koch Decl. ¶ 24 & Ex. A. Over the period 2000 - 2002, the CIA was the only agency that had “consistently decreased the number of requests in its backlog of pending requests.” *See* Koch Decl. ¶ 27. During Fiscal Years 2003 through 2005, the CIA was one of two agencies with “processing rates above 100 percent in all three years, meaning that each made continued progress in reducing their number of pending cases.” *See* Koch Decl. ¶ 28 & Ex. B. In addition to reducing the number of cases in its backlog, the CIA has reduced the median time that a FOIA request remains pending. At the end of Fiscal Year 2001, “the median number of days pending was 605 days for FOIA requests.” *See* Koch Decl. ¶ 29. Three years later, that figure was down to 349 days. *See* Koch Decl. ¶ 29. At the end of Fiscal Year 2006, “the median days of pendency for the 896 FOIA/PA cases carried over into FY 2007 was 234.” *See* Koch Decl. ¶ 29.

When Plaintiff’s February 15, 2007 FOIA request was submitted to the agency, the number of FOIA requests in various stages of processing had grown to 907. *See* Koch Decl. ¶ 35. At present, however, there are only 573 FOIA requests ahead of Plaintiff’s for processing. *See* Koch Decl. ¶ 35. The CIA’s best estimate is that by October 2007, it will complete processing Plaintiff’s request. *See* Koch Decl. ¶ 37. A stay of this action to allow the CIA to process Plaintiff’s request on that timetable is therefore warranted.

**B. The CIA's Review for Classified Information Contributes to Its Backlog and Need for Additional Time to Process Plaintiff's Request.**

The significant resources that the CIA devotes to declassification and review of classified information contribute to the exceptional circumstances necessitating a stay of this action. *See* Koch Decl. ¶ 20 (explaining one reason for the CIA's backlog as "the process of responding to FOIA and other declassification review requests in a manner which avoids inadvertent disclosure of classified information"). Courts have recognized that the quantity of classified materials and the devotion of resources to declassification reviews "may be a basis for finding exceptional circumstances." *Center for Public Integrity v. United States Dept. of State*, 2006 WL 1073066, at \* 2 (D.D.C., Apr. 24, 2006) (noting that "other circumstances in addition to FOIA request backlogs may be a basis for finding exceptional circumstances, including 'resources being devoted to the declassification of classified materials of public interest'"); *Electronic Frontier*, 2007 WL 1334973, at \*4 (concluding that FOIA's legislative history "clearly contemplate[s] that other circumstances, such as . . . the amount of classified material . . . [and] the resources being devoted to the declassification of classified material of public interest . . . are relevant to the courts' determination as to whether exceptional circumstances exist"). These considerations compel the conclusion that such circumstances are present here.

Because the overwhelming majority of the CIA's withholdings under FOIA are "based on FOIA Exemptions (b)(1) and (b)(3),"<sup>3</sup> the CIA must give "the utmost care" to ensure that in responding to FOIA requests, the agency does not "reveal information about intelligence collection, sources, methods, or capabilities and thereby . . . damage this country's national security." *See* Koch Decl. ¶ 18. Records that are determined responsive to a FOIA request are therefore reviewed "line-by-line to identify any information which is classified, pertains to intelligence sources or methods, or is otherwise exempt under the FOIA." *See* Koch Decl. ¶ 13. This "need to protect intelligence sources and methods, renders [the CIA's] record searches complex and information reviews multiple and exacting." *See* Koch Decl. ¶ 17. In an effort to improve its processing of FOIA requests, the CIA has "increasingly focused" on making "popular collections" and "frequently requested documents" available on the agency's website. *See* Koch Decl. ¶ 25. Although that initiative over time is expected to result in a decline in FOIA requests, that declassification effort and the ordinary processing of FOIA requests has resulted in a backlog that necessitates the additional time to process Plaintiff's FOIA request.

---

<sup>3</sup> FOIA exemption (b)(1) and (b)(3), respectively, protect from disclosure information "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and . . . are in fact properly classified pursuant to such Executive order" and information "specifically exempted from disclosure by statute . . . provided that such statute [] requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or [] establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(1), (3).

