

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

Defendant.

**EMERGENCY MOTION FOR STAY OF
DISCLOSURE DEADLINE PENDING APPEAL
BY DEPARTMENT OF LABOR**

1 Pursuant to Federal Rule of Civil Procedure 62(d) and (e) and Local Rule 7-11, Defendant
2 Department of Labor (“DOL”) hereby moves, on an emergency basis, for a stay of the February 20,
3 2024 disclosure deadline set forth in the Court’s December 22, 2023 Order, Dkt. No. 51 as extended by
4 Order dated December 28, 2024, Dkt. No. 53, pending appellate review. DOL filed its notice of appeal
5 today, February 15, 2024. Dkt. No. 57. A stay of the disclosure deadline is necessary to avoid the
6 irreparable harm that would result to DOL from mandated disclosure pending appeal.

7 Because February 19, 2024, is a federal holiday and disclosure has been ordered for February 20,
8 2024, DOL respectfully requests a decision on this emergency motion by Friday, February 16, 2024, to
9 give DOL the opportunity to seek an emergency motion for stay pending appeal from the Ninth Circuit
10 pursuant to Federal Rule of Appellate Procedure 8(a)(2). In the event this Court denies the motion for
11 stay, DOL respectfully requests that the Court extend the disclosure date by seven days, to February 27,
12 2024, to permit DOL to seek a stay from the Ninth Circuit.

13 In anticipation of the impending disclosure deadline, counsel for DOL attempted to connect with
14 Plaintiffs’ counsel on Tuesday, February 13, 2024, to get their position regarding DOL’s request for a
15 stay pending appeal. Plaintiffs were unwilling to stipulate to an extension of the deadline. Following
16 the filing of the Notice of Appeal earlier today, counsel for DOL again emailed counsel for Plaintiffs
17 requesting that they stipulate to a stay pending appeal, or in the alternative, to an interim extension of the
18 deadline to permit time for the Court to consider DOL’s motion for a stay on a less abbreviated timeline.
19 Plaintiffs responded that they were unwilling to stipulate to a stay at this time.

20 **ARGUMENT**

21 By Order dated December 22, 2023, this Court denied in part and granted in part the parties’
22 cross-motions for summary judgment in this Freedom of Information Act (“FOIA”) case and held that
23 the EEO-1 reports of the five bellwether federal contractors were not exempt from disclosure under
24 Exemption 4. The Court ordered DOL to “produce the remaining EEO-1 reports at issue within 28
25 days” of the Order. Dkt. No. 51 at 13. Pursuant to the parties’ stipulation, the Court extended that
26 deadline to February 20, 2024, the same day as the government’s deadline to appeal. Dkt. No. 53.
27 Earlier today, DOL filed a notice of appeal. Dkt. No. 57. To preserve the government’s right to seek
28 appellate review and to preserve the Ninth Circuit’s ability to consider the issues presented in this

1 appeal, DOL respectfully requests a stay of the February 20, 2024, production deadline pending appeal.
 2 A stay of the production deadline is necessary to avoid the irreparable harm that would result if the
 3 government is forced to release the documents before it has the opportunity to pursue its appellate rights.

4 The Court has discretion to determine whether it should stay its orders pending appeal. *See City*
 5 *of Oakland v. Holder*, 961 F. Supp. 2d 1005, 1012 (N.D. Cal. 2013). To make this decision, district
 6 courts consider four factors: (1) whether the movant has made a strong showing that it is likely to
 7 succeed on the merits; (2) whether the movant will be irreparably injured absent a stay; (3) whether
 8 issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where
 9 the public interest lies. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (stay of order releasing
 10 prisoner); *Leiva–Perez v. Holder*, 640 F.3d 962, 964 (9th Cir. 2011) (stay of removal). In the Ninth
 11 Circuit, a party requesting a stay may either show “both a probability of success on the merits and the
 12 possibility of irreparable injury” or “that serious legal questions are raised and that the balance of
 13 hardships tips in its favor.” *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). Here, the
 14 government will effectively be denied its right of appeal if a stay is not granted, and the matter
 15 undoubtedly presents serious legal questions. In light of this, a stay is plainly warranted.

