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 COINSEL, Defendants.	DOCKET NO. 05-CV-9620 (AKH)

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

On October 4, 2007, the *New York Times* published a front-page article disclosing that the Office of Legal Counsel ("OLC") authored two memoranda in 2005 relating to the interrogation of prisoners held by the Central Intelligence Agency ("CIA"). The first memorandum reportedly authorized the CIA to use certain "enhanced" interrogation techniques against prisoners held in its custody. The second memorandum reportedly advised the CIA that the use of these interrogation techniques would not violate prohibitions on "cruel, inhuman, or degrading treatment."

The memoranda plainly relate to the treatment of prisoners in U.S. custody abroad, and are thus responsive to Plaintiffs' January 31, 2005 FOIA request. Accordingly, these two memoranda should have been identified and processed by OLC in connection with the litigation that has been pending before this Court since June 2004. In fact, particularly because the memoranda appear to endorse abusive and possibly unlawful practices, it is profoundly troubling to Plaintiffs that neither memoranda have been disclosed or indexed in the declarations provided by the government for OLC documents it seeks to withhold.

While the government has claimed that it was not required to disclose the memoranda because they post-date January 31, 2005, the date applied by the OLC as the temporal limit for its search, this justification is inconsistent with evidence from the *Vaughn* declarations submitted by OLC in this case to the effect that OLC in fact processed documents post-dating January 31, 2005, and thus applied a date subsequent to January 31, 2005 as the actual temporal limit of its search. Moreover, and in any event, use of a January 31, 2005 "cut-off" date - the date of Plaintiffs' FOIA request - is improper under FOIA and the regulations applicable to the OLC, which in this case required OLC to apply a temporal limit cut-off date of the date or dates upon which it searched for responsive documents.

Accordingly, Plaintiffs respectfully request that the Court compel OLC to immediately process the two memoranda described above as well as any other outstanding documents originating between January 31, 2005 and the date(s) OLC searched for documents responsive to Plaintiffs' FOIA request pertaining to, *inter alia*, the treatment of prisoners held in U.S. custody abroad.

STATEMENT OF FACTS

Plaintiffs' FOIA Request

On January 31, 2005, Plaintiffs served a FOIA request on OLC, a component of the Department of Justice, incorporating by reference its October 7, 2003 request served on the Department of Justice and other Federal agencies seeking the disclosure of records concerning (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. ("Plaintiffs' FOIA request").[1] *See* Declaration of Melanca D. Clark, October 24, 2007, ("Clark Decl.") ¶ 2 and Ex. B (Letter from Lewis to Farris). The January 31, 2005 request also enumerated a non-exhaustive list of documents falling within the scope of Plaintiffs' request.[2]

In a letter dated February 24, 2005, the Assistant U.S. Attorney representing OLC and other defendant Federal Agencies informed Plaintiffs that the January 31, 2005 FOIA request

[1] After receiving no meaningful responses to these FOIA requests, Plaintiffs filed a complaint in June 2004, and on July 2, 2004, sought a preliminary injunction requiring Defendants to expeditiously process Plaintiffs' requests and to provide Plaintiffs with all responsive non-exempt documents.

[2] For reasons not germane to this motion, Plaintiffs' FOIA request for unclassified documents, limited to the period of time covered by the original request, was resubmitted to the OLC on May 30, 2006.

would be given expedited processing by OLC.[3] *See* Clark Decl. ¶ 3 and Ex. C (Letter from Lane to Lustburg and Lewis). By letter dated March 21, 2005, OLC informed Plaintiffs that OLC had begun processing Plaintiffs' FOIA request, and was withholding several responsive unclassified documents. *See* Clark Decl. ¶ 4 and Ex. D (Letter from Colburn to Lewis). On June 1, 2005, OLC produced 14 unclassified documents responsive to Plaintiffs' FOIA request, and by letter of the same date, informed Plaintiffs that the agency had "completed our search of our unclassified files," but had "not yet searched our classified files." *See* Clark Decl. ¶ 5 and Ex. E (Letter from Colburn to Lewis). By letter dated September 19, 2005, OLC informed Plaintiffs that the search of the agency's classified files had been completed, and that the search revealed a large number of documents responsive to Plaintiffs' FOIA request, all of which were being withheld pursuant to putative FOIA exemptions. The letter stated, "This completes the response of the Office of Legal Counsel to your [FOIA] request dated January 31, 2005." *See* Clark Decl. ¶ 6 and Ex. F (Letter from Colburn to Lewis).

