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 (KBJ)
NATIONAL SECURITY AGENCY	)	
and	)	
CENTRAL INTELLIGENCE AGENCY	)	
Defendants.	)	

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO STAY PROCEEDINGS

INTRODUCTION

The Defendants in this Freedom of Information Act action ask the court to award them an extraordinary remedy – to bar Plaintiff Citizens for Responsibility in Washington (CREW) from litigating its claims indefinitely pending the resolution of cross-motions for summary judgment filed in *The James Madison Project, et al. v. Central Intelligence Agency, et al.*, Case No. 17-01231 (ABJ) (D.D.C.), a case in which it is not a party. The Government argues that the documents sought by plaintiffs in both cases are indistinguishable and that the *Glomar* defenses it has asserted in both are therefore identical. As a result, the Defendants assert that a stay here would advance the cause of judicial efficiency and avert the hardship that they would experience if required to litigate the same case twice.

Taken at face value, the logical flaw in the argument is readily apparent. If this and the *James Madison Project* (hereinafter "JMP") case were in fact the same,[1] the Government would experience no hardship in filing the same brief and declarations twice, and this court and the *JMP* court would decide them in an order they deem appropriate. A stay is a solution in search of a problem. But it would cause real harm to CREW. The more the Government argues that a decision in *JMP* would be persuasive and impactful in this case, the more unfair it is for CREW's to-be stayed case to be affected by a first-decided case in which it has no voice.

However, as explained below, the more serious weakness in the Government's argument lies in its erroneous view that this and the *James Madison Project* case are the same. In reality, the documents sought by each party are only partly overlapping. The FOIA request in this case is considerably broader than that presented in *James Madison Project*. That both erodes the Government's judicial efficiency argument and, more important, threatens yet greater harm on CREW whose demand for documents beyond that of JMP's is sought to wait indefinitely.

Because the Defendants have failed to discharge their obligation to make a clear case that they have a pressing need for a stay, their motion should be denied.

FACTUAL BACKGROUND

The White House has long acknowledged that President Donald Trump met with Russian Foreign Minister Sergei Lavrov and former Russian Ambassador to the United States Sergey Kislyak in the Oval Office on May 10, 2017. On May 15, 2017, the *Washington Post* reported that, during that meeting, the President provided Mr. Lavrov and Mr. Kislyak highly classified

[1] If nothing else, the Government certainly has not acted as though the cases were the same. Although this lawsuit was filed on March 14, 2018, the Government delayed filing a Notice of Related Case in *James Madison Project* until May 10, 2018. It has not filed a Notice of Related Case in this case's docket as required by Local Rule 40.5(b)(3) and it has not filed a motion to consolidate the cases pursuant to Local Rule 40.5(d).

information provided by an intelligence gathering partner regarding threats posed by the Islamic State using laptops on aircraft. Greg Miller & Greg Jaffee, *Trump revealed highly classified information to Russian foreign minister and ambassador*, Wash. Post (May 15, 2017), https://www.washingtonpost.com/world/national-security/trump-revealed-highly-classified-information-to-russian-foreign-minister-and-ambassador/2017/05/15/530c172a-3960-11e7-9e48-c4f199710b69_story.html.

Naturally, this revelation was reported widely in subsequent press reporting and generated immediate reaction. *Trump Revealed Highly Classified Intelligence to Russia, in Break With Ally, Officials Say*, N.Y. Times (May 15, 2017), https://www.nytimes.com/2017/05/15/us/politics/trump-russia-classified-information-isis.html; *Donald Trump 'shared highly classified information with Russian officials'*, The Guardian (May 15, 2017), https://www.theguardian.com/us-news/2017/may/15/donald-trump-shared-classified-information-russia-white-house-report.

The White House moved quickly to quell the growing controversy. Later on May 15, the President's former National Security Advisor, H.R. McMaster, who was present at the Oval Office meeting, admitted that the President discussed common terrorist threats, including threats to aviation. *Press Briefing with National Security Advisor H.R. McMaster*, The White House YouTube channel (May 16, 2017), https://youtu.be/eMaRFQY23nA. However, he attempted to downplay the seriousness of the President's disclosures by stating that, "[a]t no time were any intelligence sources or methods discussed, and no military operations were disclosed that were not already known publicly." *H.R. McMaster on Reports of Trump Sharing Classified Data with Russians*, N.Y. Times (May 15, 2017), https://www.nytimes.com/video/us/politics/100000005100141/hr-mcmaster-on-reports-of-trump-sharing-classified-data-with-russia.html.

