

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION, CENTER FOR  
CONSTITUTIONAL RIGHTS, PHYSICIANS FOR HUMAN  
RIGHTS, VETERANS FOR COMMON SENSE AND  
VETERANS FOR PEACE,

Plaintiffs,

v.

DEPARTMENT OF DEFENSE, AND ITS COMPONENTS  
DEPARTMENT OF ARMY, DEPARTMENT OF NAVY,  
DEPARTMENT OF AIR FORCE, DEFENSE INTELLIGENCE  
AGENCY; DEPARTMENT OF HOMELAND SECURITY;  
DEPARTMENT OF JUSTICE, AND ITS COMPONENTS  
CIVIL RIGHTS DIVISION, CRIMINAL DIVISION, OFFICE  
OF INFORMATION AND PRIVACY, OFFICE OF  
INTELLIGENCE, POLICY AND REVIEW, FEDERAL  
BUREAU OF INVESTIGATION; DEPARTMENT OF STATE;  
AND CENTRAL INTELLIGENCE AGENCY,

Defendants.

DOCKET NO. 04-CV-4151 (AKH)

**Document Electronically Filed**

AMERICAN CIVIL LIBERTIES UNION, CENTER FOR  
CONSTITUTIONAL RIGHTS, PHYSICIANS FOR HUMAN  
RIGHTS, VETERANS FOR COMMON SENSE AND  
VETERANS FOR PEACE,

Plaintiffs,

v.

DEPARTMENT OF JUSTICE, AND ITS COMPONENT  
OFFICE OF LEGAL COUNSEL,

Defendants.

DOCKET NO. 05-CV-9620 (AKH)

**REPLY MEMORANDUM OF LAW  
IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION  
COMPELLING DEFENDANT OLC TO PROCESS OUTSTANDING DOCUMENTS  
RESPONSIVE TO PLAINTIFFS' FOIA REQUEST**

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## PRELIMINARY STATEMENT

The Office of Legal Counsel (“OLC”) created secret memoranda (the “OLC Bradbury Memoranda”) in the spring of 2005, addressing, and perhaps authorizing the Central Intelligence Agency’s use of harsh interrogation techniques for terror detainees. After learning of the existence of the memoranda from a front-page New York Times article, Plaintiffs promptly demanded that the documents, plainly responsive to Plaintiffs’ FOIA request, be produced or identified by OLC. Believing the agency’s purported justification for failing to turn over the documents unsatisfactory, Plaintiffs filed the instant motion for emergent relief. Now, in response to Plaintiffs’ motion, OLC states that it has identified and located the memoranda at issue but will not turn them over or even process them because, despite the evidence to the contrary, OLC applied a temporal limit to the scope of its search for documents responsive to Plaintiffs’ FOIA request – January 31, 2005 – that predates the creation of the secret memoranda.

If OLC did in fact apply a cut-off date of January 31, 2005 to Plaintiffs’ FOIA request, an assertion undercut by the presence of documents post-dating that date on the *Vaughn* declarations provided by the agency, the date of the cut-off was obscured by OLC’s provision to Plaintiffs of inaccurate and misleading information indicating that a much later cut-off date had been applied. Thus, Plaintiffs are only now learning – a full two years after filing the instant complaint - that a supplemental FOIA request would be necessary to obtain documents dating from the spring of 2005.

In the absence of the grant of requested relief - relief which would impose truly minimal burdens on the OLC, which has already located and identified the memoranda at issue, and is processing the documents for response in a separate FOIA suit - Plaintiffs will be forced to propound a new FOIA request for the memoranda, greatly frustrating their mission to provide the public with timely and informed information critical to the public’s ability to understand and

evaluate the current policies and practices of the United States government, and unnecessarily burdening the Court with supplemental litigation.

For the reasons set forth below, Plaintiffs are entitled to a grant of injunctive relief compelling OLC to immediately process the outstanding documents responsive to Plaintiffs' January 31, 2005 FOIA request.