On November 15, 2005, after exhausting their administrative remedies, Plaintiffs filed the instant complaint against the Department of Justice and its component OLC, seeking the release of documents withheld by the agency. *See* Clark Decl. ¶ 7 and Ex. G (Complaint).

Several months later, on May 15, 2006, OLC provided Plaintiffs with a *Vaughn* declaration setting forth its purported basis for withholding classified documents. On September 8, 2006, OLC provided a *Vaughn* declaration setting forth its basis for withholding unclassified documents responsive to Plaintiffs' FOIA request. On March 2, 2007, Plaintiffs filed a motion seeking summary judgment on its claims of improper withholding by the OLC, Department of Defense, and the Central Intelligence Agency of documents responsive to Plaintiffs' FOIA

[3] The Government's letter titles the request the "February FOIA Request," in reference to the date, February 1, 2005, that the January 31, 2005 request was received.

request. In response, the government submitted revised *Vaughn* declarations for both the classified and unclassified OLC documents, including classified OLC documents referred by OLC to the CIA as the original classification authority for those documents. *See* Clark Decl. ¶ 10 and Ex. H & I (Bradbury and Dorn Declaration Excerpts). The indices for the classified and unclassified documents attached to the *Vaughn* declarations included 12 documents post-dating January 31, 2005.[4] *Id.* The *Vaughn* declaration addressing unclassified documents stated that searches for OLC documents were performed in March and April, 2005 and "revealed a large number of classified and unclassified documents." *See* Clark Decl. ¶ 11 and Ex. H, ¶ 44. The *Vaughn* declaration addressing classified documents did not describe OLC's search for documents. Thus, neither declaration made reference to the OLC search of its classified files discussed in OLC's letter to Plaintiffs of June 1, 2005. Also absent from the declarations, as well as from all correspondence from OLC, was notification to Plaintiffs of the apparent cut-off date applied by the agency as the temporal limit for its search.

OLC Bradbury Memoranda

On October 4, 2007, an article appeared on the front page of the New York Times describing two OLC memoranda created by Steven G. Bradbury, now Principal Deputy Assistant Attorney General for the Office of Legal Counsel. ("OLC Bradbury Memoranda"). *See* Clark Decl. ¶ 15 and Ex. A (*Secret U.S. Endorsement of Severe Interrogations*). The first memorandum, dated at some point "soon after" February 2005, is described in the article as an OLC opinion providing "explicit authorization" for the combined use of harsh interrogation

[4] *See* Third Bradbury Decl. dated June 7, 2007, doc. no. 307 dated Feb. 26, 2005, doc. no. 386 dated June 4, 2006, doc. no. 726 dated Aug. 18, 2006, doc. no. 1097 dated Feb. 1, 2006, doc. no. 1447 dated Feb. 4, 2005, doc. no. 1449 dated Feb. 4, 2005; Dorn Decl. dated June 7, 2007, doc. no. 105 dated Mar. 1, 2005, doc. no. 106 dated Mar. 7, 2005, doc. no. 107 dated Apr. 22, 2005, doc. no. 108 dated Apr. 27, 2005, doc. no. 109 dated Apr. 29, 2005, doc. no. 110 dated May 5, 2005.

techniques on terror suspects by the Central Intelligence Agency ("CIA"). This secret opinion was reportedly issued subsequent to the public release of an OLC memo dated December 30, 2004 declaring torture "abhorrent to American law and values," by which the government appeared to distance itself from the infamous OLC "Torture Memo" of August 1, 2002 endorsing the legality of certain harsh interrogation techniques. The second memorandum, also authored by Mr. Bradbury in 2005, is described as an OLC opinion that CIA interrogation methods would not violate the prohibition on "cruel, inhuman, or degrading treatment." The memo was apparently crafted in response to Congress' consideration of legislation that would expressly outlaw such treatment. That legislation was passed in the House and Senate and signed into law in two separate bills in December of 2005 and January of 2006. *See* P.L. 109-148, Title X § 1003 (2006); P.L. 109-163, Title XIV § 1402 (2006) (the "McCain Amendment").

