

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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CITIZENS FOR RESPONSIBILITY AND)	
ETHICS IN WASHINGTON,)	
)	
	Plaintiff,)	
)	
	v.)	Case No. 1:09-cv-01356-EGS
)	
U.S. DEPARTMENT OF HOMELAND)	
SECURITY,)	
)	
	Defendant.)	
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**MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFF’S MOTION FOR A PRELIMINARY INJUNCTION AND IN SUPPORT OF
DEFENDANT’S MOTION FOR A STAY**

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INTRODUCTION

Plaintiff in this Freedom of Information Act (“FOIA”) lawsuit, Citizens for Responsibility and Ethics in Washington (“CREW”), cannot satisfy its burden in support of the emergency injunctive relief it seeks, which is an order to compel the Secret Service (a component of the Department of Homeland Security) to expeditiously process and release “agency records” evidencing visits to the White House and the residence of the Vice President by leading health care industry executives from January 21, 2009 to the present. Among other grounds requiring the denial of plaintiff’s motion, a threshold question of law controlling this case—whether the key records sought by plaintiff are in fact Presidential records that are therefore not subject to the FOIA but instead the Presidential Records Act—is currently pending before the D.C. Circuit in two related cases in which the government’s initial brief is due to be filed on September 3, 2009. Thus, even if plaintiff could demonstrate that the key records it seeks are Secret Service records subject to the FOIA, and could further demonstrate that it has a compelling need for the immediate production of these records (which it cannot do), any order by this Court granting such relief as requested by plaintiff would necessarily have to be stayed in order to preserve the government’s right of appeal on a question of law currently pending before the D.C. Circuit. Indeed, absent a stay, the “preliminary” injunctive relief sought by plaintiff—the processing and release of records—would constitute a final judgment from which the government would have no effective appeal. Plaintiff is clearly not entitled to such relief, and under the circumstances of this case it makes no sense for the Court even to entertain plaintiff’s motion for a preliminary injunction.

Plaintiff, moreover, cannot satisfy any of the factors that traditionally govern the issuance

of preliminary injunctive relief. Among other factors, CREW cannot demonstrate that it has a compelling need for the Secret Service to process and release on an expedited basis the non-exempt records it seeks, which is the basis for its motion for emergency relief. Plaintiff's sole argument in support of its requested injunctive order is that there is a particular urgency for the public to know whether certain health care executives have visited the White House in order "to inform the public about the possible influences to which the administration may have been subject in formulating its health care policy . . ." See Plaintiff's Memorandum in Support of its Motion for a Preliminary Injunction ("Pl. Mem."), at 4. But as plaintiff admits in its amended complaint, the White House, by letter dated July 22, 2009, in which it acknowledged the public's interest in the health care debate, identified the health care executives of interest to plaintiff who have visited the White House and the dates on which these visits took place. See July 22, 2009 Letter from Gregory B. Craig to Anne L. Weismann, attached hereto as Ex. A. The White House further identified who, among these executives, attended a meeting at the White House on May 11, 2009. See id. Owing to this fact, there is no real urgency to plaintiff's FOIA request at all that might possibly justify the emergency relief it seeks.

For these reasons and the other grounds set forth below, plaintiff's motion for a preliminary injunction should be denied. Defendant furthermore respectfully requests that this case be stayed pending the appeal of related cases in which the D.C. Circuit is expected to decide questions of law that are controlling in this case. There is no reason for this Court to expend valuable judicial resources to decide issues that are pending before the circuit court. Any relief that might otherwise be granted on behalf of plaintiff would have to be stayed in any event pending appeal.

BACKGROUND

As relevant to this case, CREW has brought two prior lawsuits seeking White House and Vice President's Residence ("VPR") visitor records. The first, brought in 2006, sought records relating to nine individuals described as conservative Christian leaders. Citizens for Responsibility and Ethics in Washington v. Department of Homeland Security, No. 06-cv-01912-RCL (D.D.C. filed Nov. 9, 2006) (hereinafter "CREW 2"). In moving for summary judgment, the Department of Homeland Security ("DHS") (of which the Secret Service is a component) argued that, with respect to the principal categories of visitor records potentially at issue—consisting of Worker and Visitor Entrance System ("WAVES") records and Access Control Records System ("ACR") records at the White House Complex; and access requests, access lists, entry logs, and event lists at the VPR—the Secret Service did not have the "exclusive control" over these categories of records necessary to make them "agency records" subject to the FOIA. Instead, DHS argued that these records are subject to the Presidential Records Act. See 44 U.S.C. § 2201, et seq. In a decision dated December 17, 2007, Judge Lamberth granted, in relevant part, CREW's motion for summary judgment, finding that the visitor records that CREW sought were "agency records" subject to the FOIA. CREW 2, 527 F. Supp. 2d 76, 98 (D.D.C. 2007).¹ DHS immediately moved for a stay, to which CREW consented under the condition that the government file a motion to expedite briefing in the D.C. Circuit. See Consent Motion for Stay Pending Appeal, CREW 2, attached hereto as Ex. B. Judge Lamberth then entered an order staying the court's decision pending appeal. See 12/21/2007 Order, CREW 2,

¹ Judge Lamberth's decision contains a detailed discussion of the key records that are at issue in this case. See CREW 2, 527 F. Supp. 2d at 79-86.

attached hereto as Ex. C.

On appeal, the D.C. Circuit found that it lacked appellate jurisdiction because the district court had only granted in part CREW's summary judgment motion without ruling on the applicability of any of FOIA's exemptions to the records at issue. CREW 2, 532 F.3d 860, 863 (D.C. Cir. 2008) ("Only after the district court rules on any claimed exemptions – either for or against the government – will there be a final decision for the government or CREW to appeal."). On remand, DHS filed a new motion for summary judgment, arguing that executive privilege attached to the records at issue under FOIA Exemption 5.