In a statement the same day, former Secretary of State Rex Tillerson corroborated General McMaster's account. *Tillerson: Trump did not discuss 'sources, methods' in meeting with Russia's Lavrov*. Reuters (May 15, 2017), https://www.reuters.com/article/us-usa-trump-russia-tillerson-idUSKCN18B2PP. On May 16, 2017, the President himself confirmed the discussion of common terrorist threats, specifying those involving airline safety: "As President, I wanted to share with Russia (at an openly scheduled W.H. meeting) which I have the absolute right to do, facts pertaining…to terrorism and airline flight safety. Humanitarian reasons, plus I want Russia to greatly step up their fight against ISIS & terrorism." Donald Trump (@realDonaldTrump), Twitter (May 16, 2017, 8:30 AM, 8:13 AM), https://twitter.com/realDonaldTrump/status/864436162567471104 and https://twitter.com/realDonaldTrump/status/864438529472049152.

Immediately following the President's tweet, by letter dated May 16, 2017, CREW filed FOIA requests with the NSA and CIA seeking the following categories of information:

1. Records documenting and/or confirming a call or calls between Thomas P. Bossert, assistant to the president for homeland security and counterterrorism, and NSA Director Michael S. Rogers and/or any other NSA official concerning the meeting President Donald Trump had with Russian Foreign Minister Sergei Lavrov and Russian Ambassador Sergey Kislyak on May 10, 2017;
2. Documents relating to and reflecting the information President Trump shared with Mr. Lavrov and Mr. Kislyak during their May 10, 2017 meeting, including, but not limited to, common threats that both Russia and the United States face from terrorist organizations; and

3. Transcripts or other recordings of President Trump's May 10, 2017 meeting with Mr. Lavrov and Mr. Kislyak.

CREW's May 16, 2017 requests also sought expedited processing. CREW explained that, given the turmoil that President's Trump's disclosure of highly sensitive information to Russia caused, the urgency to restore the public's faith and confidence in our national security apparatus could not be greater. The very next day, May 17, 2017, Defendant CIA acknowledged CREW's FOIA request and, recognizing that CREW had established "compelling need" under 32 C.F.R. § 1900.34, granted its request for expedited processing. *See* Exhibit 1.

Six days *after* CREW's filing, on May 22, JMP filed FOIA requests with a broader group of government agencies: the NSA, CIA, FBI, Defense Intelligence Agency and the Department of State. It sought three categories of records:

1. Any 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;

2. Any documentation relied upon for the purpose of briefing President Trump on the intelligence information that falls within the scope of information referenced in category #1, including, but not limited to, documentation that identified the country that had originally gathered the information;

3. Any documentation – including documentation reflecting verbal statements – memorializing the briefing in which President Trump was informed of the intelligence information that falls within the scope of the information referenced in category1, including, but not limited to, documentation that identified the country that had originally gathered the information.

After receiving no response to its FOIA requests, JMP filed its lawsuit on June 22, 2017. Cross-motions for summary judgment on the threshold *Glomar* issues have been filed and are awaiting decision.

ARGUMENT

I. THE GOVERNMENT HAS A FORMIDIBLE BURDEN OF ESTABLISHING THE NEED FOR A STAY.

As the Government acknowledges, Defendants' Motion to Stay Proceedings ("Defs' Mot.") at 5, the relief it seeks – to stay a case brought by a different plaintiff while allowing another to proceed – is an "extraordinary remedy." *Nat'l Indus. for the Blind v. VA*, Civ. No. 17-cv-0997 (KBJ), 2017 U.S. Dist. LEXIS 184251, *13-14 (D.D.C. Nov. 7, 2017). As the Supreme Court has declared, "only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936); *see Belize Soc. Dev., Ltd. v. Gov't of Belize*, 668 F.3d 724, 732 (D.C. Cir.), *cert denied*, 133 S.Ct. 274 (2012). For that reason, the burden is on the Government to "make out a clear case of hardship or inequity in being required to go forward." *Wrenn v. District of Columbia*, 179 F. Supp. 3d 135, 137 (D.D.C. 2016) (quoting *Landis*, 299 U.S. at 255). That is no small task. In language that aptly describes this case, the Supreme Court held that a lower court abuses its discretion in ordering a stay "of indefinite duration in the absence of a pressing need." *Landis*, 299 U.S. at 255.

