

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

JAMES MADISON PROJECT, et al.

Plaintiff

vs.

CENTRAL INTELLIGENCE AGENCY,

Defendant

Civil Action No. 07-cv-2306 (RBW)

**DEFENDANT'S SUPPLEMENT TO DEFENDANT'S MOTION FOR A STAY OF
PROCEEDINGS**

Defendant Central Intelligence Agency hereby supplements the earlier filed Defendant's Motion for a Stay of Proceedings (dkt. no. 7), which remains pending before the Court, to request a stay of proceedings in this litigation until February 28, 2009, based on the pending federal criminal investigation into the CIA's destruction of videotapes. The defendant initially requested a stay only until December 2008, but additional time is necessary to accommodate the pending federal criminal investigation.

This civil action concerns requests submitted by the plaintiffs under the Freedom of Information Act (FOIA) seeking documents pertaining to the Central Intelligence Agency's destruction of videotapes of the interrogations of detained terrorism suspects.¹ On June 9, 2008, at the request of prosecutors conducting a federal criminal investigation into the CIA's destruction of the tapes, the defendant filed a motion seeking a stay of proceedings of six months. See Defs.' Mot. for a Stay of Proceedings (dkt. no. 7). That motion remains pending

¹James Madison Project filed its request on December 9, 2007, and plaintiff Matthew Cole filed a substantially similar FOIA request on December 27, 2007. First Amended Compl. ¶¶ 22, 37.

before the Court and, pursuant to the Court's minute order of December 10, 2008, is set for a hearing on January 6, 2009. In a declaration accompanying the defendant's motion, Acting United States Attorney John H. Durham, who is supervising the criminal investigation, estimated that the investigation would continue for at least six more months, that is, at least until December 2008. Durham Decl. (dkt. no. 7) ¶ 11.

The current status of the criminal investigation is detailed in the attached Second Declaration of John H. Durham. Because the declaration reveals specific details concerning the status and direction of an ongoing criminal investigation, it is being filed on the public record in redacted form, and defendant is submitting by separate motion an unredacted version for the Court's ex parte, in camera review. See Second Decl. of John Durham ¶ 3. As discussed in Mr. Durham's declaration, the investigation into the CIA's destruction of the tapes is continuing. Several factors prevented completion of the investigation within the six-month time frame earlier estimated, including obstacles associated with the processing and exchange of classified information in connection with the investigation, as well as additional factors that cannot be described on the public record. See Second Decl. of John Durham ¶ 7. Mr. Durham now expects that the witness interviews necessitating a stay of proceedings will be completed by no later than February 28, 2009. See Second Decl. of John Durham ¶ 8. Accordingly, the defendant seeks a stay until February 28, 2009, for the reasons explained in the defendant's motion papers. See Def.'s Mot. for a Stay of Proceedings (dkt. no. 7); Def.'s Reply Mem. in Supp. of Def.'s Mot. for a Stay of Proceedings (dkt. no. 16). The plaintiffs will not be seriously prejudiced by a stay. The brief delay of eight weeks from the date of the currently scheduled hearing is outweighed by the need to protect the integrity of an important criminal investigation.

The defendant has conferred with the plaintiffs, and the plaintiffs have indicated that they

oppose entry of the requested stay.

Dated: December 31, 2008

Respectfully submitted,

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

THE JAMES MADISON PROJECT,)

and)

MATTHEW COLE)

Plaintiffs,)

v.)

Case No. 1:07cv02306 (RBW)

CENTRAL INTELLIGENCE AGENCY,)

Defendant.)

SECOND DECLARATION OF JOHN H. DURHAM

I, John H. Durham, declare as follows:

1. As noted in my previous declaration, I am Counsel to the United States Attorney for the District of Connecticut. I have been employed as a federal prosecutor since December 20, 1982, when I became a Trial Attorney for the New Haven Field Office of the Boston Strike Force on Organized Crime. I served as the Strike Force Chief in the District of Connecticut until September 1989. In September 1989, I became Chief of the Criminal Division for the United States Attorney's Office for the District of Connecticut and served in that position until March 1994, when I became the Deputy United States Attorney for the Office.¹ I became Counsel to the United States Attorney in March 2008. At various times, I have also served as the Interim United States Attorney for the District of Connecticut, Special Attorney in the District of Massachusetts investigating and prosecuting corruption involving law enforcement agencies in

¹ In the District of Connecticut, the Deputy United States Attorney is the position commonly known in other districts as the First Assistant United States Attorney.