In a decision dated January 9, 2009, Judge Lamberth denied DHS's motion for summary judgment. See CREW 2, 592 F. Supp. 2d 111, 117-19 (D.D.C. 2009). That decision would have required the release of at least one record responsive to CREW's request and for which the Secret Service would not claim any exemptions (other than the Presidential Communications Privilege already invoked by the government). DHS immediately filed a notice of appeal and, on the same day, a motion to stay. See Defendants' Second Motion for Stay Pending Appeal, attached hereto as Ex. D. CREW stated that it "does not oppose a stay of the obligation to immediately produce all responsive non-exempt documents," but indicated that it did oppose a stay of defendant's obligation to conduct a full search for responsive records. Id. The next day, Judge Lamberth granted DHS's motion in its entirety and stayed the effect of the Court's order pending appeal. See 01/15/2009 Order, CREW 2, attached hereto as Ex. E.

CREW brought a second FOIA lawsuit in the fall of 2008, in which it sought White House and VPR visitor records relating to an individual named Stephen Payne. Citizens for Responsibility and Ethics in Washington v. Department of Homeland Security, No. 08-cv-01535-

RCL (D.D.C. filed Sept. 4, 2008) (hereinafter "CREW 4"). DHS moved for summary judgment, advancing the "agency records" and executive privilege arguments that were made in CREW 2. On January 9, 2009, Judge Lamberth denied DHS's motion (and granted CREW's cross-motion for summary judgment), relying on his decisions in CREW 2. See CREW 4, 592 F. Supp. 2d 127 (D.D.C. 2009). DHS moved for a stay of the obligation to search for or produce responsive documents pursuant to the court's order. See Defendant's Motion for Stay Pending Appeal, CREW 4, attached hereto as Ex. F. As in CREW 2, CREW indicated that it "does not oppose a stay of the obligation to immediately produce all responsive non-exempt documents," but "takes the position that the defendant's obligation to conduct a search should not be stayed." Id. The next day, Judge Lamberth granted DHS's motion for a stay in its entirety. See 01/22/2009 Order, CREW 4, attached hereto as Ex. G.

CREW 2 and CREW 4 have been consolidated on appeal, and the government's opening brief is due on September 3. See 07/20/2009 Order, CREW 2, attached hereto as Ex. H.

ARGUMENT

I. A PRELIMINARY INJUNCTION IS INAPPROPRIATE IN THE CONTEXT OF THIS CASE.

A. This Court Should Not Issue a Preliminary Injunction Because Any Such Injunction Would Need to be Immediately Stayed.

In the usual case, a court will apply a four-factor analysis to determine whether to issue a preliminary injunction. Those factors—(1) plaintiff's likelihood of success on the merits; (2) irreparable injury to the plaintiff absent the requested relief; (3) harm to other interested parties; and (4) the public interest—are well-known to this Court. See CityFed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 746 (D.C. Cir. 1995); see also, e.g., Wash. Metro. Area Transit

Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 842-43 (D.C. Cir. 1977).

This is not, however, the usual case. Even if CREW could prevail on the application of the four factors—an outcome that DHS disputes—plaintiff would still not be entitled to the relief it seeks, which is the expedited processing and release of non-exempt records evidencing visits to the White House or the VPR by the health care industry executives. That is because any court-ordered disclosure of those records would necessarily have to be stayed pending appeal; otherwise, the government would suffer irreparable harm and, as a practical matter, a waiver of any meaningful right of appeal. Once a disclosure occurs, it cannot be undone.

CREW cannot dispute this. In both CREW 2 and CREW 4, it consented to the entry of a stay of Judge Lamberth's orders to the extent they required the Secret Service to disclose White House and VPR visitor records. As Anne Weismann, CREW's Chief Counsel, explained, "we do not oppose a stay of the obligation to produce the documents. We understand full well the case law and the fact that to do so would effectively moot their case." Transcript of 01/15/2009 Hearing in CREW 2 and CREW 4 at 9:6-9, attached hereto as Ex. I. As Judge Lamberth explained, "I always grant a stay in a FOIA case. I think every judge does, so you know I'm going to grant the stay." Id. at 8:23-25. See also U.S. Dep't of Justice v. Rosenfeld, 501 U.S. 1227, 1227 (1991) (granting stay pending appeal); John Doe Agency v. John Doe Corp., 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers, granting stay as Circuit Judge for the Second Circuit); Providence Journal Co. v. FBI, 595 F.2d 889, 890 (1st Cir. 1979); Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 217 F. Supp. 2d 58, 58 (D.D.C. 2002) (explaining that "stays are routinely granted in FOIA cases"). Also, in absence of a stay, the Secret Service would be required—perhaps unnecessarily, depending on the outcome of the appeals currently pending in

CREW 2 and CREW 4, as well as any potential appeal in this case—to search for the requested records.

These grounds, by themselves, demonstrate that plaintiff’s application for a preliminary injunction is inappropriate. No purpose is served by requiring the Court to assess the merits of plaintiff’s legal arguments in support of its claimed entitlement to the key records at issue or to adjudicate the other factors governing a motion for preliminary injunction when the ultimate relief requested by plaintiff—expedited processing and release of responsive, non-exempt records—is otherwise not available.

B. The “Preliminary” Injunction Sought by Plaintiff Would Constitute a Final Judgment From Which Defendant Would Have No Effective Appeal.

That plaintiff is not entitled to the “preliminary” relief it seeks is furthermore made clear by the fact that it would have the force and effect of a final judgment from which the government would have no appeal. The traditional purpose of a preliminary injunction is to preserve the status quo so that the court can issue a meaningful decision on the merits. Accordingly, because preliminary injunctive relief is not intended to provide plaintiffs with a means to bypass the litigation process and achieve rapid victory, “it is generally inappropriate for a federal court at the preliminary injunction stage to give a final judgment on the merits.” Univ. of Texas v. Camenisch, 451 U.S. 390, 397 (1981); see also 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”).