## II. PLAINTIFF’S CONDUCT SUPPORTS GRANTING THE CIA THE ADDITIONAL TIME REQUESTED.

Courts have considered the plaintiff’s conduct relevant to the determination of whether to grant a stay. *See* 5 U.S.C. 552(a)(6)(C)(iii) (plaintiff’s refusal to modify request or arrange alternative time frame are relevant “factor[s] in determining whether exceptional circumstances exist”); *Jimenez*, 938 F. Supp. at 32 (plaintiff’s need for the information requested is relevant to whether a stay is appropriate). Here, such consideration heavily supports granting the CIA an additional four months to process Plaintiff’s FOIA request.

### A. Plaintiff Does Not Have an Urgent Need for the Documents Requested.

Plaintiff cannot overcome the CIA’s demonstration of exceptional circumstances based on Plaintiff’s need for the information requested. Notwithstanding an agency’s demonstration of exceptional circumstances, a “stay is not appropriate where the request is necessary and urgent.” *Jimenez*, 938 F. Supp. at 31. However, where as here, the plaintiff cannot demonstrate “urgent need,” “plaintiff must wait his turn in having the requested documents processed and disclosed.” *Id.* at 32; *see also Edmond v. United States Attorney*, 959 F. Supp. 1, 4 (D.D.C. 1997) (same); *Ohaegbu v. Federal Bureau of Investigation*, 936 F. Supp. 7, 9 (D.D.C. 1996) (same); *see also Open America*, 547 F.2d at 615 (noting that “[i]f everyone could go to court when his request had not been processed within thirty days, and by filing a court action automatically go to the head of the line at the agency, we would soon have a listing based on priority in filing lawsuits”).

Plaintiff has disavowed any urgent need for the requested “communications between the White House and the CIA regarding Valerie Plame Wilson and/or Joseph C. Wilson.” *See* Compl. ¶ 18 (noting that “CREW never requested that the CIA expedite the processing of its

FOIA request”). The CIA also independently determined that Plaintiff’s request did not present a “compelling need” for which the agency would make an exception to its “first-in, first-out” rule for processing FOIA requests. *See* Compl. Ex. B. Plaintiff’s request accordingly is being handled in the order received. At the time that Plaintiff’s request was submitted, the CIA “had over 907 FOIA requests in various stages of processing[, of which ] approximately 573 currently remain ahead of [P]laintiff’s request in the complex queue.” *See* Koch Decl. ¶ 35. “Based upon the request, the manner and level of the records search, the nature of potentially responsive documents, and the careful, multi-step review the CIA must conduct to prevent the inadvertent release of classified national security or other exempt information, and relative placement in the processing queue, [the CIA’s] best estimate is that CIA will be able to complete processing [Plaintiff’s] request by October 2007.”<sup>4</sup> *See* Koch Decl. ¶ 37. Given the absence of a compelling need, Plaintiff should be required to wait until then for its request to be processed.

---

<sup>4</sup> Plaintiff has suggested that the CIA should not require additional time to process its FOIA request because it seeks a “discrete” set of records. *See* Joint Status Report (filed June 14, 2007) (“Plaintiff believes that given the discrete topic of its FOIA request – ‘communications between the White House and the CIA regarding Valerie Plame Wilson and/or Joseph Wilson’ – that a stay would be inappropriate and would simply delay the processing of its FOIA request.”). That belief, however, misapprehends the work involved in processing FOIA requests and ignores the CIA’s FOIA backlog. Plaintiff’s request was assigned to the CIA’s complex track because it “entails records searches within components of the Directorate of Intelligence, the independent offices known as the D/CIA area, and the National Clandestine Service (formerly the Directorate of Operations) as well as Information Management Services.” *See* Koch Decl. ¶ 23; *see also* Koch Decl. ¶¶ 7-9 (describing the CIA’s decentralized and compartmentalized records system). There are presently 573 requests ahead of Plaintiff’s in the CIA’s complex queue. *See* Koch Decl. ¶ 35.