Upon learning of the existence of the OLC Bradbury memoranda, Plaintiffs promptly demanded an explanation from the government as to why these memoranda had not been produced or identified, as these documents were unmistakably responsive to Plaintiffs' FOIA request. *See* Clark Decl. ¶ 18 and Ex. J (Letter from Lustberg and Clark to Lane). By letter dated October 12, 2007, the government responded that the memoranda post-dated the cut-off dates used by the OLC and CIA, for the temporal limits of their search, and the memoranda thus "fell outside the scope" of the searches responsive to Plaintiffs' FOIA requests." [5] *See* Clark Decl. ¶ 19 and Ex. K (Letter from Lane and Skinner to Lustberg and Clark). The government's letter stated that OLC applied the date of Plaintiffs' FOIA request - January 31, 2005 - as the cut-off date for documents, and not any of the dates upon which OLC performed its search for responsive documents, despite the fact that Department of Justice FOIA regulations provide that

[5] The CIA's response to Plaintiffs' FOIA request is not at issue in this motion.

the agency and its components apply the date that the search commenced as the temporal limit for a search's scope, and require notice to the requester if any other date is applied. *See* 28 C.F.R. § 16.4 (a). The government's response also failed to address why documents post-dating January 31, 2005, were included in the *Vaughn* declarations indexing documents processed by OLC if in fact a January 31, 2005 cut-off date had been applied.

ARGUMENT

It has long been recognized that freedom of information is a "structural necessity in a real democracy." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004). In enacting FOIA, Congress recognized that an informed citizenry is "needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). FOIA was "enacted to illuminate government activities, . . .to provide a means of accountability, to allow Americans to know what their government is doing." *ACLU v. Dep't of Defense (I)*, 339 F.Supp. 2d 501, 504 (2004) (citing *Halpern v. Dep't of Defense*, 181 F.3d 279, 284-85 (2d Cir. 1999)); *ACLU v. Dep't of Defense (III)*, 389 F.Supp.2d 547, 578-79 (S.D.N.Y. 2005) (FOIA is "a means for citizens to know what their 'Government is up to'") (quoting *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157, 171-72 (2004)). FOIA thus "adopts as its most basic premise a policy strongly favoring public disclosure of information in the possession of federal agencies." *Halpern*, 181 F.3d at 286 (2d Cir. 1999).

OLC's refusal to disclose documents responsive to Plaintiffs' FOIA request should be immediately enjoined. *See* 5 U.S.C. § 552(a)(4)(B) ("[T]he district court ... has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant."); *Payne Enters. v. U.S.*, 837 F.2d 486, 494 (D.C.Cir. 1988) ("[t]he FOIA imposes no limits on courts' equitable powers in enforcing its terms.") (citation omitted). This Court's review of the OLC's actions is *de novo*, and OLC bears

the burden of justifying its actions. 5 U.S.C. § 552(a)(4)(B); *see also Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989) ("Unlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, the FOIA expressly places the burden 'on the agency to sustain its action,' and directs the district courts to 'determine the matter *de novo*.'") (quoting 5 U.S.C. § 552(a)(4)(B)).

I. PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION COMPELLING DEFENDANT TO PROCESS DOCUMENTS AT ISSUE ON AN EXPEDITED BASIS.

In order to prevail on a motion for a preliminary injunction, Plaintiffs must demonstrate:

> (1) the likelihood of irreparable injury in the absence of such an injunction, and (2) either (a) likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation plus a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

Fed. Express Corp. v. Fed. Espresso, Inc., 201 F.3d 168, 173 (2d Cir. 2000). As shown below, Plaintiff meets the burden warranting immediate injunctive relief.

A. Irreparable Injury Is Likely To Result If Plaintiffs' Request For A Preliminary Injunction Is Not Granted.

Plaintiffs are likely to suffer irreparable injury if the Court does not order OLC to immediately produce or justify its withholding of the OLC Bradbury memoranda, and to commence the processing of remaining outstanding documents responsive to Plaintiffs' FOIA request.

