

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

THE JAMES MADISON PROJECT,)
and MATTHEW COLE,)
)
Plaintiffs,)
)
v.)
)
CENTRAL INTELLIGENCE AGENCY,)
)
Defendant.)
)

Case No. 1:07cv02306 (RBW)

DEFENDANT’S MOTION FOR A STAY OF PROCEEDINGS

Defendant Central Intelligence Agency (“CIA”) hereby moves for a stay of proceedings in the above-captioned matter pending completion of the federal criminal investigation into the destruction of videotapes by the CIA, and disposition of any resulting indictments and prosecutions. The grounds for the motion are set forth in the accompanying memorandum of points and authorities. A proposed order is also enclosed.

In accordance with Local Civil Rule 7(m), counsel for the defendant has consulted with counsel for plaintiffs, who has indicated that plaintiffs intend to oppose this motion.

Dated: June 9, 2008

Respectfully submitted,

GREGORY G. KATSAS
Acting Assistant Attorney General

JEFFREY A. TAYLOR
United States Attorney

ELIZABETH J. SHAPIRO
Assistant Branch Director

/s/ Vesper Mei

VESPER MEI

(D.C. Bar No. 455778)

Trial Attorney

United States Department of Justice

Civil Division, Federal Programs Branch

Post Office Box 883

Washington, D.C. 20044

Telephone: (202) 514-4686

Facsimile: (202) 616-8470 (fax)

E-mail: vesper.mei@usdoj.gov

Counsel for Defendant

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

THE JAMES MADISON PROJECT,)
and MATTHEW COLE,)
)
Plaintiffs,)
)
v.)
)
CENTRAL INTELLIGENCE AGENCY,)
)
Defendant.)
)

Case No. 1:07cv02306 (RBW)

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANT’S MOTION FOR A STAY OF PROCEEDINGS**

INTRODUCTION

This is a Freedom of Information Act (“FOIA”) case seeking documents pertaining to the Central Intelligence Agency’s (“CIA”) destruction of videotaped interrogations. After the CIA’s destruction of videotapes was made public, the Attorney General directed first a preliminary inquiry, and then a full criminal investigation into the destruction of videotapes. This investigation is ongoing. The documents that plaintiffs seek in their FOIA requests are closely related to the questions that the criminal investigation seeks to answer, and the CIA’s review and processing, and any release, of these documents, would substantially interfere with the criminal investigators’ ability to conduct a complete, thorough and untainted federal criminal investigation into the destruction of videotaped interrogations. As a result, the criminal investigators have requested that the CIA seek a stay in this case pending disposition of the criminal investigation, a process that they expect, based on presently available information, will take at least six more months. If indictments and criminal prosecutions result from the investigation, the investigators would request that the CIA seek a further stay of the proceeding

until the conclusion of the criminal proceedings.

BACKGROUND

Plaintiff, The James Madison Project (“JMP”), filed this FOIA suit on December 21, 2007, seeking expedited processing and the release of “records in the possession or control of the Central Intelligence Agency (“CIA”) pertaining to the 2005 destruction of videotapes of the interrogations of Zayn Abidin Muhammed Hussain Abu Zubaida (a/k/a Abu Zubaydah) and Abd al-Rahim al-Nashiri and other suspected terrorists.” Plaintiff’s First Amended Complaint (“Compl.”) at 1. After JMP amended its complaint to add as a plaintiff Matthew Cole, a journalist (and to whom the CIA had granted expedited processing for the identical FOIA request), the CIA filed its answer on February 19, 2008.

The CIA’s destruction of videotapes was made public on December 6, 2007, with an announcement by CIA Director Michael V. Hayden. Shortly after the destruction of the videotapes was made public, Attorney General Michael Mukasey directed a preliminary inquiry, and shortly thereafter, on January 2, 2008, a full criminal investigation, into the destruction of the tapes. That criminal investigation has been ongoing, and, because the CIA’s processing and review of the documents potentially responsive to plaintiffs’ FOIA request would interfere with the criminal investigators’ ability “to conduct a complete, thorough, and untainted federal criminal investigation into the destruction of videotaped interrogations” June 9, 2008 Declaration of John H. Durham (“Durham Decl.”) ¶ 9, the criminal investigation serves as the basis for this request for a stay.