Plaintiff’s motion for a preliminary injunction violates these principles. In particular, CREW does not seek to preserve the status quo, but instead seeks a court order to require the

Secret Service to process and disclose non-exempt White House and VPR visitor records within 10 days of the issuance of the order. But as noted above, plaintiff's alleged entitlement to the records it seeks requires resolution of a threshold question of law—whether the key records at issue are agency records subject to the FOIA or are Presidential records—that is currently before the D.C. Circuit for decision. In effect, plaintiff attempts by means of its requested “preliminary” relief to bypass the appellate process and to obtain from this Court “a final judgment on the merits,” Univ. of Texas, 451 U.S. at 397, from which there would be no meaningful appeal available to the government.

None of the cases relied on by plaintiff supports the issuance of such remarkable relief. Plaintiff asserts that courts have “recognized the general availability of injunctive relief to compel expedited processing of FOIA requests.” Pl. Mem. at 5. However, all but one of the cases are completely inapposite because they concerned the question of whether expedited processing was appropriate and, if so, the speed at which a given FOIA request would be processed; the issues raised were of timing. Here, by contrast, there exists the threshold legal question of whether the records that plaintiff seeks are even subject to the FOIA. The remaining case on which plaintiff relies, The Washington Post v. Dep't of Homeland Sec., 459 F. Supp. 2d 61 (D.D.C. 2006), did address whether White House and VPR visitor records are subject to the FOIA. And while Judge Urbina did grant a preliminary injunction requiring the production of White House and VPR visitor records, DHS took an immediate appeal from the court's ruling and received a stay from the D.C. Circuit. See Order, The Washington Post v. Dep't of Homeland Sec., attached hereto as Ex. J (granting emergency motion for stay pending appeal as

DHS “satisfied the stringent standards required for a stay pending appeal”).² Tellingly, that stay was entered notwithstanding the Washington Post’s stated urgent need to disseminate visitor record information prior to impending midterm elections in order to inform the public.

For these reasons, the Court should not even entertain plaintiff’s motion for emergency relief. Plaintiff’s motion contravenes the principles underlying the issuance of preliminary relief as it would effectively grant CREW a final judgment while denying the government the ability to appeal from such relief as is its right.

II. EVEN UNDER THE FOUR-PART PRELIMINARY INJUNCTION TEST, THIS COURT SHOULD DENY PLAINTIFF’S MOTION FOR A PRELIMINARY INJUNCTION.

Even under the traditional four-part test for analyzing preliminary injunction applications, plaintiff cannot prevail. See CityFed Fin. Corp., 58 F.3d at 746 (setting forth four-part test). A court typically must find that these four factors together justify the drastic intervention of a preliminary injunction. See id. at 747. A party can compensate for a lesser showing on one factor by making a very strong showing on another factor. See CSX Transp., Inc. v. Williams, 406 F.3d 667 (D.C. Cir. 2005).

Plaintiff in this case cannot make a sufficient showing on any of the four factors. CREW’s entire argument in support of a preliminary injunction is based on a false premise: namely, that the Secret Service’s obligation to produce the key visitor records in this case is well-settled, such that the Court need only resolve the question of whether CREW is entitled to “expedited processing.” See, e.g., Pl. Mem. at 10 (“this Court must consider whether plaintiff is

² After the government filed its opening brief on appeal, the plaintiff elected to dismiss its FOIA action; the appeal was dismissed and the district court decision vacated. See No. 06-5337, Order of Feb. 27, 2007.

entitled to expedited processing of its request and whether DHS has processed the request consistent with that entitlement”); *id.* at 14 (“Unless the Court immediately enjoins DHS from failing to comply with its obligations to expedite the processing of plaintiff’s FOIA request, plaintiff will suffer irreparable injury.”); *id.* at 16 (“Requiring DHS to comply with the law and expedite its processing of CREW’s FOIA request can hardly be characterized as an undue ‘burden’”); *id.* at 17 (“The public interest favors the issuance of an order directing defendant DHS to immediately process and release the requested information.”). That premise sweeps aside the threshold question of law that is pending on appeal before the D.C. Circuit in related cases brought by CREW. When properly framed, each of the preliminary injunction factors favors denial of plaintiff’s motion.

A. Likelihood of Success on the Merits.

CREW asserts that it is likely to succeed on the merits because it is “entitled to expedited processing of its request.” Pl. Mem. at 10-14. As noted above, that argument puts the cart before the horse: the threshold legal issue raised by this case is whether the key categories of visitor records that CREW seeks are even subject to the FOIA. Of course, if these records are not “agency” records, CREW’s claims under the FOIA fail as a matter of law.

For the reasons set forth above, it is unnecessary in the current posture of this case for the Court to resolve or assess the merits of this threshold legal question. As demonstrated by Judge Lamberth’s memorandum opinions in CREW 2 and CREW 4, *see* CREW 2, 527 F. Supp. 2d 76; CREW 4, 592 F. Supp. 2d 127, there are at a minimum “serious legal questions going to the merits,” *see* Population Inst. v. McPherson, 797 F.2d 1062, 1078 (D.C. Cir. 1986), thus justifying

consideration of the other preliminary injunction factors.³

B. Irreparable Injury to Plaintiff.

CREW argues that it will suffer irreparable injury “[u]nless the Court immediately enjoins DHS from failing to comply with its obligations to expedite the processing of plaintiff’s FOIA request.” Pl. Mem. at 14. More specifically, plaintiff contends that it needs emergency injunctive relief because a particular urgency exists for the public to know whether specifically identified health care executives have visited the White House in order “to inform the public about the possible influences to which the administration may have been subject in formulating its health care policy . . .” Pl. Mem. at 4. But as noted above, the White House has identified the health care industry executives of interest to plaintiff who have visited the White House and the dates on which the visits took place. See Ex. A.⁴ There cannot, as a result, be any purported urgency for the release of the visitor records that plaintiff seeks. CREW, to be sure, identifies other information that might (or might not) be available in the records it seeks, including the time and location of a scheduled appointment at the White House, the name of the person who requested that a visitor be admitted to the White House, and the name of the recipient of the visitor. Pl. Mem. at 7. However, whatever value such information (to the extent it exists) might

³ The question whether the key visitor records at issue are “agency records” raises substantial separation of powers concerns. As the D.C. Circuit has recognized, Congress’s exclusion of the President and Vice President from the FOIA’s definition of “agency” was compelled by appropriate respect for separation of powers. See Armstrong v. Executive Office of the President, 1 F.3d 1274, 1292 (D.C. Cir. 1993). While CREW argues that there are “multiple court rulings that the requested records are agency records for which the Secret Service . . . has a legal obligation to search and produce under the FOIA,” Pl. Mem. at 2, the D.C. Circuit has yet to address this issue and its constitutional underpinnings.