Plaintiffs are each non-profit organizations that share a central purpose of providing the public with information on government conduct. OLC's refusal to turn over responsive documents frustrates Plaintiffs' 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 in particular the scope and scale of detainee

abuse, as well as the extent of any official responsibility for such abuse. OLC itself acknowledged that there is an "urgency to inform the public" about the subject matter of Plaintiffs' FOIA request when it granted Plaintiffs' request for expedited processing in February 2005.[6] *See* 5 U.S.C. § 552(a)(6)(E)(v) (setting forth the standard for granting expedited processing under FOIA); *see also Electronic Privacy Information Center v. Dep't of Justice*, 416 F.Supp.2d 30, 41 (D.D.C. 2006) ("DOJ's arguments challenging the irreparable nature of the harm sustained by [plaintiff] as a result of DOJ's delay is severely undermined by its determination that [plaintiff's] FOIA requests merit expedition.") (granting preliminary injunction ordering DOJ to expeditiously process FOIA request where plaintiff would otherwise be precluded from obtaining information in a timely fashion "vital to the current and ongoing debate surrounding the legality of the Administration's warrantless surveillance program."); *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988) (finding that organization that relies "'heavily and frequently on FOIA' to conduct work that is essential to the performance of certain of their primary institutional activities" demonstrated sufficient injury to warrant equitable relief in the face of agency delay in the release of requested records.) (quoting *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 91 (D.C. Cir. 1986)).

At issue in this case is not simply a delay in OLC's identification and production of documents, but rather, OLC's unilateral denial of access to documents responsive to Plaintiffs' request, in violation of Plaintiffs' statutory right to the documents under FOIA. Allowing OLC to withhold documents pertaining to issues that are currently and immediately the subject of important public discourse and debate would irreparably injure Plaintiffs by precluding them

[6] Indeed, this Court has previously determined that the information sought by Plaintiffs in their FOIA requests "are matters of significant public interest." *See ACLU (I)*, 339 F. Supp. 2d at 504 (S.D.N.Y. 2004) (granting injunctive relief and ordering expedited processing of Plaintiffs' request).

from providing their particular perspective to the public on these issues. *Cf. Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (citation omitted). For these reasons, OLC's failure to process the outstanding documents is likely to cause Plaintiffs' irreparable harm.

B. Plaintiffs Are Likely To Succeed On The Merits.

Under FOIA, an agency must conduct an adequate search for documents responsive to a FOIA request, and is required to either disclose responsive documents or to provide a justification for their non-disclosure. 5 U.S.C. § 552; *Ruotolo v. Dep't of Justice, Tax Div.*, 53 F.3d 4, 8-9 (2d Cir. 1995) (In a FOIA suit, the defending agency must show "that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements.") (quoting *Nat'l Cable Television Ass'n v. FCC*, 479 F.2d 183, 186 (D.C. Cir. 1973)).

OLC's failure to disclose or justify the withholding of documents responsive to Plaintiffs' FOIA request, and or conduct an adequate search for those documents, violates FOIA. Therefore, Plaintiffs are likely to succeed on the merits of their claim.

Initially, OLC's assertion that it applied a January 31, 2005 temporal limit cut-off to its search for documents responsive to Plaintiffs' FOIA request is inconsistent with the *Vaughn* declarations provided by Defendants demonstrating that OLC processed documents originating after its purported cut-off date. Specifically, the *Vaughn* indices for both the classified and unclassified OLC records include documents that post-date January 31, 2005, and three of the documents processed by OLC post-date all of 2005, the year in which the OLC Bradbury

memoranda were reportedly created.[7] If the OLC Bradbury memoranda do in fact pre-date the cut-off applied by OLC for its search for responsive documents, OLC's refusal to identify or disclose the documents to Plaintiffs is plainly violative of FOIA. *See Coastal States Gas Corp. v. Dep't of Energy*, 495 F.Supp. 1180, 1182 (D.C. Del. 1980) ("If the agency can lightly avoid its responsibilities by laxity in identification or retrieval of desired material, the majestic goals of the [FOIA] Act will soon pass beyond reach").

