

# EXHIBIT “1”

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

THE JAMES MADISON PROJECT <u>et al.</u>	*	
	*	
Plaintiffs,	*	
	*	
v.	*	Civil Action No. 07-02306 (RBW)
	*	
CENTRAL INTELLIGENCE AGENCY	*	
	*	
Defendant.	*	
	*	
* * * * *		

**DECLARATION OF MARK S. ZAID, ESQ.**

I, MARK S. ZAID, pursuant to 28 U.S.C. § 1746, hereby declares as follows:

1. I am a person over eighteen (18) years of age and competent to testify. I make this Declaration on personal knowledge and in support of the plaintiff’s Opposition to Defendant’s Motion for a Stay of Proceedings (filed June 9, 2008).

2. I am the Executive Director of the plaintiff James Madison Project (“JMP”) and have served in that position since I founded the organization in 1998. JMP is a Washington, D.C.-based non-profit organization created for the primary purpose of educating the public on issues relating to intelligence gathering and operations, secrecy policies, national security and government wrongdoing. Much of the work undertaken by JMP involves litigation under disclosure acts such as the Freedom of Information Act (“FOIA”). The principles underlying the objectives of the JMP are derived from the 1997 findings of The Commission on Protecting and Reducing Government Secrecy. Our website, which contains further information and examples of JMP’s activities, can be viewed at *www.JamesMadisonProject.org*.

3. I am also an attorney of record in this litigation for the plaintiffs. I am admitted to practice law in the States of New York, Connecticut, Maryland and the District of Columbia, as well as the D.C. Circuit, Second Circuit and Fourth Circuit Court of Appeals, and the United States District Courts for the District of Columbia, Maryland, Eastern District of New York, Northern District of New York, the Southern District of New York and the Court of Claims. I have been litigating FOIA cases since 1993. I have been teaching the D.C. Bar Associations CLE courses on FOIA since 2003, and I have been the co-editor of LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS since 2002.

#### **Procedural Background**

4. By letter dated December 9, 2007, I submitted to the Central Intelligence Agency (“CIA”) on behalf of JMP a FOIA request which sought copies of all:

- (a) records pertaining to the 2005 destruction of videotapes of the interrogations of Zayn Abidin Muhammed Hussein Abu Zubaida (a/k/a Abu Zubaydah) and Abd al-Rahim al-Nashiri – please refer to the enclosed newspaper articles for spelling variations;
- (b) records, including correspondence, created after September 11, 2001, with Members of Congress or its Committees, The 9/11 Commission (“National Commission on Terrorist Attacks Upon the United States”) or the Department of Justice about (1) the existence of videotapes of interrogations of terrorist suspects; (2) requests for access to videotapes of interrogations of terrorist suspect; (3) warnings or instructions not to destroy any videotapes of interrogations of terrorist suspect; and/or (4) any investigation into your Agency’s destruction of the tapes identified in (a);
- (c) records of interrogatory or document production requests, or any records discussing CIA responses thereto, received as part of any criminal prosecutions that sought acknowledgment of the existence and/or copies of videotape interrogations of terrorist suspects since September 11, 2001;

- (d) records of Freedom of Information Act requests received by your Agency after September 11, 2001, for copies of any records pertaining to videotape interrogations of terrorist suspects; and
- (e) records pertaining to (a) that specifically reflect the identity of the attorney within your Agency's Office of General Counsel who approved the destruction of the videotapes and any records setting forth the policy or legal analysis underlying that conclusion.

5. The request sought both a fee waiver and expedited processing. By letter dated December 19, 2007, the CIA waived any associated fees surrounding this request but denied JMP's request for expedited processing. This lawsuit was filed on December 21, 2007, to initially challenge the CIA's denial of expedited processing.

6. On December 27, 2007, I filed, as counsel, an identical FOIA request on behalf of plaintiff Matthew Cole, a journalist. This request similarly sought a fee waiver and expedited processing. By letter dated January 11, 2008, the CIA waived any associated fees surrounding this request and granted Mr. Cole expedited processing. Exhibit "A".