16 **A. The Government Would Suffer Irreparable Injury if a Stay is not Granted, and the**
 17 **Balance of Hardships Weighs in its Favor.**

18 Once the documents have been surrendered, not only is any possible appeal moot, but the status
 19 quo can never be restored. The documents are in the public domain forever, and the breach of
 20 confidentiality caused by public release cannot be undone. That alone is irreparable harm. *See John Doe*
 21 *Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers); *see also United*
 22 *States Dep’t of Commerce v. Assembly of Cal.*, 501 U.S. 1272 (1991). As this Court has recognized,
 23 disclosure of confidential information “would necessarily destroy the private information, no matter the
 24 circumstance.” *A.S.B.L. v. Dep’t of Defense*, 411 F. Supp. 3d 824, 832 (N.D. Cal. 2019). Accordingly,
 25 “stays are routinely granted in FOIA cases.” *Ctr. for Nat’l Sec. Studies v. DOJ*, 217 F. Supp. 2d 58, 58
 26 (D.D.C. 2002) (granting stay because disclosure of detainee names would “effectively moot any
 27 appeal”), *aff’d in part, rev’d in part*, 331 F.3d 918 (D.C. Cir. 2003).¹

28

¹ *See HHS v. Alley*, 556 U.S. 1149, 1149 (2009); *Dep’t of Commerce v. Assembly of the State of*
 EMERGENCY MOTION FOR STAY PENDING APPEAL
 No. 22-cv-07182-WHA 2

As the First Circuit recognized, in the absence of a stay, the appeal will become moot, and the vital public policy interest represented by the claimed exemption will be irretrievably harmed:

[T]he Constitution and laws entitle litigants to have their cases independently reviewed by an appellate tribunal. Meaningful review entails having the reviewing court take a fresh look at the decision of the trial court before it becomes irrevocable. Appellants' right of appeal here will become moot unless the stay is continued pending determination of the appeals. Once the documents are surrendered pursuant to the lower court's order, confidentiality will be lost for all time. The status quo could never be restored.

Providence Journal, 595 F.2d at 890 (emphasis added). The need to preserve the Government's right to appellate review of a disclosure order is "perhaps the most compelling justification" for the grant of a stay. *John Doe Agency*, 488 U.S. at 1309 (Marshall, J., in chambers). In this case, once the Government is forced to disclose the withheld documents to plaintiff, its right to a meaningful appeal will be lost, and the status quo cannot be restored.

The harm from compliance with the December 22, 2023 order is not only irreparable, but also significant. Important interests are protected by FOIA's exemptions, which "are as much a part of [FOIA's] purpose[s and policies] as the [statute's disclosure] requirement." *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019) ("*Argus Leader*") (citation omitted; alterations in original). In particular, Exemption 4 is intended to protect the interests of third-party submitters whose information was collected by the government. *ASBL*, 411 F. Supp. 3d at 836. Refusing to grant a stay here would irrevocably compromise these interests without any opportunity for the Ninth Circuit's to consider whether the documents at issue should be—as the government contends—protected from disclosure by Exemption 4. On the other side of the balance, a stay would not substantially harm Plaintiffs. DOL has already disclosed the vast majority of documents that Plaintiffs sought in their FOIA requests. The stay will appropriately extend for the duration of the appeal to provide DOL a meaningful opportunity to challenge the Court's ruling.

California, 501 U.S. 1272 (1991); *DOJ v. Rosenfeld*, 501 U.S. 1227 (1991); *John Doe Agency*, 488 U.S. at 1309; *Islamic Shura Council of S. Cal. v. FBI*, 635 F.3d 1160, 1164 (9th Cir. 2011); *Elec. Frontier Found. v. ODNI*, 595 F.3d 949, 954 (9th Cir. 2010) (granting stay pending appeal to allow Solicitor General opportunity to decide which portions of summary judgment order to appeal), *amended by* 639 F.3d 876 (9th Cir. 2010); *Taylor v. Dep't of the Army*, 684 F.2d 99, 102 (D.C. Cir. 1982); *see also Martin v. IRS*, 857 F.2d 722, 724 (10th Cir. 1988); *Acumenics Research & Technology v. DOJ*, 843 F.2d 800, 803 (4th Cir. 1988); *Coastal States Gas Corp. v. Dep't of Energy*, 644 F.2d 969, 973-74 (3d Cir. 1981); *Providence Journal Co. v. FBI*, 595 F.2d 889, 889-90 (1st Cir. 1979).

B. This Appeal Presents Serious Legal Questions, and the Government Can Establish a Probability of Success.

The Court is familiar with DOL’s view regarding application of Exemption 4 to the EEO-1 reports at issue here. While DOL recognizes that the Court has ruled that the reports at issue are not “commercial in nature,” DOL respectfully submits that, at a minimum, there is a substantial basis for the government’s views on this important and unsettled issue, which has never been considered by the Ninth Circuit. Indeed, this Court acknowledged that “there is no clearly defined limit for what is considered ‘commercial’ within our court of appeals.” Dkt. No. 51 at 5.

