IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
Plaintiff,	)	
v.	)	Civ. No. 1:12-cv-1510 (JDB)
U.S. DEPARTMENT OF JUSTICE,	)	
Defendant.	)	

PLAINTIFF'S RESPONSE TO DEFENDANT'S
MOTION TO STAY; REQUEST FOR HEARING

Plaintiff Judicial Watch, Inc., by counsel, respectfully submits this response in opposition to Defendant's motion for an indefinite stay of the proceedings. In addition, pursuant to LCvR 7(f), Plaintiff requests an oral hearing on Defendant's Motion to Stay. As grounds therefor, Plaintiff states as follows:

MEMORANDUM OF LAW

At the heart of Defendant's argument is the assertion that Plaintiff's FOIA lawsuit "is ancillary to the *House Committee* suit." Defendant's Motion to Stay at 11. This notion that Plaintiff's lawsuit is in some way inferior is simply incorrect. Plaintiff has as much of a right under the law as the House Committee to seek access to records of Defendant. In fact, since Defendant does not challenge Plaintiff's claim on jurisdictional grounds, it could be reasonably argued that Plaintiff's right is greater – it is certainly clearer and simpler – than that of the House Committee.

Under the Freedom of Information Act ("FOIA"), any person has "has ***a right*** to request any records held by a federal agency." *Taylor v. Sturgell*, 553 U.S. 880, 885 (2008) (*citing*

5 U.S.C. §552(a)(3)(A)) (emphasis added). "No reason need be given for a FOIA request, and unless the requested materials fall within one of the Act's enumerated exemptions . . . the agency must 'make the records promptly available to the requester." *Taylor*, 553 U.S. at 885 (*quoting* 5 U.S.C. § 552(a)(3)(A)). In addition, "[i]f an agency refuses to furnish the requested records, the requester may file suit in federal court." *Taylor*, 553 U.S. at 885. In other words, a FOIA requester has an undisputed, statutory right to request records of the government and litigate the withholding of those records.

There is no dispute that Plaintiff has brought a proper claim. Plaintiff filed its Complaint on September 13, 2012. *Id*. at 7. Defendant filed its Answer on October 18, 2012. *Id.* Although Defendant initially suggested that it may move to dismiss the case on threshold grounds, Defendant has since indicated that it believes only that "this FOIA litigation should not proceed at this time." *Id*.

Since both the Complaint and Answer have been filed, the briefing of dispositive motions on the merits is appropriate at this time. There is no dispute that Plaintiff exhausted its administrative remedies. Nor is there a dispute that records responsive to Plaintiff's FOIA request exist. The only issue before the Court is whether Defendant is properly withholding records responsive to Plaintiff's FOIA request.

The straightforward procedural posture of this case stands in sharp contrast to the complexity of the *House Committee* suit. In that case, it is unclear if or when the courts will ever resolve the issue on the merits. As Defendant stated, oral argument only on a motion to dismiss based on jurisdictional grounds is scheduled for February 7, 2013. Defendant's Motion to Stay at 7. There is no deadline for a decision on jurisdiction to be issued. Nor is there a schedule for

briefing of the merits. In fact, it is a near certainty that regardless of the Court's decision on the motion to dismiss, the losing party will seek an immediate appeal, which could ultimately require resolution by the U.S. Supreme Court. *Committee on the Judiciary of the U.S. House of Represenatives v. Miers*, 542 F.3d 909 (D.C. Cir. 2008) (In denying a motion for an expedited appeal in a case with the same jurisdictional issues, the D.C. Circuit stated that "even if expedited, this Controversy will not be fully and finally resolved by the Judicial Branch – including resolution by a panel and possible rehearing by this Court en banc and by the Supreme Court.").

Whereas Plaintiff's FOIA lawsuit is ripe for adjudication on the merits, the *House Committee* suit could be months, if not years, away from reaching the same stage. In addition, it is quite possible that the U.S. Supreme Court could ultimately decide that jurisdiction does not exist. Therefore, the delay of adjudication of Plaintiff's lawsuit caused by any stay would not only be "immoderate" but "oppressive." *Landis v. North American Company*, 299 U.S. 248, 256 (1936). For this reason alone, Defendant's motion to stay should be denied.

In addition, it is undisputed that Plaintiff is not a party in the *House Committee* suit. Therefore, for Plaintiff to be estopped from litigating its claim, one of the six exceptions to the rule against nonparty preclusion must exist. *Taylor*, 553 U.S. at 893-895. None of the six exemptions exist in this case. Importantly, Defendants do not even argue that Plaintiff would be estopped from proceeding; it baldly asserts that "[i]f Judge Jackson were to reach the merits of the assertion, such a ruling would, at the very least, be relevant here." Defendant's Motion to Stay at 12. Defendant has made no effort to demonstrate how any ruling by Judge Jackson would be relevant. It would be irrelevant. *Playboy Enterprises, Inc. v. Department of Justice,*

677 F.2d 931, 936 (D.C. Cir. 1982) (With respect to claims of privilege, "issues in the context of a FOIA action are quite different [than that in discovery proceedings]. That for one reason or another a document may be exempt from discovery does not mean that it will be exempt from a demand under FOIA.").

Similarly, if Defendant sincerely believed that Plaintiff's lawsuit was closely related to the *House Committee* suit, LCvR 40.5 required Defendant to notify the Court that the two cases were related. It never did so. Defendant's inaction is telling. By not "immediately notify[ing]" the Court, Defendant has conceded that Plaintiff's lawsuit and the *House Committee* suit do not "(i) relate to common property, or (ii) involve common issues of fact, or (iii) grow out of the same event transaction or (iv) involve the validity or infringement of the same patent." Nor has Defendant sought to consolidate the two cases.

In addition, Defendant claims that negotiations between the Executive and Legislative Branches would be hindered if Plaintiff's lawsuit were to proceed. Yet it is unclear how any discussions between the two parties in the *House Committee* suit would be affected by Defendant satisfying its obligations under FOIA. Regardless of any potential resolution in that case, Defendant in this action will still be required to satisfy its obligations under FOIA, including justifying its withholdings. Plaintiff's lawsuit simply does not vanish if and when the *House Committee* suit is resolved.

Simply put, Plaintiff has a statutory right to the requested records and to have Defendant's denial of Plaintiff's FOIA request reviewed by this Court. Plaintiff's claim is now ripe for adjudication, and Plaintiff is prepared to brief the issues. Defendant simply seeks to delay the date that it must justify its claims of exemption. Defendant has not demonstrated why

Plaintiff's rights should be immoderately and oppressively delayed; it has only disparaged the public's right to request records of its government. For the foregoing reasons, Plaintiff respectfully requests that Defendant's request for an indefinite stay of the proceedings be denied.[1]

Dated: January 15, 2013

Respectfully submitted,

/s/ Paul J. Orfanedes
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[1] Although Plaintiff believes that summary judgment briefing is appropriate at this time, at a minimum, the Court should order Defendant to provide Plaintiff with a *Vaughn* index or other detailed justification for its claims of withholdings.