II. THE GOVERNMENT HAS NOT PRESENTED A CLEAR CASE OF A PRESSING NEED FOR AN INDEFINITE STAY.

A. The JMP FOIA Requests and the CREW FOIA Requests Are Different.

The Defendants' argument rests entirely on their view that the CREW and JMP requests are "identical," or "substantively" or "functionally" indistinguishable. Defs' Mot at 1, 6. Their efficiency arguments depend on a showing that the requests totally eclipse each other, leaving, as the Government says, "no daylight between the issues presented in the respective cases." *Id.* at 5. What is actually presented is an unexceptional partial eclipse leaving ample sunlight – the

"best of disinfectants" to government secrecy. Louis D. Brandeis, *Other People's Money and How the Bankers Use It*, 92 (1914).

First, CREW's first request, for documents reflecting calls by Thomas Bossert, former assistant to the president for homeland security and counterterrorism and the NSA, *post-date* the May 10 meeting and are thus not sought by JMP. *See* Washington Post, *supra* ("Senior White House officials appeared to recognize quickly that Trump had overstepped and moved to contain the potential fallout. Thomas P. Bossert, assistant to the president for homeland security and counterterrorism, placed calls to the directors of the CIA and the NSA, the services most directly involved in the intelligence-sharing arrangement with the partner."). JMP has not requested documents reflecting these post-meeting calls.

Second, CREW's second request is broader than JMP's second and third requests. JMP specifically seeks documents relied upon to brief President Trump on the "intelligence information" discussed on May 10, and documents memorializing that intelligence briefing. Assuming that the President received a briefing before the May 10 meeting, the focus of the request is on records relied on and reflecting the briefing of the President on the intelligence information conveyed to the Russians at the meeting.

CREW's request, in contrast, focuses less on the records reflecting information provided by staff to the President and more on information furnished by the President to the Russians. In addition, CREW's 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.[2]

[2] CREW's third request, for transcripts and recordings of the May 10 meeting, largely overlaps JMP's first request, which in addition seeks notes of the contents of the discussion.

These are not technical differences. The Government's *Glomar* defense imposes on the Defendants the burden of showing that "merely acknowledging the existence of a responsive record would itself cause harm cognizable under [a] FOIA exception." *People for the Ethical Treatment of Animals v. Nat'l Inst. of Health,* 745 F.3d 535, 540 (D.C. Cir. 2014). Naturally, the Government's presentation in the *JMP* case would focus on the asserted harm caused were the Government to confirm or deny the existence of documents responsive to the particular requests JMP made. Because CREW's request is broader than JMP's, the application of *Glomar* to areas and issues beyond JMP's requests necessarily involves a different inquiry.

Here, for example, JMP focused on records relating to Presidential briefings on particular *classified* intelligence topics disclosed to the Russian officials. CREW, however, requested documents relating to *any* information the President shared with the Russian officials at the May 10 meeting, whether or not classified. The Government's blanket *Glomar* invocation of FOIA Exemptions 1 and 3 to both requests does not make them the same. At a minimum, whether or not Exemptions 1 and 3 support the Government's *Glomar* defense in this case as to unclassified information raises a different legal issue.

A *Glomar* defense may be challenged in two ways. First, a plaintiff may challenge the agency's assertion of an exemption on its merits—that confirming or denying the existence of requested records would not result in "harm cognizable under [a] FOIA exception." *Wolf v. CIA,* 473 F.3d 370, 374 (D.C. Cir. 2007) (quoting *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982)); *De Sousa v. CIA*, 239 F. Supp. 3d 179, 190 (D.D.C. 2017). Second, the plaintiff may argue that the agency has already "officially acknowledged" the existence of a responsive record. *Wolf*, 473 F.3d at 378 (quoting *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1999)); *see also ACLU v. CIA*, 710 F.3d 422, 427 (D.C. Cir. 2013) (*ACLU II*) ("[T]he plaintiff can overcome a

Glomar response by showing that the agency has already disclosed the fact of the existence (or nonexistence) of responsive records, since that is the purportedly exempt information that a *Glomar* response is designed to protect."). The *JMP* case deals entirely with the second issue.

This case, at least the portion dealing with unclassified information, may also involve the first issue. This court has carefully examined, and rejected, *Glomar* defenses that over broadly claim that the Government cannot confirm or deny the existence of records untethered to the existence of a FOIA exemption. *See, e.g., Prop of the People v. United States DOJ*, Civ. No. 17-1193, 2018 U.S. Dist. LEXIS 67469 (D.D.C. Apr. 23, 2018) (denying cross motions for summary judgment because there may be categories of records not subject to *Glomar*); *Shapiro v. CIA*, 170 F. Supp. 3d 147, 159 (D.D.C. 2016) (finding NSA's *Glomar* response did not adequately address plaintiff's request for non-signals intelligence-related records). Thus, not only do the cases present different factual issues, but potentially different legal ones as well. The potential dissimilarity between the issues to be addressed in the two cases examined by this court in the *National Industries for the Blind* case was a major reason for denying the stay requested in that case. *National Industries for the Blind*, 2017 U.S. Dist. LEXIS 184251, *27 (rejecting stay when the case to proceed may not address all the issues presented in the case sought to be stayed). This case is no different.