⁴ The White House’s search included White House visitor records through June 30, 2009.

have, it cannot justify the issuance of the extraordinary injunctive relief that plaintiff asks this Court to issue. Dorfmann, 414 F.2d at 1173 (preliminary injunctive relief is an extraordinary remedy, and the power to issue such an injunction “should be sparingly exercised”).

C. Harm to Other Interested Parties.

CREW dismisses this prong, asserting that “[r]equiring DHS to comply with the law and expedite its processing of CREW’s FOIA request can hardly be characterized as an undue ‘burden’” since “[a]ll that plaintiff seeks through a preliminary injunction is the government’s compliance with what the law already mandates.” Pl. Mem. at 16. That assertion ignores the interest of the White House—which is certainly an “interested party”—in ensuring the proper treatment of these records under the Presidential Records Act. In any event, “what the law . . . mandates” is an issue pending before the D.C. Circuit. And, as noted extensively in Part I.A, supra, any preliminary injunction, without a corresponding stay, would irreparably harm the government by precluding any meaningful right of appeal.

D. The Public Interest.

Acknowledging the great public interest in the health care reform debate, the White House has already provided plaintiff with a letter identifying when each of the 18 health care executives for whom CREW sought records visited the White House. See Ex. A.⁵ The question, then, is not whether the White House should disclose visits by the health care executives—it already has—but whether the public interest in additional information requires this court to award extraordinary relief, rather than to allow these legal issues to be resolved in the ordinary

⁵ The Office of the Vice President has also searched relevant visitor records and determined that none of the 18 health care executives that CREW identified in its FOIA request visited the VPR during the time period January 21, 2009 through June 30, 2009.

course.

That question must be evaluated in light of the purposes of the FOIA, which is to understand the internal workings of the federal agency whose records are sought, which, CREW argues in this case, is the Secret Service. Quiñón v. FBI, 86 F.3d 1222, 1231 (D.C. Cir. 1996) (the public interest protected by the FOIA "is that in '[o]fficial information that sheds light on an agency's performance of its statutory duties'" (emphasis added) (quoting Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989)); see Computer Prof'ls for Soc. Responsibility v. Secret Service, 72 F.3d 897, 904 (D.C. Cir. 1996) ("the basic purpose of the [FOIA] [is] to open agency action to the light of public scrutiny"). The records at issue here shed little if any light on the activities of the Secret Service, and plaintiff makes no attempt to argue to the contrary. See Quiñón, 86 F.3d at 1231 ("Disclosure of information that 'reveals little or nothing about an agency's own conduct' does not further the public interest envisaged by FOIA.") (quoting Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. at 773).

Moreover, it is entirely speculative whether any harm to the public interest would result from the denial of plaintiff's motion for a preliminary injunction. Such "speculative harm [can]not outweigh the immediate harm" that DHS and the President would suffer "in the absence of a stay," namely, the deprivation of their right to appeal. Hechinger v. Metropolitan Washington Airports Auth., 845 F. Supp. 902, 910 (D.D.C. 1994); see Standard Havens Prods., Inc. v. Gencor Indus., Inc., 897 F.2d 511, 515-16 (Fed. Cir. 1990).

III. THIS COURT SHOULD STAY THIS ENTIRE ACTION PENDING THE D.C. CIRCUIT’S RESOLUTION OF THE APPEAL IN CREW 2 AND CREW 4.

For the same reasons that plaintiff’s application for a preliminary injunction is inappropriate, this Court should stay this entire matter pending the D.C. Circuit’s issuing a decision in CREW 2 and CREW 4. This Court has broad discretion to stay all proceedings in an action pending the resolution of proceedings elsewhere. Int’l Painters and Allied Trades Indus. Pension Fund v. Painting Co., 569 F. Supp. 2d 113, 120 (D.D.C. 2008); see generally Landis v. N. Am. Co., 299 U.S. 248, 254 (1936) (“the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants”).

The D.C. Circuit is likely to resolve the legal issue at the heart of this case—whether the key visitor records are “agency” records subject to the FOIA.⁶ Absent a stay, the parties will be obligated to present to this Court for adjudication the same arguments that are expected to be made before the D.C. Circuit in the related cases brought by CREW. It would be a waste of both this Court’s and the parties’ time and resources to attempt to resolve those core issues in light of the pending appeal in CREW 2 and CREW 4.

⁶ There are a small number of categories of records that may contain documents responsive to CREW’s FOIA request and that DHS would not dispute, at least for purposes of this litigation, are agency records. See, e.g., CREW 2, 527 F. Supp. 2d at 81 (describing Secret Service Form 1888); see also July 7, 2009 Letter from Craig W. Ulmer to Anne L. Weismann, attached to Pl. Mem. as Ex. B (Dkt. No. 4-3 at 21 (07/22/2009) (indicating “vast majority, if not all” of records to be searched are not agency records)). Any such records may, however, be subject to exemptions. While the status of other categories of records may not be resolved by the appeal in CREW 2 and CREW 4, see, e.g., CREW 4, 592 F. Supp. 2d at 131, a decision by the D.C. Circuit on the scope of DHS’s agency records argument is likely to inform the treatment of such records, if any such responsive records even exist. For these reasons, and to avoid piecemeal searching and litigation, DHS seeks a stay of this entire action pending resolution of the appeals in CREW 2 and CREW 4.

CONCLUSION

For the foregoing reasons, plaintiff's motion for a preliminary injunction should be denied, and this Court should stay this action pending a decision by the D.C. Circuit.