7. On February 1, 2008, a First Amended Complaint was filed adding Mr. Cole as a plaintiff, as well as substantively challenging the CIA's failure to disclose responsive records.

8. From January 22, 2008 to March 7, 2008, I conversed via e-mail with Vesper Mei, the Department of Justice attorney representing the CIA, in an effort to negotiate a release schedule. Exhibit "B". I was notified that the CIA would be able to review and release all nonexempt documents within six months, although it would likely invoke FOIA Exemption 7(a) to withhold records. Id. Then suddenly, on June 9, 2008, I was notified that the CIA will seek a stay of proceedings, which led to the filing of this current Motion. Id.

### Substantive Response

9. The CIA relies on the Declaration of John H. Dunham, Counsel for the U.S. Attorney, District of Connecticut and Acting U.S. Attorney for the Eastern District of Virginia (dated June 9, 2008)(“Dunham Decl.”) to support its Motion for a Stay of Proceedings.

10. Mr. Durham, who is currently handling the criminal investigation into the actual destruction of the videotapes, argues that each of the five categories of documents sought by JMP and Mr. Cole’s FOIA requests relate directly to the destruction of the videotapes and therefore substantially overlap with the ongoing federal criminal investigation. The CIA notes that the criminal investigation is broad, “essentially looking into all aspects of the destruction of the videotapes interrogations, including whether anyone obstructed justice, made false statements, or acted in contempt of court or Congress in connection with the destruction of the videotapes.” *Id.* at ¶4. The CIA also argues that “because the review and processing of the documents potentially responsive to plaintiffs’ FOIA requests will be done by individuals who are potential (and essential) witnesses in the interrogation, such review and processing could well prejudice the criminal investigation by causing these witnesses to, unintentionally or intentionally, change their testimony to conform their version of events to the documents. *Id.* at ¶7. In light of that, the CIA argues that the circumstances warrant a stay.

11. Mr. Durham’s declaration relies largely upon generic, boilerplate statements detailing the similarity of the proceedings and the potential prejudicial risk that the present case poses to the criminal investigation, ultimately relying upon the assertion that the “highly classified nature of much of the information in this investigation” cautions

against divulging further any details regarding the prejudicial risks posed by this civil action. *Id.* at ¶¶6-10. These vague statements fail to provide sufficient context within which to identify the extent that: (1) the individuals responsible for reviewing the records responsive to the FOIA requests would be “potential” or “essential” witnesses in the criminal investigation; (2) such review and processing could – or more specifically, would – cause witnesses to change their testimony; (3) the likelihood of public disclosures would arguably be increased due to the processing of the FOIA request – excluding the issue of actual documents that might be disclosed.

12. Additionally, the Durham Declaration provides negligible factual context in asserting that many of the individuals who would review responsive records are “essential” witnesses in the criminal investigation and that exposing these witnesses to records responsive to JMP’s FOIA request could arguably affect the answers they would subsequently provide to criminal investigators. *Id.* at ¶¶6-7. Without at least some form of supplemental information on these particular individuals and why they would be involved in both proceedings, this Court is deprived of any context in which to assess whether the particular individuals would, in fact, be involved in both the present civil FOIA action and the criminal proceedings, as well as whether other individuals within particular offices and/or divisions of the CIA could fill this role for purposes of this present case. In effect, the Durham Declaration is arguing that entire offices and/or divisions of CIA employees are considered “essential” witnesses, and therefore nobody could be permitted to review the records due to their need to participate with the criminal investigation. Given that the CIA admits that many, if not most, of the documents in question have already been identified for purposes of the criminal investigation, *id.* at ¶6, it remains

unclear what role, if any, non-FOIA personnel would have at this point in processing JMP's FOIA request. Determinations relating to responsiveness and classification are handled exclusively by FOIA personnel, none of whom could arguably be considered as "potential" witnesses in the criminal investigation. To say the least, this argument begs further question in light of the CIA's admission that it has already identified thousands of relevant pages and begun processing through FOIA (and, in fact, would complete this process by September 2008) without any apparent harm to the criminal investigation. Exhibit "B".

I do solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true to the best of my knowledge.

Date: July 21, 2008

/s/

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Mark S. Zaid