Moreover, even if OLC applied a January 31, 2005 cut-off as the temporal limit of its search, the use of a date-of-request cut-off is generally impermissible under the Department of Justice FOIA regulations. In particular, 28 C.F.R. § 16.4(a), which applies to the Department of Justice and its components, provides that a temporal limit cut-off of the day a search is commenced is to be applied to FOIA requests in the absence of notice to the requester of the use of an alternative cut-off date. By failing to apply a date-of-search cut-off, or to send notice that a cut-off other than a date-of-search was to be applied, OLC violated its own regulatory obligations.

Further, under FOIA, an agency must conduct an adequate search for responsive documents using methods that can reasonably be expected to produce the information requested. *See* 5 U.S.C. § 552(a)(3)(C); *see also Campbell v. Dep't of Justice*, 164 F.3d 20, 27 (D.D.C. 1998) ("The court applies a 'reasonableness' test to determine the 'adequacy' of a search methodology … consistent with congressional intent tilting the scale in favor of disclosure.") (citation omitted). "[A] temporal limit pertaining to FOIA searches … is only valid when the limitation is consistent with the agency's duty to take reasonable steps to ferret out requested documents." *McGehee v. CIA*, 697 F.2d 1095, 1101 (D.C. Cir. 1983). The agency bears the

[7] *See* Footnote 4, *supra*.

burden of establishing that any limitations on the search it undertakes comports with its obligation to conduct a reasonably thorough investigation. *Id.; see Tarullo v. Dept. of Defense*, 170 F.Supp.2d 271, 274 (D.Conn., 2001). In this case, Plaintiffs' FOIA request seeks information concerning *ongoing* activity by OLC and other government departments and agencies with respect to detainees whom the U.S. Government continues to capture and detain.[8] The application of a date-of-request cut-off to OLC's search would thus necessarily result in the omission of documents otherwise responsive to Plaintiffs' request, and therefore cannot satisfy OLC's duty to use a search method reasonably calculated to produce the requested information. The use of a date-of-request cut-off would also impose a burden on Plaintiffs of having to continually update their request during the initial request's pendency. *See Van Strum v. EPA*, 1992 WL 197660, *2 (9th Cir. Aug. 19, 1992) (reasonable temporal cut-off date for the FOIA search was the date upon which the search for documents commenced); *Public Citizen v. Dep't of State*, 276 F.3d 635, 644 (D.C. Cir. 2002) (finding date-of-request cut-off policy unreasonable where " the policy's net result is to increase processing time by forcing [plaintiff] to file multiple FOIA requests to obtain documents that the Department would have released in response to a single request had it used a later cut-off date.").

Here, the government's declaration attesting to the adequacy of OLC's search for documents states that OLC performed a search of its files in March and April of 2005. *See* Clark Cert. ¶ 12. However, a letter to Plaintiffs from OLC indicates that the search of its classified files did not commence until some point after June 1, 2005. *See* Clark Cert. ¶ 5. Given the

[8] Notably, the fact that centrally relevant documents responsive to Plaintiffs' FOIA request were continuing to be produced must have been appreciated by Steven G. Bradbury, who not only supervises OLC's responses to FOIA requests, and submitted the *Vaughn* declarations for the OLC in this matter, but who is the author of the two OLC memos at issue in this motion. *See* Ex. H at ¶ 1 (Bradbury Decl.).

omissions and inconsistencies in the government's submissions, Plaintiffs are unable to discern the precise nature of OLC's search for documents. If it is the case that OLC's search for documents responsive to Plaintiffs' FOIA request proceeded in multiple and distinct stages, each of the distinct searches should, at the earliest, have had a temporal-limit cut-off applied as of the date of the commencement of the respective search, as this method is the one most reasonably calculated to uncover responsive documents. OLC's apparent failure to apply a date-of-search cut-off to its search for responsive documents, and its failure to identify or disclose responsive documents to Plaintiffs, is unreasonable and unlawful under FOIA.

There is no question that OLC has failed to identify or disclose documents responsive to Plaintiffs' FOIA request, either by using an improper cut-off date as the temporal limit for its search, or failing to identify or disclose the OLC Bradbury memoranda - which pre-date a dozen documents processed and identified by OLC in its *Vaughn* submissions - and thus appear to have been encompassed within the scope of the temporal limit that did apply to OLC's search. Plaintiffs have thus demonstrated a likelihood of success on the merits sufficient to justify the grant of a preliminary injunction.