Dated: August 3, 2009

Respectfully submitted,

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THE WHITE HOUSE
WASHINGTON

July 22, 2009

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Dear Ms. Weismann:

I am writing in response to your Freedom of Information Act ("FOIA") request to the United States Department of Homeland Security dated June 22, 2009. The request seeks records relating to any visits to the White House by eighteen health care executives since January 21, 2009. I understand that the Department of Homeland Security responded to your request by letter dated July 7, 2009. The letter stated that the legal status of White House visitor records is the subject of ongoing litigation and that the White House is reviewing its policy governing the discretionary release of such records.

There is no more important issue than health care reform, and the President is fully committed to helping Americans live healthier lives, preventing illness, and increasing the competitiveness of our country. Given the compelling public interest in the health care debate and the President's goal of increasing transparency in government, we have reviewed the White House visitors records related to the eighteen individuals listed in your request through June 30, 2009. The President has decided to exercise his discretion and release the following information, which is reflected in the relevant visitor records:

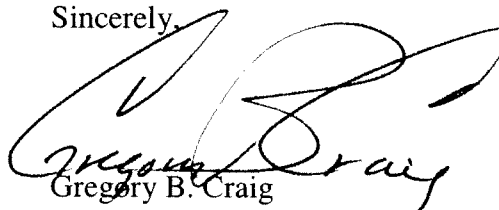
- Bill Tauzin visited the White House on March 5, May 19, June 2, and June 24.
- Karen Ignagni visited the White House on March 5, 6, and 11 and June 30.
- Richard Umbdenstock visited the White House on February 4, February 23; March 5, March 25, March 30; April 6, and May 22.

- J. James Rohack visited the White House on March 25, June 22, and June 24.
- William C. Weldon visited the White House on May 12.
- Jeffrey B. Kindler visited the White House on March 5, May 6, and June 2.
- Stephen J. Hemsley visited the White House on May 15 and 22.
- Angela F. Braly visited the White House on February 13.
- George Halvorson visited the White House on March 27 and June 5.
- Jay Gellert visited the White House on February 10, March 11, and March 20.
- Thomas Priselac visited the White House on April 3.
- Richard Clark visited the White House on March 24.
- Wayne T. Smith visited the White House on June 4.
- Rick Smith visited the White House on May 19 and June 2.

In addition to the above information, the White House visitor records reflect that Mr. Tauzin, Ms. Ignagni, Mr. Umbdenstock, Mr. Rohack, Mr. Kindler, Mr. Halvorson, Mr. Gellert, Mr. Priselac, David Nexon, and Rick Smith were scheduled to attend a May 11 meeting at the White House. We understand that all the individuals attended the meeting except Mr. Kindler, and that Mr. Clark attended as well. Finally, the visitor records do not reflect any visits by the following individuals: Ben J. Lipps; William A. Hawkins, III; or Robert L. Parkinson.

We are continuing to review your specific FOIA request, as well as the White House's general policy governing the discretionary release of visitor records.

Sincerely,

A handwritten signature in black ink, appearing to read "Gregory B. Craig". The signature is fluid and cursive, with the first name "Gregory" being more prominent and larger than the last name "Craig".

Gregory B. Craig
Counsel to the President

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

CITIZENS FOR RESPONSIBILITY AND)
ETHICS IN WASHINGTON,)
)
Plaintiff,)
)
v.)
)
U.S. DEPARTMENT OF HOMELAND)
SECURITY, et al.,)
)
Defendants.)
)

CIVIL ACTION NO.
1:06-cv-01912-RCL

CONSENT MOTION FOR STAY PENDING APPEAL

The parties have consented to the issuance of a stay on condition that the government file a motion to expedite briefing of its appeal in the D.C. Circuit. Pursuant to the foregoing agreement, the parties respectfully request that the court stay its December 17, 2007 Order pending resolution of the government's appeal.

Dated: December 21, 2007

Respectfully submitted,

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

CARL J. NICHOLS
Deputy Assistant Attorney General

JEFFREY A. TAYLOR
United States Attorney

ELIZABETH J. SHAPIRO, D.C. Bar 418925
Assistant Director

/s/

JOHN R. TYLER, D.C. Bar No. 297713
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COUNSEL FOR DEFENDANTS

/s/

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Citizens for Responsibility and Ethics
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Phone: (202) 408-5565
Fax: (202) 588-5020

COUNSEL FOR PLAINTIFF

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

<hr/>)	
CITIZENS FOR RESPONSIBILITY)	
AND ETHICS IN WASHINGTON,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 06-1912 (RCL)
)	
U.S. DEPARTMENT OF)	
HOMELAND SECURITY, et al.,)	
)	
Defendants.)	
<hr/>)	

ORDER

Upon consideration of the parties' Joint Motion for Stay Pending Appeal, it is hereby ORDERED that the parties' consent motion is GRANTED, and it is further ORDERED that enforcement of this Court's December 17, 2007 order is stayed pending resolution of the government's appeal, contingent on the government filing a motion for expedition in the Court of Appeals on or before December 31, 2007.

SO ORDERED.

Signed Royce C. Lamberth, United States District Judge, on December 21, 2007.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND)
ETHICS IN WASHINGTON,)
)
Plaintiff,)
)
v.)
)
U.S. DEPARTMENT OF HOMELAND)
SECURITY, et al.,)
)
Defendants.)

CIVIL ACTION NO.
1:06-cv-01912-RCL

DEFENDANTS' SECOND MOTION FOR STAY PENDING APPEAL

The defendants, by their undersigned counsel, hereby respectfully move that implementation of this Court's Order of January 9, 2009 (docket #76), be stayed pending resolution of defendants' appeal therefrom.

The grounds for this motion are set forth in the accompanying Memorandum of Points and Authorities in Support of Defendants' Second Motion for Stay Pending Appeal.