B. The Government Fails to Establish a Clear Case of Harm Without a Stay.

Wrong as it is, the Government's argument and its logical conclusion are at least straightforward – when two FOIA cases are filed seeking release of the same documents, the one furthest along in litigation should always proceed and the other one always be stayed. There is no ground for nuance or distinction. One imagines that this scenario occurs with some frequency. If so, one would expect the Government to cite countless FOIA decisions granting

stays on the ground that the judge in the stayed case will later benefit from the reasoning of the decision in the first case while conserving the resources of the waiting parties. The only case the Government cites, however, is an unreported case showing a stay as a docket entry in a case brought by a *pro se* litigant in Colorado. See *Evans v. Central Intel. Agency*, Case No. 11-2544 (D. Colo. Oct. 26, 2011).

The reason is clear. The Government offers a stay as the solution to a problem that does not exist. Successive FOIA litigation in different cases does not invariably present concerns requiring a stay.[3] A decision in the first case does not necessarily impact the second. Despite the Government's view that a decision in JMF will "resolve" this case, Def's Mot. at 6, it will not. A decision in JMP is not binding on this court. *In re Executive Office of the President*, 215 F.3d 20, 24 (D.C. Cir. 2000) (per curiam) (district court decisions in the same circuit are not binding on other district judges within the circuit). Nor will it have preclusive effect in this case. *Cf. Taylor v. Sturgell*, 553 U.S. 880 (2007) (rejecting virtual representation as a basis for non-party preclusion to bar successive FOIA suit). And, it may not even be persuasive to this court.

[3] A recent example makes the point. In January 2017, the James Madison Project sued several government agencies in this court for documents relating to the "Steele Dossier." Civ. No. 17-00114 (D.D.C.). The Government asserted a *Glomar* defense. *James Madison Project v. DOJ*, 2018 U.S. Dist. LEXIS 1674 (D.D.C. Jan. 4, 2018). In May 2017, Judicial Watch sued several government agencies for a similar, but not identical, set of documents relating to the "Steele Dossier." Civ. No. 17-0916 (D.D.C.). The Government again asserted a *Glomar* defense. *Judicial Watch, Inc. v. United States DOJ*, 2018 U.S. Dist. LEXIS 18316 (D.D.C. Feb. 5, 2018). A review of the dockets shows that the Government did not move to stay one of the cases in favor of the other despite what the Government argues here --hardship of litigating both cases at once, concern about judicial economy, and worry about inconsistent judgments. Nothing terrible happened in the absence of a stay; the parties briefed the *Glomar* issues and two judges decided them, *James Madison* first and *Judicial Watch* second. We do not suggest that the Government should file stay motions in each of these sorts of cases, but its failure to do so in a very similar scenario undercuts the parade of horribles the Government claims to wish to avoid by filing one in this case.

To be sure, a second judge may benefit from the logic and rationale provided by the first deciding judge. But the Government's conception of judicial economy alone cannot justify a stay in every such case. Put bluntly, this court does not need the Government, or any other party, telling it what judicial economy demands. In most cases, a stay's effect on judicial economy is "simply imponderable." *Wrenn*, 179 F.Supp.3d at 140 (denying motion to stay pending interlocutory appeal because of uncertainties about how the resolution of the appeal will affect the district court proceeding).

If judicial efficiency means anything, it means that courts should have maximum flexibility to manage their dockets and decide cases in an order and timetable they believe appropriate. A stay, ironically, limits that flexibility. It presumes what is not necessarily true, that the case fully briefed first gets decided first. In any event, a stay is not needed to conserve judicial resources. After the *Glomar* issue is briefed here, this court can determine when it wishes to decide the issue; it can wait for *JMP* to be decided or chose to decide this case first.

The only thing clear about a stay here is that it would be one of "indefinite duration." This case would await the outcome of *JMP* and, if the plaintiffs were to lose, one would expect the Government to move to extend the stay until the appeal is resolved. Months would pass before CREW would have an opportunity to present its arguments in this very different case. Delays in resolving FOIA cases where the Government naturally opposes release of documents affirmatively benefit the Government, which should not be confused with averting hardship. That is why, when a proposed stay is one of indefinite duration, the venerable *Landis* case requires that the movant demonstrate "pressing need" for a stay, *Belize Soc. Dev. Ltd.*, 668 F.3d at 732 (quoting *Landis*), and the Government fails to do so.