## **ARGUMENT**

### **I. Plaintiffs Are Entitled To a Preliminary Injunction.**

The Court, sitting in equity, has broad powers to fashion an appropriate remedy in this case. "The essence of a court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by unlawful action." *Freeman v. Pitts*, 503 U.S. 467, 487 (1992). *See Payne Enters. v. U.S.*, 837 F.2d 486, 494 (D.C. Cir. 1988) ("FOIA imposes no limits on courts' equitable powers in enforcing its terms.") (citing *Renegotiation Board v. Bannerkraft Clothing Co., Inc.*, 415 U.S. 1, 20 (1974)); *see also Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1205 (4th Cir.1976) ("the [FOIA] Act, to a definite degree, makes the district courts the enforcement arm of the statute...") (quoting *Renegotiation Board*, and affirming district court's grant of injunctive relief).

In light of these broad powers, and the balance of equities in this case - namely, the significant interests set forth by Plaintiffs as weighed against OLC's position, having provided inaccurate information to Plaintiffs regarding the temporal limit applied to its search for documents responsive to Plaintiffs' FOIA request - as well as the minimal hardship to OLC to immediately process the three documents it has already located and identified, the Court should grant the requested relief.

**A. Plaintiffs Are Likely To Succeed on the Merits.**

As an initial matter, even if OLC did apply a January 31, 2005 cut-off date as the temporal limit of its search for documents responsive to Plaintiffs' FOIA request of the same date, OLC's assertion that the January cut-off date was reasonable is not supported by the facts. OLC concedes that it was required to conduct a search for documents responsive to Plaintiffs' FOIA request, "reasonably designed to identify and locate responsive documents." *See* Defs Br. at 6 (citing *Garcia v. Dept. of Justice, Office of Information and Privacy*, 181 F. Supp.2d 356, 368 (S.D.N.Y. 2002)). The agency further acknowledges that the validity of any temporal limit it has applied to Plaintiffs' FOIA request is judged by the same reasonableness standard, and is therefore evaluated in light of the facts of the case. *See Id.* at 7 (citing *McGehee v. Central Intelligence Agency*, 697 F.2d 1095, 1101 (D.C. Cir. 1983)). Typically, the reasonable temporal limit to apply to the scope of a search is the date an agency commences its search for responsive records. *See* 28 C.F.R. § 16.4(a) (Department of Justice FOIA regulation concerning cut-off dates). As set forth in Plaintiffs' opening brief, the selection of an appropriate cut-off date is particularly important when a FOIA requests seeks information concerning *ongoing* activities, as the selection of the cut-off date will impact the number of documents responsive to the request. *See* Pls. Opening Br. at 13-14. Reasonable steps must be taken to "ferret out requested documents," *McGehee*, 697 F.2d at 1101, so where multiple and distinct searches are conducted to obtain responsive documents, each search should have a cut-off date applied as of the date of the commencement of the specific search at issue. *See* Pls. Opening Br. at 13-15.

OLC asserts that a January 31, 2005 temporal cut-off satisfies FOIA's reasonableness standard because it corresponded to the start of OLC's search. *See* Defs. Br. at 7. However, a review of the declaration submitted by OLC Special Counsel Paul P. Colborn, reveals that an actual search for responsive documents occurred only with respect to the request for seven

discrete documents identified in the attachment to Plaintiffs' FOIA request. *See* Declaration of Paul P. Colborn, dated November 5, 2007 ("Colburn Decl."), ¶ 3 ("these documents were given first priority."). While an email was sent to OLC attorneys during the first week in February relating to Plaintiffs' broader FOIA request, those attorneys were not specifically directed to locate responsive records, but were rather asked to notify the paralegal coordinating the response if they had relevant documents in their possession. *See* Colburn Decl., ¶ 5, Ex. E. A subsequent email provided by OLC shows that the specific search parameters that OLC applied to Plaintiffs' FOIA request were not apparently communicated to OLC staff attorneys until March 18, 2005, and those attorneys, if any, who had begun their searches not using the specified search terms were asked to "redo the searches" at that time.<sup>1</sup> *See Id.* Ex. F. Finally, OLC did not commence its search of the agency's central file "containing all final OLC opinions" until March and April of 2005. *See Id.* ¶ 7.

