IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,	)	
Plaintiff,	)	
v.	)	Civil Action No. 18-00569
NATIONAL SECURITY AGENCY, et al.,	)	
Defendants.	)	

DEFENDANTS' REPLY MEMORANDUM
IN SUPPORT OF MOTION TO STAY PROCEEDINGS

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INTRODUCTION

Defendants National Security Agency ("NSA") and Central Intelligence Agency ("CIA") (collectively, "Defendants") seek a temporary stay of these proceedings so that the parties and the Court can conserve their time and resources in light of the forthcoming decision in *The James Madison Project, et al. v. Central Intelligence Agency, et al.*, Case No. 17-01231 (ABJ) (D.D.C.). On the other hand, Plaintiff Citizens for Responsibility and Ethics in Washington ("Plaintiff") argues against a stay because it alleges that the instant matter and *The James Madison Project* are "very different" cases. Plaintiff is mistaken. Plaintiff, like The James Madison Project, seeks records about the May 10, 2016 Oval Office meeting between President Trump and Russian government officials. And in both cases, the CIA and NSA cannot confirm or deny whether they possess responsive records for the same exact reason—any response other than a Glomar assertion would tend to confirm one way or another whether they played a role in the meeting, which itself is a classified fact exempt from disclosure. Therefore, the primary legal question before the Court will be addressed in *The James Madison Project*, and the Court's consideration of that decision may help it adjudicate the instant case and promote judicial efficiency. Further, Plaintiff has not and cannot articulate what hardship it will endure if the Court issues a temporary stay. This is especially true given Plaintiff's decision to wait nine months to initiate this litigation after it was statutorily authorized to do so. In sum, the Court should temporarily stay these proceedings.

ARGUMENT

I. A Stay is Warranted because the Government Asserted its Glomar Responses in Both Cases for Identical Reasons

Plaintiff insists that the relatively minor differences between its FOIA requests and those submitted in *The James Madison Project* caution against a stay of these proceedings. Plaintiff

misses the point.[1] Although worded slightly differently, the requests are functionally indistinguishable for purposes of the Glomar assertions. *See* Defs.' Opp'n at 1. In both cases, the NSA and CIA asserted their respective Glomar responses for identical reasons—confirming or denying whether they possess responsive information would tend to confirm, one way or another, whether they played any role in the May 10 meeting or the lead-up briefing. Such classified and statutorily-protected information is exempt from disclosure by FOIA Exemptions 1 and 3. The basis for the Glomar assertions are identical in both cases; whether the FOIA requests are word-for-word the same is simply irrelevant when assessing the merits of the Government's motion for a temporary stay.

Nor are Plaintiff's requests as different from The James Madison Project's requests as Plaintiff contends. Plaintiff claims that its request "extends beyond the classified information relating to the Islamic State and terrorism to *all* information President Trump shared at that meeting, whether or not classified, and whether or not involving terrorism." Pl.'s Opp'n at 7 (emphasis in original). But The James Madison Project's request was equally broad with respect to the May 10 meeting, asking for "[a]ny documentation – including, but not limited to, transcripts or notes – memorializing the contents of the discussion between President Trump and the two Russian Government officials in the Oval Office on May 10, 2017." Moreover, the

[1] In a footnote, Plaintiff raises two unfounded allegations. First, Plaintiff claims that Defendants should have moved to stay this case as soon as it filed the Complaint. *See* Pl.'s Opp'n at 2 n.1. But the CIA did not officially determine that a Glomar response was necessary until the first week of May 2018. *See* Ex. A. Second, Plaintiff asserts that Defendants have not properly notified the Court about the related case. *See* Pl.'s Opp'n at 2 n.1. This is simply not true; in the parties' joint proposed schedule, the Government addressed *The James Madison Project*, cited to Local Rule 40.5, and made clear its intention to move for a stay. *See* Joint Proposed Schedule, Dkt. No. 9, ¶¶ 3–4. Plaintiff suggests that the Government must file a separate "Notice of Related Case," which is inaccurate, as Local Rule 40.5(b)(3) states that Defendants must merely notify the Court "in writing."