Massachusetts, and Special Attorney in the Southern District of New York investigating allegations of corruption within a federal law enforcement agency. On January 2, 2008, Attorney General Michael B. Mukasey appointed me to serve as Acting United States Attorney for the Eastern District of Virginia in connection with a federal criminal investigation into the destruction of certain videotaped interrogations of detainees by the Central Intelligence Agency (the "CIA" or the "Agency"). In my capacity as Acting United States Attorney for the Eastern District of Virginia, I am responsible for supervising the investigative efforts of a team of lawyers and Special Agents of the Federal Bureau of Investigation conducting the investigation into the CIA tapes matter.

2. This is the second declaration that I am submitting in the above-referenced action. My first declaration, which was dated June 9, 2008, requested that the defendant in this lawsuit seek a temporary stay of this civil proceeding until such time as the criminal investigation into the CIA tapes matter is complete, which, based upon information that was available to me at that time, I estimated would take at least six more months. I stated that because the individuals who would be involved in the review of the documents requested in this lawsuit are also potential witnesses for the criminal investigation, such review would create the risk that the recollections of these potential witnesses with respect to certain events relevant to the criminal investigation would be affected. I further stated that the review of the documents necessary to respond to the plaintiffs' FOIA request would increase the likelihood of public disclosures of information – through leaks, inadvertent discussions, or otherwise – that could negatively impact the ongoing criminal investigation. Specifically, I stated that the public disclosure of such information could expose potential witnesses to what may have been said or disclosed to investigators by other

witnesses and thereby cause those potential witnesses, intentionally or otherwise, to change what they say to conform to such publicly disclosed information. I stated that if this Court required further information concerning whether to grant a stay in these matters, such information could be disclosed *ex parte* and *in camera*. The contents of my June 9, 2008, declaration are incorporated by reference herein.

3. I submit this second declaration in support of the defendant's motion to stay this civil proceeding up to and including February 28, 2009. I am preparing both a redacted version of this declaration, which contains the greatest amount of information possible on the public record, as well as an unredacted version for submission *ex parte* and *in camera*. It is necessary to submit the unredacted version *ex parte* because the redacted portions reveal specific details concerning the status and direction of an ongoing criminal investigation [REDACTED]

[REDACTED] Disclosure of the contents of this declaration would, in my estimation, significantly damage the integrity of this investigation by alerting targets and/or potential targets to the progress of our investigation and the work that remains outstanding. The statements made in this declaration are based on my personal knowledge of the facts and information obtained and reviewed in the course of my official duties.

4. Since the date that I filed my prior declaration in this matter, the criminal investigators have interviewed [REDACTED] witnesses and [REDACTED] and reviewed [REDACTED] pages of documents. Additionally, as part of our ongoing disclosure obligations to the court, our investigators provided relevant information gathered during the *Moussaoui* portion of our investigation to prosecutors at the United States Attorney's Office for the Eastern

District of Virginia. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

5. To date, the criminal investigators have interviewed [REDACTED] witnesses, [REDACTED] and are in the process of reviewing [REDACTED] pages of documents. Although a considerable portion of the work to be done in connection with the investigation has already been completed, [REDACTED] a number of additional witnesses, [REDACTED] be interviewed and/or re-interviewed.

6. [REDACTED] "as-yet uninterviewed" individuals [REDACTED]. For the reasons set forth in my prior declaration, [REDACTED] memories could be altered if the stay in this case is not extended. Other as-yet uninterviewed individuals include [REDACTED] whose recollections as to key events may be affected if there is public disclosure of the information that plaintiffs seek by way of their FOIA requests.