As set forth more fully in the Durham Declaration, central questions in the criminal investigation substantially overlap with information contained within the documents sought by

plaintiffs. Durham Decl. ¶ 6. In addition, the individuals responsible for the review and processing of documents are potential witnesses in the criminal investigation, and their access to these documents creates the risk that their recollections may be changed as a result of their review. Id. Further, any public disclosures of the documents or other information sought in this FOIA case could expose witnesses to versions of the events different from their own recollections, and could cause those witnesses, intentionally or otherwise, to change what they have to say or to conform their testimony to any such publicly disclosed information. Id. ¶ 8.

After receiving the plaintiffs' FOIA request and granting expedited processing in January 2008, the CIA began its search for responsive documents. While the parties initially hoped to negotiate a processing and release schedule that would eliminate the need for further litigation, they were unsuccessful. In the meantime, the CIA and the criminal investigators realized that because of the overlap between the documents sought by plaintiffs in this litigation as well as the central questions raised (and the possibility of influencing the recollections and testimony of potential witnesses) in the criminal investigation, proceeding with plaintiffs' FOIA request would interfere with the integrity of the criminal investigation. As a result, the criminal investigators requested that the CIA seek a stay of the FOIA lawsuit. Based upon presently available information, they estimate that the investigative process will take at least six more months. Durham Decl. ¶ 11. If indictments and criminal prosecutions were to result from the investigation, they would request that the defendant seek a further stay of this proceeding until the conclusion of the criminal proceedings. Id.

ARGUMENT

I. CIVIL ACTIONS RELATING TO A PENDING CRIMINAL INVESTIGATION ARE COMMONLY STAYED IN ORDER TO AVOID COMPROMISING A CRIMINAL INVESTIGATION.

This Court has the authority to issue a stay of proceedings in this case. As the Supreme Court has held, “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.” Landis v. North American Co., 299 U.S. 248, 254 (1936). The law is well-established, moreover, that this discretionary authority is properly exercised when a civil action threatens to interfere with a related criminal proceeding. See United States v. Kordel, 397 U.S. 1, 12 n. 27 (1970) (citing cases); SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1375 (D.C. Cir. 1980). This authority allows a court to “stay civil proceedings, postpone civil discovery or impose protective orders and conditions when the interests of justice seem to require such action.” Dresser, 628 F.2d at 1375. “When a civil proceeding may interfere with a criminal investigation, it is not uncommon that the United States will seek to stay . . . the civil action in order to protect the criminal investigation.” United States v. Any and All Assets of that Certain Business Known as Shane Co., 147 F.R.D. 99, 101 (M.D.N.C. 1993) (noting further that such requests are “presumptively reasonable”). “The decision to stay a civil action pending the completion or declination of a criminal investigation lies within the sound discretion of the trial court.” Horn v. District of Columbia, 210 F.R.D. 13, 15 (D.D.C. 2002) (citing cases).

The principle supporting a stay of civil proceedings applies throughout the pendency of a criminal investigation, regardless of whether an indictment has issued. Thus, numerous courts have stayed civil proceedings related to ongoing criminal investigations prior to the issuance of

any indictment.¹ See, e.g., St. Paul Fire & Marine Ins. Co., 24 Cl. Ct. 513, 516-17 (Cl. Ct. 1991); Souza v. Schiltgen, 1996 WL 241824 at *2-*3 (N.D. Cal. 1996); Shane Co., 147 F.R.D. at 102; Capital Engineering & Manufacturing Co., Inc. v. Weinberger, 695 F. Supp. 36, 41-42 (D.D.C. 1988); Integrated Generics, Inc. v. Bowen, 678 F. Supp. 1005, 1009 (E.D.N.Y. 1988); United States v. Hugo Key & Son, 672 F. Supp. 656, 657-59 (D. R.I. 1987); Larouche Campaign v. FBI, 106 F.R.D. 500, 501-02 (D. Mass. 1985).