Government cannot confirm whether it possesses any responsive records, classified or unclassified, without disclosing properly classified and statutorily-protected information. *See* Defs.' Mot. at 7. In other words, the very existence or non-existence of *any* responsive records would tend to confirm, one way or another, whether Defendants played any part in the May 10 Oval Office meeting, which is itself a classified and statutorily-protected fact.

Plaintiff's argument that it may challenge the merits of Defendants' Glomar assertions, whereas *The James Madison Project* briefing focused on whether the Government has officially acknowledged the existence of responsive records, Pl.'s Opp'n at 8–9, is also mistaken, as nothing in the requested stay prevents it from doing so. Defendants seek a stay of the proceedings in this case pending a decision in *The James Madison Project*. Once such a decision is reached, the parties would brief summary judgment in this case (assuming the presence of contested issues), having the benefit of *The James Madison Project* decision. Plaintiff would be free to raise any arguments it deems appropriate in its briefing, including any arguments not addressed to its satisfaction in *The James Madison Project* decision.

II. A Stay of these Proceedings Will Promote Judicial Economy

Plaintiff wrongly asserts that the Government is advocating for a stay simply because its requests largely overlap with The James Madison Project's request. *See* Pl.'s Opp'n. at 9–10. Although true, the salient factor driving the stay request is that the same defendant agencies in both cases have asserted Glomar responses in response to substantially similar requests for identical reasons.[2] In other words, the primary legal question before this Court will be addressed

[2] Plaintiff speculates that cases involving requests for the same or similar documents "occurs with some frequency," and faults the Government for not identifying other instances in which a stay was sought and granted in similar circumstances. Pl.'s Opp'n at 9. Of course, whether the Government could have sought stays in other cases is irrelevant to the propriety of a stay in this case. The Government rightly moved for a stay here, where a fully briefed summary judgment

in *The James Madison Project*. Defendants, therefore, have sought a stay because waiting for a decision in the parallel case may "narrow the issues . . . and assist in the determination of the questions of law involved." *Landis v. North American Co.*, 299 U.S. 248, 253, 256 (1936). While Defendants understand that a decision in *The James Madison Project* would not be controlling, the Court may benefit from that decision's analysis and reasoning. *See, e.g.*, *Hulley Enterprises Ltd. v. Russian Federation*, 211 F. Supp. 3d 269, 276 (D.D.C. 2016) (observing that a court may stay a case in light of "a separate proceeding" even if "the issues in such proceedings are [not] necessarily controlling of the action before the court").

The two cases identified by Plaintiff in support of its argument do not help its cause. *See* Pl.'s Opp'n at 10 n.3. Plaintiff contends that it is telling that the Federal Bureau of Investigation ("FBI") did not seek to stay a later-filed case seeking documents relating to the so-called "Steele Dossier," even though an earlier case also sought records from the FBI, among other agencies, regarding the same general topic. *See id.* (citing *The James Madison Project v. Dep't of Justic*e, Case No. 17-0144[3] (APM) (D.D.C.); *Judicial Watch v. Dep't of Justice*, Case No. 17-0916 (CRC) (D.D.C.)). To begin, the FOIA requests received by the FBI in these cases were significantly different. *Compare The James Madison Project v. Dep't of Justic*e, 2018 WL 294530, *1 (Jan. 4, 2018) (seeking a "two-page synopsis of the [Steele] Dossier . . . that certain executive branch officials presented to President-elect Trump in January 2017"), *with Judicial Watch v. Dep't of Justice*, 293 F. Supp. 3d 124, 126 (D.D.C. 2018) (seeking documents about communications between the FBI and Mr. Steele and records regarding a supposed payment by

motion is pending in another case involving FOIA requests submitted to the same agencies that seek records related to the very same meeting, and where those same agencies provided Glomar responses in both cases for identical reasons that apply to the records requested in both cases.

[3] Plaintiff incorrectly identified the case number as "17-00114." *See* Pl.'s Opp'n at 10 n.3.

the FBI to Mr. Steele). And the FBI in the later-filed case asserted its Glomar response based on multiple FOIA exemptions that were not at issue in the first case, including Exemptions 1, 3, and 6. *See Judicial Watch*, 293 F. Supp. 3d at 127–28.