In accordance with Local Rule 7(m), John R. Tyler, counsel for the defendants, has conferred with counsel for the plaintiff regarding the relief sought in this motion. Counsel for the plaintiff has indicated that CREW does not oppose a stay of the obligation to immediately produce all responsive non-exempt documents but does oppose a stay of defendant U.S. Department of Homeland Security's obligation to conduct a full search consistent with the Court's memorandum opinion and order.

Dated: January 14, 2009

Respectfully submitted,

GREGORY G. KATSAS
Assistant Attorney General

JEFFREY A. TAYLOR
United States Attorney

JOHN R. TYLER, D.C. Bar 297713
Assistant Director

/s/ W. Scott Simpson

W. SCOTT SIMPSON, Va. Bar 27487
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COUNSEL FOR DEFENDANTS

Dated: January 21, 2009

Respectfully submitted,

MICHAEL F. HERTZ
Acting Assistant Attorney General

JOHN R. TYLER (DC Bar 297713)
Assistant Branch Director

/s/ Brad P. Rosenberg
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COUNSEL FOR DEFENDANT

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

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CITIZENS FOR RESPONSIBILITY AND)		
ETHICS IN WASHINGTON,)		
)		
Plaintiff,)		
)	CIVIL ACTION NO.	
v.)	1:08-cv-01535-RCL	
)		
U.S. DEPARTMENT OF HOMELAND)		
SECURITY,)		
)		
Defendant.)		
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ORDER

This matter comes before the Court on Defendant’s Motion to Stay Pending Appeal.

Upon consideration of the Defendant’s motion and of all materials submitted in relation thereto, it is hereby

ORDERED that Defendant’s motion is GRANTED; and it is further

ORDERED that the effect of this Court’s Order of January 9, 2009 [18] be, and it hereby is, STAYED pending resolution of Defendant’s appeal therefrom.

SO ORDERED.

Date: January 22, 2009

/s/
Royce C. Lamberth
United States District Judge

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5014

September Term 2008

1:06-cv-01912

Filed On: July 20, 2009 [1197074]

Citizens for Responsibility and Ethics in
Washington,

Appellee

v.

United States Department of Homeland
Security and Archivist of the United States,

Appellants

Consolidated with 09-5015

ORDER

It is **ORDERED**, on the court's own motion, that the following briefing schedule will apply in this case:

Appellants' Brief	September 3, 2009
Appendix	September 3, 2009
Appellee's Brief	October 5, 2009
Appellants' Reply Brief	October 19, 2009

All issues and arguments must be raised by appellants in the opening brief. The court ordinarily will not consider issues and arguments raised for the first time in the reply brief.

Parties are strongly encouraged to hand deliver their briefs to the Clerk's office on the date due. Filing by mail could delay the processing of the brief. Additionally, parties are reminded that if filing by mail, they must use a class of mail that is at least as expeditious as first-class mail. See Fed. R. App. P. 25(a). All briefs and appendices must contain the date that the case is scheduled for oral argument at the top of the cover, or state that the case is being submitted without oral argument. See D.C. Cir. Rule 28(a)(8).

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Cheri W. Carter
Deputy Clerk

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UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY
AND ETHICS IN WASHINGTON

CIVIL ACTION NO. 06-1912
08-1535

WASHINGTON, D.C.

VERSUS

THURSDAY, JANUARY 15, 2009

U.S. DEPARTMENT OF HOMELAND
SECURITY

4:30 P.M.

STATUS VIOLATION

BEFORE THE HONORABLE ROYCE C. LAMBERTH

UNITED STATES DISTRICT COURT CHIEF JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF,

Anne L. Weismann, Esq.
CITIZENS FOR RESPONSIBILITY
AND ETHICS IN WASHINGTON
1400 Eye Street, NW
Suite 450
Washington, DC 20005
(202) 408-5565 Ext. 108

FOR THE DEFENDANT,

Brad P. Rosenberg, Esq.
John R. Tyler, Esq.
Elizabeth Shapiro, Esq.
DEPARTMENT OF JUSTICE
Civil Division, Federal
Programs Branch
20 Massachusetts Avenue, NW
Washington, DC 20001
(202) 514-3374

REPORTED BY:

WENDY C. RICARD, RPR, CCR
OFFICIAL COURT REPORTER
333 Constitution Avenue, NW
Room #6718
Washington, DC 20001
202-354-3111

Proceedings recorded by mechanical stenography.

Transcript produced by computer-aided transcription.

P-R-O-C-E-E-D-I-N-G-S

1
2 THE DEPUTY CLERK: Civil action 06-1912, the
3 Citizens for Responsibility and Ethics in Washington versus
4 the United States Department of Homeland Security, et al, and
5 civil action 08-1535, Citizens for Responsibility and Ethics
6 in Washington versus the U.S. Department of Homeland Security.

7 Counsel, please introduce yourself to the Court.

8 MS. WEISMANN: Anne Weismann on behalf of CREW, and
9 with me is our executive director Melanie Sloan(Phonetic).

10 THE COURT: Okay.

11 MR. ROSENBERG: Good afternoon, Your Honor. My name
12 is Brad Rosenberg on behalf of the federal defendants. With
13 me is Mr. John Tyler and Ms. Elizabeth Shapiro.

14 THE COURT: Okay. Let me ask you a couple of
15 questions, Mr. Rosenberg, first, and then we'll go to Ms.
16 Weismann. I'm not sure I fully understand a couple of issues.

17 So in 1912, you moved for a stay; in 1835, you may
18 have, but I have not seen it yet.

19 MR. ROSENBERG: We have not moved for a stay yet,
20 nor have we filed a notice of appeal in that case yet.

21 THE COURT: Okay. And is -- in your representations
22 in the 1912 stay motion, you indicate that there has not been
23 a search, and the records have not been segregated.

24 MR. ROSENBERG: In 1912, there has been a search of
25 those records that were within the Secret Services'

1 possession.

2 THE COURT: Right. Right. Right.

3 MR. ROSENBERG: The subject records that are at
4 issue here -- in other words, the records that have been
5 transferred to the White House and for which the Secret
6 Service does not have copy have not yet been searched.