Not surprisingly, the Defendants cite no FOIA cases in which the Government demonstrates a "clear case" of a "pressing need" for a stay. They assert hardship by claiming a burden in litigating "the same issue on two fronts." Def's Mot. at 7. But, given the Government's view that this and the *JMP* case are indistinguishable, there is only one front – it need merely refile its brief and declarations from *JMP* in this case. This poses no hardship at all. In reality, they are two different cases, but even if the costs of duplication were more than trivial, it would be insufficient to demonstrate hardship. *Painters' Pension Trust Fund of Wash., D.C. & Vicinity v. Manganaro Corp., Md.*, 693 F. Supp. 1222, 1225 (D.D.C. 1988) ("[T]he usual costs attendant to litigation, however great and duplicative, do not warrant a stay.").

Nor is the Government's worry about inconsistent judgments compelling. Defs' Mot. at 7. As this court explained in *National Industries for the Blind*, "[i]t is also seemingly incumbent upon the government Defendants to explain why, in our federal system, inconsistent judgments from courts in different jurisdictions should be considered inherently problematic. There are no doubt countless examples of inconsistent legal rulings in the various federal circuits that impact agency decision making; yet, somehow, the government soldiers on." *Nat'l Indus. for the Blind*, 2017 U.S. Dist. LEXIS 184251, *23. Intra-district inconsistency is not different but easier to deal with. Inconsistent orders could, for example, be appealed on a consolidated basis. In any event, a stay only avoids inconsistent judgments when the second judge follows the first and the cases are the same.

In contrast to the absence of Government hardship, a stay would adversely impact the Plaintiff's interests. FOIA's "core purpose" is to inform citizens about "what their government is up to." *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773, 775 (1989). The FOIA's intent is to "ensure an informed citizenry, vital to the functioning of a

democratic society, needed to check against corruption and to hold the governors accountable to the governed." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). That is particularly true in this case where CREW is seeking records relating to an unusually important and concerning episode of the Trump presidency.

Indeed, the day after the request was filed, Defendant CIA granted CREW's request for expedited processing, finding that the request satisfied 32 C.F.R. § 1900.34. The CIA will only make such a filing "(1) When the matter involves an imminent threat to the life or physical safety of an individual; or (2) When the request is made by a person primarily engaged in disseminating information and the information is relevant to a subject of public urgency concerning an actual or alleged Federal government activity." *Id.*, § 1900.34(c). Having determined that CREW's request involved a matter of public urgency, the Government cannot now contend a bar of indefinite length on CREW's right to seek the records at issue causes it little hardship.[4]

To be sure, we are not at the point of arguing about any preclusive effects of a ruling in *JMP* on this case whether or not there is a stay. But, a variant of the underlying danger of the use of offense non-mutual issue preclusion is in play and highlights a second unfairness to CREW were a stay entered. The Government, of course, hopes that a favorable ruling for it in *JMP* will benefit it in this case. Offensive non-mutual issue preclusion against CREW is not possible because it would "work a basic unfairness to the party bound by the first determination." *Univ. of Colo. Health at Mem. Hosp. v. Burwell,* 233 F. Supp. 3d 69, 83 (D,D.C. 2017) (*quoting Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992). But, given the highly discretionary determination to be made here, the court should mindful of the potential

[4] The Government engages in faulty calculation when it argues that CREW waited nine months to file this complaint. Defs' Mot. at 7. The NSA denied CREW's administrative appeal on December 6, 2017 and the complaint was filed March 14, 2018.

unfairness to CREW if a decision in *JMP*, a case in which CREW has not presented its arguments, has the effect in this case that the Government desires.[5] Of course, that effect is possible in the absence of a stay, but the stay the Government seeks is premised on it. A stay unnecessarily invites this hardship on CREW.

In sum, given the failure of the Government to demonstrate it requires a stay to avoid concrete hardship, this court cannot make the required "balanced finding that such need overrides the injury to the party being stayed." *Belize Soc. Dev., Ltd.*, 668 F.3d 724, 732 *(quoting Dellinger v. Mitchell*, 442 F.2d 782, 787 (D.C. Cir. 1971)).

CONCLUSION

For the foregoing reasons, the Defendants' motion for a stay should be denied.

Respectfully Submitted,

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[5] The reverse is not true because a Government loss in *JMP* may have preclusive effects against it here because the Government had a full and fair opportunity to present its arguments in *JMP*. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 332-33 (1979).