Thus, OLC's assertion that its search for responsive documents commenced the first week of February is only correct in the most formalistic sense, as it is apparent that the search of OLC staff attorney files commenced on dates subsequent to the first week in February, and the search of the agency's central files did not begin until March. Given the nature of OLC's search, OLC should have selected search cut-off dates corresponding to the commencement of each of the discrete searches of its files. Applying a few discrete temporal limits to the scope of OLC's searches would not be burdensome, or impose "ongoing obligations on OLC to process records," Defs. Br. at 9, as OLC claims, but rather, would be consistent with the "agency's duty to take reasonable steps to ferret out requested documents." *McGehee*, 697 F.2d at 1101. *See Public Citizen v. Dept. of State*, 276 F.3d 635, 644 (D.C. Cir. 2002) (In FOIA search where agency

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<sup>1</sup> Notably, the email to OLC attorneys did not specify any particular temporal cut-off date to apply to the search.



required to search multiple files or components, reasonable to apply a temporal cut-off date of the date of the search of the agency's comprehensive central file to that particular search, a file typically searched *last* by the agency).

Moreover, and in any event, whether or not the OLC applied a reasonable temporal cut-off to its search for documents responsive to Plaintiffs' FOIA request has no bearing on Plaintiffs' entitlement to injunctive relief where the agency not only failed to notify Plaintiffs of the search cut-off date it was applying to Plaintiffs' FOIA request, but to the contrary, gave Plaintiffs every indication that the temporal limit of its search extended well beyond January of 2005. First, the *Vaughn* declarations for withheld OLC documents included a dozen documents post-dating the purported cut-off date, with certain documents post-dating that date by as much as 17 months. *See* Declaration of Melanca D. Clark, October 24, 2007, ¶ 10 and Ex. H & I. Irrespective of whether these documents were "inadvertently" included by OLC in the *Vaughn* indices, Defs. Br. at 9, Plaintiffs relied on the *Vaughn* declarations in assessing the scope and parameters of the OLC's search. Plaintiffs also relied on paragraph 44 of the Bradbury *Vaughn* declaration, related to the adequacy of OLC's search, which by failing to describe the details of the OLC's searches provided information that was both unclear and incomplete. *Cf. Maricopa Audubon Soc. v. U.S. Forest Service*, 108 F.3d 1089, 1092 (9th Cir. 1997) (in FOIA cases plaintiffs are at "a distinct disadvantage" in FOIA litigation because they do not have access to withheld materials) (citation omitted). Similarly, the tortured explanation provided by Mr. Paul Colburn, Special Counsel at the OLC, of why his letter to Plaintiffs of June 1, 2005, stating that the agency had "not yet searched our classified files," did not in fact mean what the letter clearly

stated,<sup>2</sup> does not alter the fact that Plaintiffs should have been able to rely on the information conveyed.

In short, Plaintiffs had every reason to believe that the search performed by the OLC for documents responsive to their FOIA request would have encompassed documents created as late, if not later, than June of 2005, including, therefore, the OLC Bradbury Memoranda at issue in this motion. Plaintiffs are only now informed, two years after filing a complaint against the Department of Justice and its component OLC, and on the very eve of the Court's determination of Plaintiffs' summary judgment motion challenging the OLC's withholding of responsive documents, that the temporal limit of the OLC's search for documents was months earlier than previously represented. OLC's harmful actions violate the spirit of FOIA, "and its presumption in favor of disclosure," *Tigue v. Dept. of Justice*, 312 F.3d 70, 7 (2d Cir. 2002), and are in contravention of the agency's own regulations, which contemplate notification to the FOIA requester of the search cut-off date applied by the agency. *See* 28 C.F.R. § 16.4 (a); U.S. Dept. of Justice, Office of Information and Privacy, FOIA POST, May 5, 2004 ("Simply put, a FOIA requester should know what "cut-off" date is being applied to his request, if for no other reason than to minimize the chance of any inefficient misunderstanding about what that request encompasses. *See* FOIA Update, Vol. XVI, No. 3, at 3 (reminding agencies of the importance of FOIA requesters "being fully informed of all such scope matters")."). Plaintiffs have thus demonstrated a likelihood of success on the merits sufficient to justify the grant of a preliminary injunction.