7. As the Court is well aware, investigations such as this, involving the handling and review of highly sensitive and compartmented information, pose particular challenges which result in inevitable delays that are not encountered in typical civil or criminal cases. Indeed, the sheer volume of materials being reviewed, a significant portion of which initially were not available to the investigators in electronic format, has consumed [REDACTED] of investigative work hours. As a consequence, investigators have not been able to complete all of the witness

interviews we had expected to complete within the six-month time frame that I had requested in my prior declaration, due to these and a number of additional obstacles. Those obstacles include the following:

a. As noted, the review of documents in preparation for witness interviews is complicated by the sensitivity of those documents. Our team has [REDACTED] pages of documents from [REDACTED] federal agencies [REDACTED]. Most of these documents are classified at the level of Top Secret and involve Sensitive Compartmented Information and thus, our team can only review these documents in designated Sensitive Compartmented Information Facilities ("SCIF"). Indeed, the sensitivity of those documents has caused otherwise simple ministerial tasks such as document processing to become complicated because those functions can only be performed in designated SCIFs by a limited number of support staff holding appropriate security clearances. Our investigators and support staff have been working diligently to overcome these challenges. Notwithstanding those efforts, the interviews of the [REDACTED] individuals mentioned in paragraph 6 remain outstanding.

b. In many instances, we have encountered delays in our interviews because those witnesses who want legal representation must have their attorneys seek and await approval from [REDACTED] to gain the requisite security clearances, a process that has taken, in several instances involving [REDACTED] witnesses, [REDACTED]. Additionally, even after those attorneys are properly approved for access to the highly sensitive and compartmented information involved in this investigation, they can only discuss this information and review documents with their client in appropriately designated SCIFs. Because of these complicating factors, it has not been unusual for our investigators to encounter delays [REDACTED] from

the time that a witness retains counsel, to the time that our investigators finally get an opportunity to interview that person.

c. Given the period of time during which the activity at the center of the criminal inquiry occurred, [REDACTED] witnesses have retired from government service. Typically an individual who has had Top Secret clearance and been read into programs involving classified, compartmented information is read out of those programs when s/he leaves the government. Investigators seeking to conduct an interview of that person at a later point in time (as has been the case in the instant investigation) then encounter not only the delays associated with getting counsel cleared, but also must take steps to have the former-government employee's security status updated and reinstated. Again, these security clearance issues can and have taken [REDACTED] to resolve.

d. The investigative team has determined that the interviews of [REDACTED]
[REDACTED]
[REDACTED] Due to the factors described in paragraph 7(a)-(c), [REDACTED]
[REDACTED] the remaining [REDACTED] interviews could not be completed within the six-month time frame that I had previously requested.

e. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

8. Investigators are now in the process of scheduling interviews with the remaining witnesses to be interviewed in this investigation, many of which have already been confirmed for the balance of this month and during the month of January 2009. Based on the investigative accomplishments to date, we anticipate that by mid-February 2009, and no later than February 28, 2009, we will have completed the interviews [REDACTED]

[REDACTED] Accordingly, we request that this Court stay this civil proceeding until and including February 28, 2009.

9. Finally, I had previously submitted declarations in two Freedom of Information Act cases pending in federal court in the Southern District of New York, *Amnesty International USA, et al. v. Central Intelligence Agency, et al.*, 07 Civ. 5435 (LAP), and *American Civil Liberties Union, et al. v. Department of Defense, et al.*, 04-CIV-4151 (AKH), requesting that the search and review of certain information related to those proceedings be stayed until late December 2008. These requests were granted by the respective District Judges. For many of the reasons that are set forth in this declaration, I have requested that Judge Preska and Judge Hellerstein extend the stay period in those proceedings in a coordinated fashion with this matter, until and including February 28, 2009.

10. For the foregoing reasons, and for those set forth in my prior declaration, I respectfully submit that this Court stay this civil proceeding until and including February 28,

2009, at which time I believe the interviews described in this declaration will be completed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Dec. 23, 2008.


JOHN H. DURHAM