The Ninth Circuit has held that the term “commercial” must be given its “ordinary or common” meaning. *Watkins v. U.S. Bureau of Customs and Border Protection*, 643 F.3d 1189, 1194 (9th Cir. 2011). This Court recognized that principle, but proceeded to apply an unduly constricted interpretation of the term that engrafted requirements that are neither contained in the statutory language nor consistent with prior case law. There was no disagreement between the parties that headcount data is “of a commercial nature,” even if it is, as Plaintiff argued, “broad and non-specific.” But this Court’s Order seems to impose both a specificity and a “competitive impact” requirement on the commerciality analysis, requiring that the information not be simply commercial in nature but that it reveal “commercially valuable information.” Dkt. No. 51 at 6. That requirement is not contained in the statutory language, is not dictated by the plain meaning of “commercial,” and is inconsistent with the Supreme Court’s decision in *Argus Leader*.

Second, the Court focused on the specific format and use of the EEO-1 report rather than the inherent nature of the information that it contained to reach its conclusion. This approach is inconsistent with the commerciality standard, which asks whether the information “serves a ‘commercial function’ or is of a ‘commercial nature’” “in and of itself.” *Citizens for Responsibility & Ethics in Washington v. D.O.J.*, 58 F.4th 1255, 1263 (D.C. Cir. 2023). It is the nature of the information, not the format of the data or the purpose of its compilation, that is the relevant inquiry. *See CREW*, 58 F.4th at 1265 (citing cases). Even if the specific format of the EEO-1 report was designed for government reporting purposes, the information contained in that report is commercial in nature.

Third, the Court dismissed the argument that diversity data has inherent commercial

1 significance—a proposition that was conceded by Plaintiffs’ expert, who acknowledged that “many
2 firms use diversity data in designing and managing aspects of their internal operations”—without
3 addressing the expert testimony or the objector’s attestations of their own use of diversity data. The
4 Court reasoned that “[l]ike names or birthdays, the demographic background of employees does not
5 speak to the commercial contributions of a company’s workforce.” Dkt. No. 51 at 8. The Court failed to
6 consider the commercial nature of the collective demographic statistics presented in the EEO-1 reports,
7 mistakenly narrowing its focus to the specific demographic background of individual employees.

8 Fourth, the Court never addressed or distinguished the considerable body of case law that has
9 come to the opposite conclusion. *See, e.g., Pub. Citizen Found. v. U.S. Dep’t of Labor*, No. 18-cv-
10 00117, 2020 WL 9439355, at *7 (D.D.C. June 23, 2020); *Sears, Roebuck & Co. v. Gen. Services*
11 *Admin.*, 384 F. Supp. 996, 1005 (D.D.C. 1974). Instead, the Court extended the reasoning of *Getman v.*
12 *NLRB*, 450 F.2d 673 (D.C. Cir. 1971), which is based on the principle that a person’s identity, without
13 more, has no commercial value “in and of itself.” The workforce demographic information in the EEO-
14 1 reports is substantively different from a bare list of employee names because a person’s identity,
15 without more, has no commercial significance “in and of itself.”

16 Finally, the Court announced that “Exemption 4 of FOIA and the Trade Secrets Act are no
17 longer co-extensive,” without providing any grounds for this assumption apart from the fact that *Argus*
18 *Leader* did not address the confidentiality standard under the Trade Secrets Act. But *Argus Leader*’s
19 broadening of Exemption 4’s confidentiality standard only opens the possibility that the Ninth Circuit’s
20 law in this area is no longer settled. *See Synopsys, Inc. v. U.S. Dep’t of Labor*, No. 20-16414, 2022 WL
21 1501094, at *4 (9th Cir. May 12, 2022). In a footnote, the *Synopsis* Court noted that the parties had
22 acknowledged the possibility that Exemption 4 may now be broader than the Trade Secrets Act, but it
23 explicitly left the issue open, stating that it “need not decide here whether Exemption 4 is indeed now
24 broader in scope than the Trade Secrets Act.” 2022 WL 1501094, at *4 n.3. The Court erred in
25 assuming that the term “confidential” in the Trade Secrets Act is narrower than the ordinary meaning of
26 the term in Exemption 4, without engaging in any analysis of the issue as a textual matter.