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<sup>2</sup> *See* Colburn Decl. ¶ 10 ("Although I used the word "searched," my intent was to communicate that OLC had not yet "processed" the responsive classified documents .... In retrospect it would have been more precise and accurate to have said that OLC "had not yet processed" the classified documents....")

**B. If Injunctive Relief is not Granted Plaintiffs Are Likely to Suffer Irreparable Injury.**

In the face of OLC's refusal to turn over or process the OLC Bradbury memoranda, Plaintiffs' only recourse will be to file a new FOIA request seeking the documents, causing extreme delay, injurious to Plaintiffs' and the public's right to prompt disclosure of government records. *See generally* Pls. Opening Br. at 10-12; *see also ACLU v. Dept. of Defense (II)*, 357 F.Supp.2d 708, 712 (S.D.N.Y. 2005) ("FOIA requires prompt disclosure of non-exempt information relevant to the public interest. ... 'and requires the executive, in response to duly made demands, promptly to produce requested documents, or to provide justification why the documents may be exempt from production.'") (citing *ACLU v. Dept. of Defense (I)*, 339 F.Supp.2d 501, 503 (2004)); *Long v. Internal Revenue Service.*, 693 F.2d 907, 909 (9th Cir. 1982) ("In determining whether injunctive relief is appropriate to resolve a FOIA dispute, the court's prime consideration should be the effect on the public of disclosure or nondisclosure.") (citation omitted).

OLC's response, that the injury to Plaintiffs resulting from OLC's actions is somehow mitigated because the memoranda at issue are included within the scope of the FOIA requests at issue in unrelated litigation, is no answer at all. *See* Defs. Br. at 10. First, the complaint in the referenced lawsuit, *Amnesty International USA, et. al. v. Central Intelligence Agency, et al.*, 07-cv-5435 (LAP) was filed just five months ago. *See* Declaration of Shayana Kadidal, November 8, 2007, ¶ 4. No *Vaughn* declarations for requested documents has been produced by any of the defendant agencies that are party to the suit, and there has been no agreement as to when declarations will be forthcoming. *See id.* at ¶ 5. Negotiations as to a timetable for filing summary judgment motions have not yet been concluded. *See id.* Consequently, any determination of the lawfulness of OLC's withholding of the OLC Bradbury memoranda is

certainly many months away. Finally, only one of the plaintiffs in the Amnesty suit, the Center for Constitutional Rights, is also a plaintiff in the instant litigation. Thus, there is no guarantee that the plaintiffs in that case will make the same strategic decisions with respect to challenging agency withholding of documents as would be made in this case. For these reasons, OLC's denial of access to the OLC Bradbury memoranda in the instant suit is likely to cause Plaintiffs irreparable harm.

**C. The Balance of Hardships Clearly Favors Plaintiffs**

The hardship to Plaintiffs if the requested relief is not granted is plain. Plaintiffs will be forced to file a new FOIA request seeking the OLC Bradbury memoranda, causing needless delay and inefficiency, burdensome to both the Plaintiffs and the Court, because unless OLC releases the documents, Plaintiffs will have no choice but to file a related complaint with the Court and eventually an additional summary judgment motion challenging OLC's withholding of the documents. On the other hand, if the requested relief is granted, any claims related to the OLC Bradbury memoranda can be adjudicated along with Plaintiffs' claims against the OLC presently pending before the Court. *See Garrett v. Bamford*, 538 F.2d 63, 71 (3d Cir. 1976) (judicial efficiency should be considered when determining whether to grant equitable relief).

Conversely, the grant of the requested relief will impose no undue hardship on OLC. The memoranda at issue in this motion have been identified and located, and by Defendant's own admission, have already been referred to OLC for processing in connection with the Amnesty FOIA suit. *See* Defs. Br. at 10, FN 5, Colburn Decl. ¶ 15. Surely then, to order OLC to process the documents in the instant suit, where it already is under an obligation to do so, would impose little if any burden on OLC, and would therefore be an appropriate exercise of the Court's broad equitable powers.

**CONCLUSION**

For the reasons set forth above, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion for a Preliminary Injunction and compel OLC to immediately process the outstanding documents responsive to Plaintiffs' January 31, 2005 FOIA request.

Respectfully submitted,

/LSL/

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