C. A Balance Of Hardships Clearly Favors Plaintiffs.

Plaintiffs are entitled to a preliminary injunction because they easily satisfy the standard of showing "sufficiently serious questions going to the merits" plus a "balance of hardships tipping decidedly toward the party requesting the preliminary relief."[9] *See Fed. Express Corp.,*

[9] Although some courts have been reluctant to apply the lesser "serious questions/balance of hardships" standard when a preliminary injunction is sought against governmental action, the Second Circuit has held that this standard is proper where the movant asserts a "claim in the public interest" and seeks to compel government compliance with a regulatory or statutory standard. *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1326, 1338-39 (2d Cir. 1992) ("[T]he 'likelihood of success' prong need not always be followed merely because a movant seeks to enjoin government action."), *vacated as moot on other grounds by Sale v. Haitian Centers Council, Inc.*, 509 U.S. 918 (1993); *see also Patton v. Dole*, 806 F.2d 24, 30 (2d Cir.

201 F.3d at 173 (holding that preliminary injunctive relief is warranted where the movant shows irreparable harm and either likelihood of success on the merits, or sufficiently serious questions going to the merits plus a balance of hardships in the movant's favor). The discussion in Part I.B above, demonstrating Plaintiffs' likelihood of success on the merits, also demonstrates that there are "sufficiently serious questions going to the merits to make them a fair ground for litigation." *Id.*

The balance of hardships is also decidedly in Plaintiffs' favor. FOIA not only recognizes that the public interest is served by disclosure of government records, but that there is a public interest in prompt disclosure. *ACLU v. Dep't of Defense (II)*, 357 F.Supp.2d 708, 712 (S.D.N.Y. 2005). When agency records shed light on potentially controversial current operations of the government, refusal or delay in releasing the records frustrates the public interests served by the statute.

In addition, there are significant hardships to Plaintiffs that attend OLC's application of an improper cut-off date to limit the scope of Plaintiffs' FOIA request. As noted above in Part I.A, Plaintiffs are harmed by OLC's refusal to identify or disclose responsive documents because they are precluded from accessing the information necessary to inform the public regarding the scope and scale of prisoner abuse and the extent of any official responsibility for such abuse, and in particular, OLC's role in developing, authorizing, or otherwise sanctioning CIA interrogation methods. Moreover, as the Court is aware, the adequacy of OLC's search, and the withholding of responsive OLC documents, are the subject of a summary judgment motion presently pending before the Court. Without the grant of a preliminary injunction, Plaintiffs will lose the ability to

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1986). Of course, if the Court agrees with Plaintiffs that there is a likelihood of success on the merits, preliminary injunctive relief is warranted and the Court need not address whether the "serious questions/balance of hardships" standard has been met.

have any claims related to the OLC Bradbury memoranda adjudicated along with their other claims against the OLC. Plaintiffs would thus have no choice but to file a second motion against OLC, delaying the vindication of their rights in court, and causing needless inefficiency, burdensome not only to the Plaintiffs, but to the Court. Conversely, the production or identification by OLC of only two memoranda by November 16th, and processing of the remaining outstanding documents by December 12th, should not pose an undue hardship on OLC. The balance of hardships thus favors the grant of a preliminary injunction, particularly in light of the overwhelming public interest in the records sought.

In light of the significant interests set forth by Plaintiffs, and the corresponding lack of equities in OLC's failure to disclose records responsive to Plaintiffs' FOIA request, a preliminary injunction is clearly warranted. The Court should grant the requested relief.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court (1) grant Plaintiffs' Motion for Preliminary Injunction and compel OLC to produce the two OLC Bradbury memoranda, or alternatively, provide a *Vaughn* declaration for the withheld memoranda stating the reasons for their non-disclosure by November 16, 2007, (2) permit Plaintiffs to file by November 20, 2007, a supplemental brief in support of their Third Motion for Summary Judgment limited in scope to the challenge of the government's justification for withholding the memoranda, if any and (3) order OLC to commence the processing of the remainder of the responsive documents created between January 31, 2005, and the date or dates upon which OLC searched for responsive documents, and produce these documents, as well as a *Vaughn* declaration for any withheld documents and the reasons for their non-disclosure by December 15, 2007.

Respectfully submitted,

/LSL/

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