7 THE COURT: Right. And no one has ever put them
8 together so they could not likely be segregated out in the
9 next couple of days easily.

10 MR. ROSENBERG: I think that that is fair especially
11 in light of the demands of the Secret Service in light of the
12 upcoming inauguration.

13 THE COURT: Right. Right. Now, when they go to the
14 Archives -- well, the boxes are going to go to the Archives.

15 MR. ROSENBERG: Many of the boxes are in fact now at
16 Archives.

17 THE COURT: Okay.

18 MR. ROSENBERG: There are still some WAVES records
19 that the WHORM has on CD-ROMs, and they are also in the
20 process of being transferred to the Archives. Though, all of
21 those records are being segregated, my understanding is that
22 they are going to be right down the street at the main
23 Archives building along with the Declaration of Independence
24 and the Constitution, but they will be segregated and
25 separated so that they won't be mixed with any other records

1 that are being transferred over from the White House.

2 THE COURT: And that's what, the WAVES records?

3 MR. ROSENBERG: These are all of the subject records
4 in this case --

5 THE COURT: That came over from DHS to the White
6 House.

7 MR. ROSENBERG: That went from DHS to the White
8 House. Now, there are actually two sub-categories to those
9 records. One category would be those records that were
10 transferred to the White House and for which the Secret
11 Service did not keep a copy, but my understanding is also
12 included in that set of records, and out of an abundance of
13 caution, are any records the Secret Service has transferred
14 that relate to visitors generally.

15 THE COURT: Okay.

16 MR. ROSENBERG: So it actually is, if anything, an
17 over-inclusive set.

18 THE COURT: Now, is there an issue that if those are
19 in the Archives' custody that the new President cannot release
20 them unless the old President agrees; is that part of the
21 issue or not? I don't really understand this.

22 MR. ROSENBERG: I don't think that's an issue.

23 THE COURT: Because I've ordered it so I don't really
24 think it matters whether the President agrees. If the stay
25 expires at some point or whatever, then I don't think it

1 really matters if the President agrees; am I wrong or not?

2 MR. ROSENBERG: No. You are not wrong. You've
3 ordered that these records be treated for purpose of this
4 litigation as federal records, and that is exactly how we are
5 treating them.

6 THE COURT: Right.

7 MR. ROSENBERG: The question that has given rise to
8 this hearing is what to do with a substantial volume of
9 records that is in the physical possession of the White House,
10 notwithstanding this Court's order that they are in fact in
11 the legal custody of the Secret Service come Inauguration Day.

12 THE COURT: Right.

13 MR. ROSENBERG: And a decision was made in full
14 conformity, we believe, with this Court's order and the
15 Federal Records Act to transfer those records to the agency
16 that is best equipped to handle large volumes of records,
17 which is, of course, NARA, and those records that I mentioned
18 are being segregated and kept separate, and upon order of this
19 Court, the Secret Service would be able to search those
20 records just as well at NARA as they would if they were
21 actually in the Secret Service's physical custody.

22 THE COURT: And there wouldn't be any delay by them
23 having been at NARA rather than the White House?

24 MR. ROSENBERG: No, Your Honor.

25 THE COURT: So the exercise Judge Bates went through

1 with those records he had that Mr. Tyler was involved in
2 wouldn't really be applicable here. You wouldn't need that
3 kind of exercise.

4 MR. ROSENBERG: I don't think so. Mr. Tyler is
5 shaking his head, yes, so I --

6 THE COURT: Okay.

7 MR. ROSENBERG: At the bottom, if this Court were to
8 order a search of those records, notwithstanding our motion to
9 stay a search, the Secret Service would be able to access
10 those records at NARA.

11 So what it really comes down to is this, physically,
12 where are they located.

13 THE COURT: Right. Okay. Ms. Weismann.

14 MS. WEISMANN: Your Honor, I must say that we were
15 very troubled to learn last night when we got the stay papers
16 in this case that the records had already physically been
17 transferred to NARA because they received this Court's order
18 last week which directed them to do a search, and they had no
19 authority, in our view, to transmit those records out of their
20 physical custody.

21 In addition, they were well aware of our request
22 pending with this Court and our position that the records
23 should not be transferred. Indeed, in discussions when I had
24 proposed that they make copies and that that would satisfy us,
25 I also pointed out that it was far from clear to me that they

1 could do a transfer without leave of this Court, and I think
2 they have taken it on themselves to make that transfer despite
3 this Court's ruling and despite our request, part of which was
4 that the records not physically be transferred to NARA, and we
5 are very troubled by that, and we think the Court should be as
6 well. I think there is a difference.

7 We just received a ruling from Judge Kollar-Kotelly
8 in separate lawsuit that I'm still digesting. It's where she
9 renewed a stay in our lawsuit brought against the Office of
10 Administration. The case is on appeal, and the issue was
11 what's going to happen to the documents while the status of
12 that entity is either an agency or Presidential Records Act
13 component gets sorted out, and in renewing the stay, she
14 pointed out some of the uncertainties that there are if the
15 records go to NARA if the Court can in fact direct their
16 return. I mean it's not at all clear what happens. It
17 creates problems that don't need to be raised here.

18 I mean we have made two proposals; one --

19 THE COURT: Well, in light of the representations he
20 just made, I don't know why it's a problem.

21 MS. WEISMANN: There's no -- I mean --

22 THE COURT: You don't think I can enforce what he
23 just represented; I bet I can.

24 MS. WEISMANN: I think it's a problem in one of the
25 cases. I would -- far be it for me to tell this Court what it

1 has authority to do, and I very much respect the authority of
2 the Court.

3 I think there is a problem in one of the cases which
4 is the case where NARA is not a party, and I suppose you could
5 do it under the bailiwick or whatever in aid of the Court's
6 jurisdiction, which, of course, you always have authority to
7 do, but as the point here is there was really no need for
8 these records to go to NARA because the vast majority of
9 White House visitor records are being retained by the Secret
10 Service, and there was absolutely no reason why this sub-set
11 could not have been transferred directly to the Secret Service
12 where all of the records could be maintained as a whole
13 collection.