27 DOL’s appeal raises serious legal issues and is likely to succeed. DOL respectfully requests that
28 the Court stay its order for the duration of this appeal. In the event this Court denies the motion for stay,

1 DOL respectfully requests that the Court extend the disclosure date by seven days, to February 27, 2024,
2 to permit DOL to seek a stay from the Ninth Circuit.

3 DATED: February 15, 2024

Respectfully submitted,

4 ISMAIL J. RAMSEY
United States Attorney

5 /s/ Pamela T. Johann
6 PAMELA T. JOHANN
Assistant United States Attorney

7 Attorneys for Defendant
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ISMAIL J. RAMSEY (CABN 189820)
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MICHELLE LO (NYRN 4325163)
Chief, Civil Division
PAMELA T. JOHANN (CABN 145558)
Assistant United States Attorney

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Attorneys for Defendant UNITED STATES
DEPARTMENT OF LABOR

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THE CENTER FOR INVESTIGATIVE
REPORTING and WILL EVANS,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
LABOR,

Defendant.

) Case No. 22-cv-07182-WHA

) **DECLARATION OF PAMELA T. JOHANN**

I, Pamela T. Johann, declare as follows:

1. I am an Assistant United States Attorney in the United States Attorney's Office for the Northern District of California, and I represent the United States Department of Labor ("DOL") in this matter. I am licensed to practice law in the State of California and to appear before this Court. I have personal knowledge of the following facts and if called to testify, I could and would competently testify thereto.

2. I submit this declaration in support of Defendant's Emergency Motion to Stay pursuant to Federal Rule of Civil Procedure 62(d) and Local Civil Rules 7-11 and 6-3.

1 3. This motion is filed to stay the December 22, 2023 order requiring the disclosure of
2 documents pending appeal to preserve the government's right to seek appellate judicial review and to
3 preserve the Ninth Circuit's ability to consider the issues presented in this appeal.

4 4. On February 15, 2024, DOL filed a notice of appeal of the Court's December 23, 2023
5 Order. Dkt. No. 57. That order currently requires release on February 20, 2024. February 19, 2024, is a
6 federal holiday. DOL requests that this Court issue a decision on its request for stay by February 16,
7 2024 so that, in the event a stay is denied, DOL can seek a stay in the Ninth Circuit pursuant to Federal
8 Rule of Appellate Procedure 8(a)(2). In the Court denies a stay pending appeal, DOL requests that the
9 Court continue the release date by seven days so that DOL can file a motion for stay in the Ninth
10 Circuit.

11 5. On Tuesday February 13, 2024, I reached out to counsel for Plaintiffs to try to schedule a
12 phone call. By email, counsel indicated that they were too busy to talk that day. By return email, I
13 explained that the disclosure deadline was approaching, the appeal decision was still under
14 consideration, and that DOL was requested a stay pending appeal in the event a notice of appeal was
15 filed. Counsel for Plaintiffs declined, indicated that they were not aware of any genuine exigency or
16 emergency requiring an extension, and to the extent DOL sought an open-ended stay there was "no
17 reason why that request could not have been made" at the time of the original request for an extension.

18 6. After filing DOL's notice of appeal, the undersigned emailed counsel for Plaintiffs again
19 to ask that Plaintiffs stipulate to a stay pending appeal, or in the alternative, to an interim continuance of
20 the release deadline to allow the court additional time to consider an emergency motion to stay. I
21 notified Plaintiffs that I intended to ask for the Court for a decision on DOL's motion to stay by
22 tomorrow, February 16, 2024, and requested a response by 4:00 p.m. today.

23 7. At 4:20 p.m., counsel for Plaintiffs responded that they were not prepared to stipulate at
24 this time and were continuing to research the matter. They also objected to a decision being made on the
25 motion tomorrow. In response to that email and in an attempt to address Plaintiffs' stated objection, I
26 proposed by email that Plaintiffs stipulate to a short extension of the release deadline to allow the
27 motion to heard on a less abbreviated timeline. Plaintiff's counsel declined that request. A true and
28 correct copy of the email chain with my requests and Plaintiffs' counsel's responses is attached hereto as

1 Exhibit A.

2 I declare under penalty of perjury that the foregoing is true and correct. Signed this 15th day of
3 February, 2024, in San Francisco, California.