When warranted, stays to protect pending criminal investigations may apply to suspend all proceedings in a civil case. See, e.g. St. Paul Fire & Marine Ins. Co., 24 Cl. Ct. at 516-17; Souza, 1996 WL 241824 at *2-*3; Integrated Generics, Inc., 678 F. Supp. at 1009; Hugo Key & Son, 672 F. Supp. at 657-59; see also, e.g., Hatfill v. Ashcroft, Civil Action No. 03-1793 (D.D.C.) (Walton, J.) (Minute Entry dated March 29, 2004); Alexander v. Federal Bureau of Investigation, Civil Action No. 96-2123 (D.D.C.) (Lamberth, J.) (Docket No. 13). The Dresser court identified as relevant considerations the prospect that either the defense or the prosecution might obtain discovery that would not ordinarily be available in a criminal case; the possibility

¹ While some courts have stated that stays should generally be denied in the absence of an indictment, these statements have come in the context of cases where the stay is sought not at the behest of the government investigators or prosecutors, but rather the moving party is the party under investigation in the related criminal proceeding, and thus where self-incrimination dangers, rather than threats to effective law enforcement, are the operative concern. Compare Hicks v. New York, 268 F. Supp. 2d 238, 242 (E.D.N.Y. 2003) (“[A] court will generally deny a stay where no indictment has been issued against the proponent of the stay.”) (emphasis added) with Baranski v. Fifteen Unknown Agents of ATF, 195 F. Supp. 2d 862, 870-71 (W.D. Ky. 2002) (granting government’s pre-indictment motion for stay, distinguishing cases where party under investigation is stay movant). Moreover, even where the party under investigation is the stay movant, some courts have rejected a general rule against pre-indictment stays. See, e.g., White v. Mapco Gas Products, 116 F.R.D. 498, 502 n.4 (E.D. Ark. 1987) (“That an indictment has not yet been returned does not make consideration of the motion for a stay any less appropriate.”) (citing Brock v. Tolkow, 109 F.R.D. 116, 120 n.2 (E.D.N.Y. 1985)).

that Fifth Amendment issues would be implicated; the chance that a criminal defendant's theory of defense would be revealed prematurely; or the risk that the criminal matter would be otherwise prejudiced. Dresser, 628 F.2d at 1376. Factors for a court to consider in deciding whether such a stay is warranted are: whether the two matters involve related issues, whether a stay would or would not create hardship or inconvenience for the courts or the parties, and whether the duration of a stay is reasonable. See, e.g., United States ex rel. Westrick v. Second Chance, 2007 WL 1020808 (D.D.C. 2007); St. Paul Fire and Marine Ins.

II. A STAY OF THIS CIVIL FOIA CASE IS WARRANTED.

A. The Pending Criminal Investigation into the CIA's Destruction of Certain Videotaped Interrogations of Detainees Is Closely Related to this FOIA Case and Could Be Harmed if the FOIA Case Proceeded.

In deciding whether to stay civil proceedings in light of a pending criminal investigation, a key issue is the risk of prejudice to the investigation due to its relation to the civil case. Estate of Gaither v. District of Columbia, 2005 WL 3272130, *3 (D.D.C. 2005). In this case, plaintiffs' FOIA requests seek documents "pertaining to the 2005 destruction of videotapes of the interrogations of Zayn Abidin Muhammed Hussain Abu Zubaida (a/k/a Abu Zubaydah) and Abd al-Rahim al-Nashiri and other suspected terrorists." Compl. at 1. Each of the five categories of documents that plaintiffs seek in their requests relate directly to the destruction of the videotapes, broadly seeking documents relating to communications with Congress about the videotapes; records "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"; and records pertaining to "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.” See Compl. ¶ 22.