14 It just doesn't make any sense to split them up, and
15 they haven't offered any compelling reason to do. It's their
16 position that all of those records are presidential. This
17 Court has ruled otherwise, and so we think that the most
18 appropriate --

19 THE COURT: But I have a thousand people who can
20 reverse me on that.

21 MS. WEISMANN: Yes. But until they do, that is the
22 Court's ruling.

23 THE COURT: But I always grant a stay in a FOIA case.
24 I think every judge does, so you know I'm going to grant the
25 stay. So, then, the question is what is the point of what

1 we're doing now?

2 MS. WEISMANN: Well, I would like to be heard.

3 THE COURT: Okay.

4 MS. WEISMANN: I mean, obviously, we want to
5 respond. What our position is on the stay -- and we so
6 represented to the government -- is we do not oppose a stay of
7 the obligation to produce the documents. We understand full
8 well the case law and the fact that to do so would effectively
9 moot their case.

10 THE COURT: Right.

11 MS. WEISMANN: We do oppose the stay as far as the
12 search is concerned. I don't think they can show irreparable
13 harm. In fact, as this Court knows from the earlier ruling in
14 this case from the DC Circuit -- and a ruling of this Court
15 that just directs an agency to perform a search is not even an
16 appealable order.

17 And so we think they should be required to complete
18 that search, and we'll be heard on that -- unless the Court
19 shortens our time -- our intent was to file it within the --
20 we're happy to accommodate the Court in any way.

21 THE COURT: I don't think you need to file anything
22 because I'm going to grant it.

23 MS. WEISMANN: Even as to the search?

24 THE COURT: Sure. I don't see how there's any harm
25 with his representations he just made that it's not going to

1 delay anything if I let them go to NARA. Then once my order
2 is un-stayed after I'm hopefully affirmed or something
3 happens, they're going to have to do the search, and NARA is
4 going to have to respond, and NARA is before the Court.

5 Now, I understand in 1835 it might be a different
6 question. They didn't move for a stay in 1835, and I'll deal
7 with that separately.

8 MS. WEISMANN: I just respectfully submit they are
9 the ones that have the burden of showing irreparable harm, and
10 I don't think they can do that with respect to the search.

11 THE COURT: I think having to do the search in these
12 few days before the Inauguration for the Secret Service is
13 irreparable injury to the Secret Service. I'm not going to
14 make them do it.

15 So the stay will be granted, and your request will
16 be denied.

17 MS. WEISMANN: I would note, though, from our
18 position that this is -- from our perspective, this is a
19 situation very much of their own making.

20 THE COURT: I understand. But they want to preserve
21 forever their right to save their presidential records. They
22 don't want to have any weakness that they have made a copy or
23 anything. The President's in total control. I say he's not,
24 and we'll see what the Court of Appeals says.

25 MS. WEISMANN: I do think that their unilateral

1 decision to transfer these records without leave of the Court,
2 knowing that our request was pending, was not an appropriate
3 action and arguably violated their legal obligations under the
4 FOIA, and we certainly would want to preserve any arguments we
5 would have on that.

6 THE COURT: Okay.

7 MS. WEISMANN: Thank you.

8 THE COURT: Anything else y'all want me to do?

9 MS. WEISMANN: I presume, then, that we do not need
10 to brief the stay issue the Court having --

11 THE COURT: No. Because I'll do an order as soon as
12 I leave the bench.

13 MR. ROSENBERG: Not unless the Court has any other
14 questions, Your Honor.

15 THE COURT: Thank y'all very much. You need to make
16 sure the archivist understands what you just represented
17 because I know her, and she knows me. Thank you.

18 [End of proceedings]
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C E R T I F I C A T E

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2
3 I, Wendy C. Ricard, Official United States Court
4 Reporter in and for the District of Columbia, do hereby
5 certify that the foregoing proceedings were taken down by
6 me in shorthand at the time and place aforesaid,
7 transcribed under my personal direction and supervision,
8 and that the preceding pages represent a true and correct
9 transcription, to the best of my ability and
10 understanding.

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14 _____
15 Wendy C. Ricard, RPR, CCR
16 Official U.S. Court Reporter
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WENDY C. RICARD, RPR, CCR
OFFICIAL COURT REPORTER

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5337

September Term, 2006

06cv001737

Filed On: November 1, 2006

[1002025]

The Washington Post,
Appellee

v.

Department of Homeland Security,
Appellant

BEFORE: Sentelle, Henderson, and Tatel, Circuit Judges

ORDER

Upon consideration of the emergency motion for stay pending appeal, the response thereto, and the reply, it is

ORDERED that the motion be granted. Appellant has satisfied the stringent standards required for a stay pending appeal. See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); D.C. Circuit Handbook of Practice and Internal Procedures 33 (2006).

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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CITIZENS FOR RESPONSIBILITY AND)	
ETHICS IN WASHINGTON,)	
)	
	Plaintiff,)	
)	
	v.)	Case No. 1:09-cv-01356-EGS
)	
U.S. DEPARTMENT OF HOMELAND)	
SECURITY,)	
)	
	Defendant.)	
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[PROPOSED] ORDER

Upon consideration of plaintiff’s motion for a preliminary injunction and defendant’s opposition thereto; and defendant’s motion to stay and plaintiff’s opposition thereto, it is hereby ORDERED as follows:

(1) Plaintiff’s motion for a preliminary injunction shall be, and it hereby is, DENIED.

(2) Defendant’s motion to stay shall be, and it hereby is, GRANTED. The Court concludes that it is appropriate to stay this action pending resolution of two related cases that are currently pending on appeal, Citizens for Responsibility and Ethics in Washington v. U.S. Department of Homeland Security, et al., D.C. Cir. No. 09-5014, and Citizens for Responsibility and Ethics in Washington v. U.S. Department of Homeland Security, D.C. Cir. No. 09-5015.

SO ORDERED.

ENTERED: _____

JUDGE EMMET G. SULLIVAN
United States District Court
District of Columbia