Plaintiff also takes issue with Defendants' motion because "this court does not need the Government, or any other party, telling it what judicial economy demands." Pl.'s Opp'n at 11. The parties agree that the Court has "broad discretion" to manage its docket in the manner it deems appropriate. *Clinton v. Jones*, 520 U.S. 681, 706 (1997). But that broad discretion includes, when appropriate, the "inherent" power to stay judicial proceedings in certain cases to promote judicial economy. *Landis*, 299 U.S. at 254–55. The Government's motion simply advocates for a temporary stay in light of the pending decision in *The James Madison Project*, considering that the Court may benefit from that decision's reasoning and analysis. *See Nat'l Indus. for Blind v. Dep't of Veterans Affairs*, 296 F. Supp. 3d 131, 143 (D.D.C. 2017) (noting that the Court "would love to have the benefit of the [parallel court's] decision prior to its own consideration of the thorny legal issue presented in the instant matters").

Plaintiff suggests that the Court should ask the parties to file their briefs on the propriety of the Glomar responses, and then "this court can determine when it wishes to decide the issue[.]" Pl.'s Opp'n at 11. Plaintiff's argument discounts how a decision in *The James Madison Project* could affect the briefing, as opposed to just the decision, in this case. Depending on how the former case is decided, one or both parties may adjust their legal positions here, which could lead to a party withdrawing its brief, seeking leave to supplement its filing, or the wholesale re-briefing by both parties. Such a result would necessarily lead to inefficiencies, when the more efficient approach is to temporarily wait for a decision in *The James Madison Project*.

To conclude, although minimized by Plaintiff, a stay in this case would likely conserve the resources of the parties and the Court. *See Nat'l Indus. for Blind*, 296 F. Supp. 3d at 137 (identifying "judicial economy" as a "key interest[]" when "evaluating a motion for a stay").

III. Plaintiff Will Not Endure Any Significant Hardship in the Event the Court Grants a Temporary Stay

Plaintiff's inability to articulate any potential hardship counsels in favor of granting Defendants' stay request. *Cf. Nat'l Indus. for Blind*, 296 F. Supp. 3d at 137–38 (explaining that the movant for a stay must show a "clear case of hardship" in the event "there is 'even a fair possibility' that a stay would adversely affect another party") (quoting *Landis*, 299 U.S. at 255).

Plaintiff wrongly contends that it will suffer some undefined harm because Defendants purportedly seek an immoderate stay, *i.e.* a stay of "indefinite duration." Pl.'s Opp'n at 11. While the D.C. Circuit disallows indefinite stays absent a pressing need, it has also expressly recognized that "[t]he scope of the stay and the reasons for its issuance determine whether a stay is immoderate." *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 732 (D.C. Cir. 2012). Indeed, the Court can fashion a stay in a manner that assures the non-moving party that it will not be one of "indefinite duration." For example, a stay pending the resolution of other proceedings may be wholly appropriate if it provides for the filing of "status updates or further review." *Id.*; *accord Hulley*, 211 F. Supp. 3d at 276–77. In this case, Defendants are amenable to filing status reports to keep the Court apprised of the state of the parallel litigation. This approach will allow the Court to periodically reevaluate the stay, though a decision in *The James Madison Project* is likely forthcoming given that the cross-motions for summary judgment have been pending since November 2017. *See Landis*, 299 U.S. at 257 ("The stay is immoderate and hence unlawful unless so framed in its inception that its force will be spent within reasonable limits[.]"). As such, Plaintiff's contention that Defendants seek a stay of "indefinite duration" is simply not accurate.