**B. Plaintiff's Refusal to Arrange an Alternative Timetable for the Processing of Its Request Supports a Stay.**

In determining whether a stay is warranted, this Court should consider Plaintiff's refusal to arrange an alternative timetable for the processing of its request. FOIA expressly provides that "[r]efusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) . . . 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." 5 U.S.C. 552(a)(6)(C)(iii). That consideration heavily supports granting a stay here.

By letter dated March 13, 2007, the CIA informed Plaintiff that it was "unlikely that we can respond within the 20 working days the FOIA requires." *See* Koch Decl. ¶ 32 & Ex. E. The CIA explained that although Plaintiff could appeal to the Agency Release Panel, "[a] more practical approach would permit us to continue processing your request and respond to you as soon as we can." *See* Koch Decl. Ex. E. Plaintiff was further advised that the CIA "w[ould] proceed on that basis *unless you object*." *See* Koch Decl. Ex. E (emphasis added). Plaintiff never communicated its objection to the CIA's FOIA office, never proposed an alternative timetable for the processing of its request, and never appealed to the Agency Release Panel. *See* Koch Decl. ¶ 33. Instead, Plaintiff filed the instant action seeking to jump ahead of all of the other FOIA requests in the CIA's backlog. That conduct should contribute to this Court's finding of exceptional circumstances warranting a stay.

**III. THE CIA'S REQUEST TO STAY THIS ACTION UNTIL NOVEMBER 1, 2007 IS REASONABLE.**

The CIA's request to stay this action for four months is substantially less than the length of stays courts have granted under similar circumstances. *See, e.g., Ohaegbu*, 936 F. Supp. at 7 (granting one-year stay from date of court's order); *Jimenez*, 938 F. Supp. at 21 (granting four-year stay); *Williams v. United States*, 932 F. Supp. 354 (D.D.C. 1996) (granting agency over a year to process plaintiff's FOIA request). A stay of this action until November 1, 2007 is therefore appropriate.

**CONCLUSION**

For the foregoing reasons, Defendant respectfully requests that the Court grant this motion and stay this action until November 1, 2007 to allow the CIA sufficient time to process Plaintiff's FOIA request.

Dated: July 16, 2007

Respectfully submitted,

PETER D. KEISLER  
Assistant Attorney General,  
Civil Division

JEFFREY A. TAYLOR  
United States Attorney

JOHN R. TYLER  
Senior Trial Counsel  
Federal Programs Branch

          /s/ Jacqueline Coleman Snead            
JACQUELINE COLEMAN SNEAD  
(D.C. Bar No. 459548)  
Trial Attorney  
United States Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Avenue N.W., Room 7214

Washington, D.C. 20530  
Tel.: (202) 514-3418  
Fax: (202) 616-8470  
Email: [jacqueline.snead@usdoj.gov](mailto:jacqueline.snead@usdoj.gov)

**Attorneys for the Central Intelligence  
Agency**

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

CITIZENS FOR RESPONSIBILITY AND )  
ETHICS IN WASHINGTON )  
1400 Eye Street, N.W., Suite 450 )  
Washington, DC 20005 )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
CENTRAL INTELLIGENCE AGENCY )  
Washington, DC 20505 )  
 )  
Defendant. )  
\_\_\_\_\_ )

Case No. 1:07CV00620-RMC

**PROPOSED ORDER**

Upon consideration of Defendant’s Motion for *Open America* Stay, the opposition thereto, and the complete record in this action, it is hereby

ORDERED that Defendant’s motion is granted; and

FURTHER ORDERED that this action is stayed until November 1, 2007 to allow Defendant additional time to process Plaintiff’s FOIA request. By no later than November 2, 2007, the parties are ordered to file a Joint Report on the status of Plaintiff’s FOIA request and the need for further proceedings in this action.

IT IS SO ORDERED.

\_\_\_\_\_  
ROSEMARY M. COLLYER  
United States District Judge

**CERTIFICATE OF SERVICE**

I hereby certify that on July 16, 2007, a true and correct copy of the foregoing Defendant's Motion for *Open America* Stay was electronically filed through the U.S. District Court for the District of Columbia Electronic Document Filing System (ECF) and that the document is available for viewing on that system.

/s/ Jacqueline Coleman Snead  
JACQUELINE COLEMAN SNEAD