Plaintiffs’ FOIA requests substantially overlap with questions central to the ongoing federal criminal investigation into the destruction of the videotapes. As set forth in the Durham Declaration, the criminal investigation is broad, essentially looking into all aspects of the destruction of the videotaped 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. Durham Decl. ¶ 4. These inquiries involve questions about who knew of the videotaped interrogations, who was aware of the various orders that might have required their preservation, and who was involved, in any way, in the decision and/or directive to destroy the videotapes. Id. ¶ 6. Clearly, every category of plaintiffs’ FOIA requests is intertwined with the inquiries involved in the federal criminal investigation. Moreover, as set forth more fully in the Durham Declaration, 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 investigation, 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. ¶ 7. Moreover, to the extent that any public release of responsive documents or information contained within may occur, such a release could also affect the recollections and testimony of witnesses for the investigation. Id. ¶ 8. Thus, the close relationship between this civil FOIA case and the ongoing federal criminal investigation into the destruction of the videotapes favors a stay of this FOIA case.

B. The Stay Would Not Create a Hardship for the Plaintiffs.

Plaintiff JMP is a non-profit corporation “with the primary purpose of educating the

public on issues relating to intelligence gathering and operations, secrecy policies, national security and government wrongdoing.” Compl. ¶ 3. Plaintiff Matthew Cole is an investigative journalist who is currently writing a book about the CIA. Id. ¶ 4. The plaintiffs made their FOIA requests and seek the documents in order to “contribute to the public’s understanding of government operations or activities.” December 9, 2007 letter from Mark S. Zaid to Scott A. Koch (Ex. A) at 3; December 27, 2007 letter from Mark S. Zaid to Scott A. Koch (Ex. B) at 2. They also apparently seek to allow the public to make its own evaluation of the CIA’s destruction of the tapes, stating:

Not only does the destruction of the tapes have the potential to serve, either by appearance or in reality, as evidence of inappropriate or unlawful efforts by the CIA to destroy evidence, but it also raises the possibility of whether the CIA and its officials, particularly those within its Office of General Counsel, knowingly and willingly obstructed justice. It goes without saying that potential criminal actions by the CIA and its officials are ‘relevant to a subject of public urgency’ and therefore satisfy the ‘compelling need’ standard.

Ex. A at 3-4; Ex. B at 3. In short, plaintiffs seek these documents in order to provide information to the public, and the questions that plaintiffs believe these documents would answer substantially overlap with the very questions the criminal investigators hope to answer. Cf. Durham Decl. ¶ 4 (“The questions under active review in this investigation include, *inter alia*, whether any federal criminal offenses were committed in connection with the destruction of the above-referenced videotapes. More specifically, the investigation team is actively reviewing whether any person or persons obstructed justice, made false statements, or acted in contempt of court or Congress in connection with the destruction of the videotapes. With respect to potential obstruction of justice offenses, we are investigating whether the destruction of the videotapes violated any order issued by any federal judicial officer and, if so, what the person or persons’

knowledge, motive, and/or intent was in destroying the tapes or causing their destruction.”).

The public’s interest in the integrity of the criminal investigation, however, takes priority over the plaintiffs’ interest in disseminating information (even to the public) that would squarely implicate the integrity of that investigation, and, to the extent that plaintiffs’ FOIA requests are made in the public interest, that interest will be vindicated through the criminal investigation (and any subsequent release of documents in this FOIA case or otherwise). Public policy “gives priority to the public interest in law enforcement.” Benevolence Int’l Found., Inc., 200 F. Supp. 2d at 941 (quoting Campbell, 307 F.2d at 487); see also Jones v. City of Indianapolis, 216 F.R.D. 440, 452 (S.D. Ind. 2003) (“The public also has an important interest in a potential, untainted criminal prosecution.”); Baranski v. Fifteen Unknown Agents of ATF, 195 F. Supp. 2d 862, 870 (W.D. Ky. 2002) (finding that the public interest served by protecting the integrity of a criminal investigation outweighed the plaintiff’s interest in pursuing the civil action); Walsh Sec., Inc. v. Cristo Prop. Mgmt., Ltd., 7 F. Supp. 2d 523, 529 (D.N.J. 1998) (holding that a unimpeded criminal investigations “benefit the public”); Bureerong v. Uvawas, 167 F.R.D. 83, 87 (C.D. Cal. 1996) (“[T]he interests of the Government in protecting its criminal investigation are clearly the paramount concern here.”); Hugo Key & Son, Inc., 672 F. Supp. at 658-59 (“[T]his court is compelled to acknowledge the greater weight of [the government’s] interest in determining the priority of the criminal action.”). Given the circumstances described herein, and in the accompanying declaration, a stay in deference to the ongoing investigation is warranted here.