Plaintiff indicates that "a stay would adversely impact the Plaintiff's interest" by delaying its hypothetical retrieval of "records relating to an unusually important and concerning episode of the Trump presidency." Pl.'s Opp'n at 12–13. First and foremost, Plaintiff's ultimate receipt of materials from the CIA and NSA is wholly speculative, as Defendants have concluded that they cannot confirm the existence or non-existence of responsive records without disclosing classified and statutorily-protected information. Moreover, Plaintiff's actions (or inaction) leading up to the initiation of this lawsuit belies the assertion that a temporary stay will cause any significant hardship. Plaintiff submitted its FOIA requests to the CIA and NSA on May 16, 2017. Compl. ¶¶ 10, 15. Neither defendant agency made a final determination with regard to the FOIA requests within 20 business days, *i.e.* June 14, 2017. *Id.* at ¶¶ 12, 18. Therefore, Plaintiff had the statutory right to file its lawsuit in this Court beginning on June 15, 2017. *See* 5 U.S.C. § 552(a)(6)(A)(i) (requiring the agency to make a determination on a FOIA request within 20 business days); 5 U.S.C. § 552(a)(6)(C) (providing that a failure to make a determination within 20 business days is treated as constructive exhaustion of administrative remedies). Plaintiff, however, chose not to do so. Instead, Plaintiff engaged in the administrative appeal process once the NSA asserted its Glomar response on August 30, 2018. *See* Compl. ¶ 12. Even after Plaintiff's appeal was denied on December 6, 2018, *id.* at ¶ 14, Plaintiff waited more than three months to file the Complaint on March 14, 2018. With regard to the FOIA request sent to the CIA, Plaintiff simply took no action, administrative or otherwise, until the commencement of this litigation. At bottom, Plaintiff did not originally believe that its document requests were of such public import that it could not wait nine months to seek judicial intervention, and as a result, its current argument that a temporary delay will cause it hardship is disingenuous.[4] *See Judicial Watch v. U.S. Dep't of Justice*, 57 F. Supp. 3d 48, 50 (D.D.C. 2014)

[4] Plaintiff asserts that the grant of expedited processing by the CIA somehow demonstrates that a stay should not be granted. Pl.'s Opp'n at 13. But the CIA's action on Plaintiff's request for

(observing that a FOIA litigant would not suffer the type of hardship that may warrant denial of a stay such as prejudice "resulting from the loss of evidence, including the inability of witnesses to recall specific facts, or the possible death of a party") (quoting *Clinton*, 520 U.S. at 681).

Plaintiff incorrectly contends that the Government will not suffer any hardship by simply recycling the briefs and declarations that it has already filed. *See* Pl.'s Opp'n at 12. Once again, Plaintiff brushes aside the potential impact a decision in *The James Madison Project* could have on the parties' respective litigating positions. Depending on the ultimate decision, Defendants may need to adjust their legal arguments or change their litigating position. At the very least, the Government will likely want to address the decision in *The James Madison Project*. Thus, the more efficient and less burdensome approach would be to simply wait for the upcoming decision.

Plaintiff also raises the perfunctory assertion that contrary decisions in the same district court on a specific legal issue would not prejudice the Government. *See* Pl.'s Opp'n at 12. Although Defendants recognize that inconsistent decisions may not occur if both cases move forward on parallel tracks, even the possibility of such a result merits consideration. As the Court is well aware, members of this district court preside over a large volume of FOIA lawsuits, many of which involve Glomar assertions by defendant agencies. If the respective courts reach contrary legal conclusions about the Glomar responses at issue here, the law in this often-litigated area could become unnecessarily muddied. By temporarily staying this case, the Court will have the benefit of reviewing a decision in *The James Madison Project* and, if necessary, the ability to enhance that Court's reasoning or distinguish the instant case. Such an approach will allow the law with regard to Glomar responses to remain consistent to the greatest extent possible.

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expedited processing does not change the fact that Plaintiff did not initiate this litigation until March 2018, even though it was statutorily able to do so in June 2017.

Finally, Plaintiff worries about the "preclusive effects" a decision in *The James Madison Project* may have on the instant proceedings. Pl.'s Opp'n at 13. Plaintiff's argument essentially concedes that the exact same legal issue presented by the instant case has been squarely put before another member of this district court. And as addressed above, the Court may benefit from the reasoning and analysis of that Court's ultimate ruling. That said, a decision in *The James Madison Project* will not preclude the parties' from fully litigating the propriety of the Glomar responses if the issue remains contested after the parallel case has concluded.

CONCLUSION

For all of the foregoing reasons, as well as those addressed in their opening brief, Defendants respectfully request that the Court stay these proceedings until 14 days after the district court issues its decision in *The James Madison Project, et al. v. Central Intelligence Agency, et al.*, Case No. 17-01231 (ABJ) (D.D.C.).

Dated: June 13, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2018, I electronically transmitted the foregoing to the clerk of court for the United States District Court for the District of Columbia using the CM/ECF filing system.

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