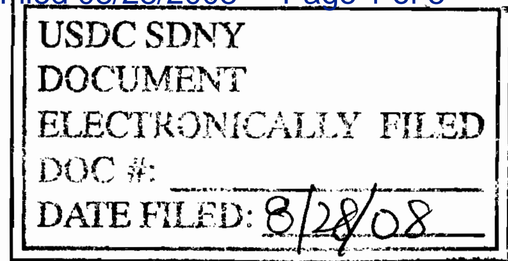

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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AMERICAN CIVIL LIBERTIES UNION, et al.

Plaintiffs,

-against-

DEPARTMENT OF DEFENSE, et al.

Defendants.

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ORDER GRANTING PRELIMINARY INJUNCTION IN PART AND DENYING IN PART

04 Civ. 4151 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

On October 24, 2007, plaintiffs in this case filed a motion for a preliminary injunction seeking, among other things, an order that the Office of Legal Counsel ("OLC"), produce three memoranda, two dated May 10 and one dated May 30, 2005. Plaintiffs claimed that the memoranda were "plainly responsive" to their Freedom of Information Act ("FOIA") request, dated January 31, 2005, for all records regarding "1) the treatment of detainees; 2) the deaths of detainees while in United States custody; and 3) the rendition of detainees and other individuals to countries known to employ torture or illegal interrogation techniques."[1] Defendants' responses did not include these documents in their productions, nor did they refer to them in Vaughn declarations claiming exemptions from production.[2]

Plaintiffs filed their motion after an October 4, 2007 New York Times article

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[1] Although plaintiffs argue in their motion that they seek information concerning "ongoing activities," there is no such language present in their FOIA request.

[2] The origin of Vaughn affidavits or declarations can be traced back to Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), where the court established the use of agency-supplied affidavits as a means of correcting the imbalance of information between the party seeking disclosure and the agency, and to permit a more effective factual review by the courts. To meet its burden in FOIA litigation, the affidavit must "describe with reasonable specificity the nature of the documents at issue and the justification for nondisclosure" and "the description provided in the affidavits must show that the information logically falls within the claimed exemption." Lesar v. DOJ, 636 F.2d 472, 481 (D.C. Cir. 1980). Vaughn affidavits are routinely used in FOIA litigation before courts in this and other circuits.

reported on two OLC memoranda issued in 2005 that related to the interrogation of prisoners held by the Central Intelligence Agency ("CIA").[3] Plaintiffs argue that the Government's failure to produce the documents, or identify the memoranda and claim exemptions in its Vaughn Declarations of May 15, 2006 for classified documents, and September 8, 2006, for unclassified documents, violate plaintiffs' statutory right under FOIA. Defendants respond that the memoranda post-date a temporal cut-off date of January 31, 2005, the date of plaintiffs' FOIA request. Furthermore, the defendants argue that plaintiffs will not suffer any irreparable injury because the same documents are requested in another pending FOIA case, Amnesty International USA, et al. v. Central Intelligence Agency, et al., No. 07 Civ. 5435 (LAP), and production can be made, or exemptions claimed, in that case. In reply, plaintiffs argue that based on representations previously made by defendants, the cut-off date should not be January 31, 2005, but rather June 30, 2005, and that production being postponed to another case will cause undue delay and be prejudicial.

I hold, since the documents are clearly substantively responsive to plaintiffs' request and have been identified, and there is minimal burden on defendants, that the Government should produce the three memoranda at issue, or claim exemption by Vaughn declaration to excuse non-production; that this is to be done by October 3, 2008, and that the responsiveness of the three documents to the Amnesty Int'l case does not excuse a failure to produce in this case. In all other respects, plaintiffs' motion for preliminary injunctive relief is denied.

I. Standard of Review

The standard for obtaining preliminary injunctive relief is well-settled in the Second Circuit. In general,

> A party seeking a preliminary injunction must demonstrate (1) that it will be irreparably harmed in the absence of an injunction,

[3] In fact, as defendants later clarified, there were three OLC opinions.

> and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits of the case to make them a fair ground for litigation, and a balance of hardships tipping decidedly in its favor.

Forest City Daly Housing, Inc. v. Town of North Hempstead, 175 F.3d 144, 149 (2d Cir. 1999). However, when the movant is seeking a preliminary injunction "that will affect government action taken in the public interest pursuant to a statutory or regulatory scheme," as plaintiffs are here, "the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success standard." Id.