4 /s/ Pamela T. Johann
5 PAMELA T. JOHANN
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Exhibit A

From: [Therese Y. Cannata](#)
To: [Johann, Pamela \(USACAN\)](#); [Aaron R. Field](#)
Cc: [Victoria Baranetsky \(vbaranetsky@revealnews.org\)](#); [Zachary E. Colbeth](#); [Danielle Ott](#)
Subject: [EXTERNAL] Re: Stay pending appeal
Date: Thursday, February 15, 2024 4:44:06 PM
Attachments: [image002.png](#)

Dear Pam,

Aaron stepped away for a moment, but I am informed on these issues. To your question, we have nothing further to add at this time. We will, of course, review and respond to your moving papers as permitted by the Court.

With regards,

Therese

Therese Y. Cannata
Attorney at Law



100 Pine Street, Suite 350
San Francisco, California 94111

CONTACT INFORMATION:

- Reception: 415.409.8900
- Direct Dial: 415.842.2321
- Email: tcannata@cofolaw.com

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From: "Johann, Pamela (USACAN)" <Pamela.Johann@usdoj.gov>
Date: Thursday, February 15, 2024 at 4:26 PM

To: "Aaron R. Field" <afield@cofolaw.com>

Cc: "Victoria Baranetsky (vbaranetsky@revealnews.org)" <vbaranetsky@revealnews.org>, "Therese Y. Cannata" <tcannata@cofolaw.com>, "Zachary E. Colbeth" <zcolbeth@cofolaw.com>, Danielle Ott <dott@cofolaw.com>

Subject: RE: Stay pending appeal

Aaron,

If the disclosure deadline is not stayed in this case, it will effectively deprive the government of an opportunity to appeal the order.

If you do not agree to a decision on DOL's emergency motion being made tomorrow, then will you agree to an extension of the release deadline to allow the motion to be heard within a reasonable time? Note that Judge Alsup's posted schedule indicates that he is not available next week.

Please let me know ASAP. I will need to file my motion in the next 15 minutes.

Thank you,
Pam

Pam Johann
Assistant United States Attorney, Deputy Civil Chief
Northern District of California
T: 415-436-7025

From: Aaron R. Field <afield@cofolaw.com>

Sent: Thursday, February 15, 2024 4:20 PM

To: Johann, Pamela (USACAN) <PJohann@usa.doj.gov>

Cc: Victoria Baranetsky (vbaranetsky@revealnews.org) <vbaranetsky@revealnews.org>; Therese Y. Cannata <tcannata@cofolaw.com>; Zachary E. Colbeth <zcolbeth@cofolaw.com>; Danielle Ott <dott@cofolaw.com>

Subject: [EXTERNAL] Re: Stay pending appeal

Pam,

The cases you have cited do not establish your entitlement to stay and are distinguishable.

Both involved law enforcement investigations, one of which related to 9/11. Both involved questions of law subject to more reasonable dispute than the one here, which has repeatedly been resolved adversely to your client but your client, the Department of Labor, insisted on relitigating yet again in this case. And, importantly, neither stands for the proposition that a stay is inevitable or that DOL is entitled to a stay as a matter of right. Both indicate a stay is available only on a showing that it is consistent with the balance of equities. We are

continuing to research the matter; however, we are not prepared to stipulate based on distinguishable cases on the timeline in your e-mail.

We also object to a decision being made on your motion tomorrow, because we will not have had a reasonable opportunity to review the matter or respond by that time.

Please include all of our e-mails in this e-mail chain in any submission that you provide to the Court.

Regards,

Aaron

Aaron Field

Attorney at Law



100 Pine Street, Suite 350

San Francisco, California 94111

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Telephone (Direct): 415.842.2285

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From: Johann, Pamela (USACAN) <Pamela.Johann@usdoj.gov>

Sent: Thursday, February 15, 2024 2:54 PM

To: Aaron R. Field <arfield@cofolaw.com>

Cc: Victoria Baranetsky (<vbaranetsky@revealnews.org> <vbaranetsky@revealnews.org>; Therese Y. Cannata <tcannata@cofolaw.com>; Zachary E. Colbeth <zcolbeth@cofolaw.com>; Danielle Ott <dott@cofolaw.com>

Subject: RE: Stay pending appeal

Re-sending the email below to the larger group—I just realized that my earlier email was sent only to Aaron.

Given the imminence of the disclosure date, the need to seek relief in the Ninth Circuit if the district court doesn't grant a stay, and Judge Alsup's unavailability next week, we are planning to file an Emergency Motion **today by 4:30**. We will request a stay pending appeal, or in the alternative a seven-day continuance to allow us time to make a motion in the Ninth Circuit. We will ask Judge Alsup for a decision by tomorrow, **February 16**. We will represent that we sought a stipulation from you but could not get a position before needing to file.