Moreover, with respect to any documents falling within the scope of the investigation – which would include virtually all of the documents sought by plaintiffs, those documents would be exempt from release under FOIA Exemption 7(A), which covers:

records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings.

5 U.S.C. § 552(b)(7)(A).

Exemption 7(A) applies as long as there is a concrete prospect of a law enforcement proceeding that could be harmed by a premature release of information. See NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 232 (1978); Campbell v. HHS, 682 F.2d 256, 259 (D.C. Cir. 1982). Accordingly, a court will uphold an agency's invocation of Exemption 7(A) if the agency can show that: (1) a law enforcement proceeding is pending or prospective, and (2) release of the information could reasonably be expected to cause some articulable harm. See Robbins Tire, 437 U.S. at 228-32. In this case, as set forth in the Durham Declaration, the criminal investigation and any subsequent indictments or prosecutions would qualify as pending law enforcement proceedings, and, as discussed above, the search for, processing, and release of the information contained in the documents would harm that investigation. As a result, even were this Court to deny defendant's Motion to Stay, the CIA would assert Exemption 7(A) over the documents, and, if this Court were to uphold that assertion, plaintiffs still would not receive the documents before the conclusion of the investigation and any resulting criminal proceedings.² Plaintiffs will not be harmed by a stay of proceedings here.

² Nor would a blanket assertion of Exemption 7(A) by the defendant resolve the problem. Under Maydak v. Dep't of Justice, 218 F.3d 760 (D.C. Cir. 2000), the CIA must review and process all of the documents for all applicable exemptions at the same time, necessitating the same problems with review by potential witnesses to the investigation that would otherwise occur.

C. Judicial Economy and the Temporary Nature of the Stay Sought Favor A Stay.

As set forth above, were this Court to deny defendant's Motion for Stay, the CIA would likely invoke Exemption 7(A) over most, if not all, of the documents sought by plaintiffs in their FOIA requests pending the conclusion of law enforcement proceedings. At that point, unless the plaintiffs conceded the propriety of Exemption 7(A), the parties would have to litigate whether that exemption applied to the documents in question, and this Court would have to decide that issue, likely resulting in the plaintiffs' inability to obtain responsive documents until the conclusion of criminal proceedings in any case. Once no further possibility of interference with such proceedings existed, however, the Exemption 7(A) issue would be moot, this Court would not have to decide the issue, and the documents (or portions of documents) withheld only under Exemption 7(A) would be released.

Moreover, the time requested for a stay is reasonable. The duration of the investigation is not indefinite; rather, the criminal investigators estimate, based upon presently available information, that the remainder of the investigatory process will take at least six more months, and, if no indictments are issued at the conclusion of that process, the stay could be lifted at that time. If indictments and prosecutions were to result from the investigation, the Speedy Trial Act will appropriately expedite a criminal trial. See St. Paul and Marine Ins. Co., 24 Cl. Ct. at 517.

CONCLUSION

For the foregoing reasons, the CIA requests that this Court grant a six-month stay, at the conclusion of which the defendant will update the Court on the status of the investigation.

Dated: June 9, 2008

Respectfully submitted,

GREGORY G. KATSAS
Acting Assistant Attorney General

JEFFREY A. TAYLOR
United States Attorney

ELIZABETH J. SHAPIRO
Assistant Branch Director

/s/ Vesper Mei

VESPER MEI
(D.C. Bar No. 455778)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
Post Office Box 883
Washington, D.C. 20044
Telephone: (202) 514-4686
Facsimile: (202) 616-8470 (fax)
E-mail: vesper.mei@usdoj.gov

Counsel for Defendant