A. Irreparable Injury

The standard for proving irreparable injury weighs heavily on the movant. Irreparable harm is "injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages." Rodriguez v. DeBuono, 162 F.3d 56, 61 (2d Cir. 1989). In this case, plaintiffs claim that if they are not granted the injunctive relief they seek, they and the public will suffer great harm, since FOIA "requires prompt disclosure of non-exempt information relevant to the public interest." ACLU v. Dep't of Defense I, 339 F.Supp.2d 501, 503 (S.D.N.Y. 2004). Defendants counter that any irreparable injury plaintiffs might suffer will never come to fruition since these documents fall within the scope of the Amnesty Int'l case pending before Judge Preska. However, it is important to note that the Amnesty Int'l case is still in its early stages, unlike plaintiffs' case here, which was filed more than four years ago. This suggests that it is unlikely that plaintiffs will get the speedy relief they seek if they are forced to wait for Judge Preska's decision on the matter. Therefore, consideration of this factor weighs in favor of plaintiffs.

B. Likelihood of Success on the Merits

Since this case implicates the more rigorous likelihood-of-success test, plaintiffs must prove, in order for their request for a preliminary injunction to be granted, that they would most likely win their case on the merits.

Under the law, an agency may meet its burdens for conducting an adequate search by "submitting a reasonably specific affidavit of the employee responsible for the search that indicates the agency undertook an adequate search and failed to recover responsive documents or that the documents it did recover were exempt under FOIA." Sussman v. DOJ, 2006 WL 2850608, at *10 (E.D.N.Y. Sept. 30, 2006). An agency is not expected to take "extraordinary measures" to find the documents, but only to conduct a search "reasonably designed to identify and locate responsive documents." Garcia v. DOJ, 181 F.Supp.2d 356, 358 (S.D.N.Y. 2002) (internal quotations omitted). The same standard is held to apply to an agency rule establishing a temporal limit to its search efforts. See, e.g., Blazy v. Tenet, 979 F.Supp. 10, 17 (D.D.C. 1997), aff'd, 1998 WL 315583 (D.C. Cir. May 12, 1998). The "reasonableness" standard is clearly subjective; as a result, the court makes its determination based on the particular facts of the case at hand. See Steinberg v. DOJ, 23 F.3d 548, 551 (D.C. Cir. 1994).

C. Discussion

Plaintiffs argue that they are likely to succeed on the merits, because OLC's search, using a temporal cut-off date of January 31, 2005, notwithstanding plaintiffs' request for records "concerning *ongoing* activities," was unreasonable and applied to excuse non-production of known, clearly responsive documents.

The Third Bradbury Declaration and the Colborn Declaration describe the Government's search. The search began immediately after plaintiffs submitted their request on January 31, 2005, in early February 2005, and was completed by April 2005. Processing of the

documents took until September 19, 2005, and the documents were then either produced, or withheld as exempt, as described in a Vaughn declaration. A few documents that post-dated the January 31, 2005 cut-off date were included, but Colborn explains that the inclusion was inadvertent. I hold, upon this showing, that a temporal cut-off date of January 31, 2005 was reasonable, and that the search for responsive documents was reasonable and adequate.

However, defendants knew of the three OLC memoranda, and that the documents were responsive, even though they were issued in May 2005. Although defendants are correct that they do not have a responsibility to conduct ongoing searches after a reasonable cut-off date, this proposition does not apply where responsive documents are known, or made known of, and are easily produced or described in a Vaughn declaration. The burden upon the Government is minimal, and the responsiveness of the records is clear.

II. Conclusion

For the reasons stated, the defendants are either to produce the three OLC opinions to plaintiffs, or, if defendants believe that the opinions are covered by specific FOIA exemptions, defendants are to produce a detailed Vaughn declaration identifying each document and the exemptions being claimed. Defendants' response will be due October 3, 2008.

In all other respects, including plaintiffs' request for a temporal cut-off date of June 30, 2005, rather than the January 31, 2005 date used by the defendants, plaintiffs' motion is denied. The Clerk shall note that the motion (Doc. # 244) is now terminated.

SO ORDERED.

New York, New York
August 28, 2008

ALVIN K. HELLERSTEIN
United States District Judge