If you are amenable to a stipulation, please let me know by 4 pm today.

Thank you,
Pam

Pam Johann
Assistant United States Attorney, Deputy Civil Chief
Northern District of California
T: 415-436-7025

From: Johann, Pamela (USACAN)
Sent: Thursday, February 15, 2024 12:04 PM
To: Aaron R. Field <arfield@cofolaw.com>
Subject: Stay pending appeal

Aaron,

As you know, DOL has filed a notice of appeal of the district court's ruling. In light of this, we are requesting that Plaintiffs stipulate to a stay of the disclosure order pending appeal to provide DOL the opportunity for appellate review. "Stays are routinely granted in FOIA cases." *Ctr. for Nat'l Sec. Studies v. DOJ*, 217 F. Supp. 2d 58, 58 (D.D.C. 2002). Disclosure would moot the appeal and would result in an irreparable injury to the government. *See John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers). Stay of the disclosure order is therefore necessary to preserve the Government's right to appellate review, which presents a "compelling justification" for the grant of a stay. *Id.*

In the event you do not agree to a stay, we will file an emergency motion for a stay in district court

and, if necessary, in the Court of Appeals. We will need to ask for an immediate decision by the Court given the current disclosure date. For that reason, we would request in the alternative that you agree to an interim continuance to allow the court additional time to consider our motion.

Please let me know as soon as possible whether you will stipulate to a stay of the disclosure order.

Thank you,
Pam

Pam Johann
Assistant United States Attorney, Deputy Civil Chief
Northern District of California
T: 415-436-7025

From: Aaron R. Field <arfield@cofolaw.com>
Sent: Wednesday, February 14, 2024 9:35 PM
To: Johann, Pamela (USACAN) <PJohann@usa.doj.gov>; Victoria Baranetsky <vbaranetsky@revealnews.org>
Cc: Therese Y. Cannata <tcannata@cofolaw.com>; Zachary E. Colbeth <zcolbeth@cofolaw.com>; Danielle Ott <dott@cofolaw.com>
Subject: Re: [EXTERNAL] Re: Available for a call?

Pam,

With regret, we again respectfully decline.

We generally do our best to be flexible about deadlines, as our prior stipulations in this case show, especially when necessary to address genuine exigencies and emergencies. However, we are not aware of any genuine exigency or emergency here. Certainly, DOL has mentioned none. In December, despite years of pre-lawsuit delays, DOL asked for, we agreed to, and the Court ordered a generous, 32-day extension of DOL's disclosure deadline, more than doubling its time to disclose. The explicit purpose was to allow DOL to decide whether to appeal. DOL has not explained how or why the extension it had asked for has suddenly come up short. Nor has it told us any other reason why it cannot, or should not be expected to, comply with the deadline that it asked for, especially given DOL's last-minute timing.

Further complicating a stipulation, DOL has not yet clearly stated what it plans to ask for in a potential motion. If DOL plans to seek the kind of open-ended "stay" it proposed yesterday, that is concerning, since there is no reason why that request could not have been made immediately after the order was issued or in place of DOL's initial extension request.

We hope that, instead of continuing to delay disclosure or relitigating the same issues it has for years, DOL will simply comply with the Court's order, which got the "commercial" issue

right.

Regards,

Aaron

Aaron Field

Attorney at Law



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From: Johann, Pamela (USACAN) <Pamela.Johann@usdoj.gov>

Sent: Wednesday, February 14, 2024 4:16 PM

To: Aaron R. Field <afield@cofolaw.com>; Victoria Baranetsky <vbaranetsky@revealnews.org>

Cc: Therese Y. Cannata <tcannata@cofolaw.com>; Zachary E. Colbeth <zcolbeth@cofolaw.com>;
Danielle Ott <dott@cofolaw.com>

Subject: RE: [EXTERNAL] Re: Available for a call?

Aaron,

As you know, stays pending appeal are routinely granted in FOIA cases because any disclosure would necessarily moot the appeal. In light of your position, we will be filing an emergency motion with the court. Would you be willing to agree to a shorter continuance to allow this motion to be briefed and decided on more than five days? Please get back to me by the end of the day so we can determine how to notice our motion.

Thank you.

Pam

Pam Johann

Assistant United States Attorney, Deputy Civil Chief

Northern District of California

T: 415-436-7025

From: Aaron R. Field <arfield@cofolaw.com>

Sent: Wednesday, February 14, 2024 4:04 PM

To: Johann, Pamela (USACAN) <PJohann@usa.doj.gov>; Victoria Baranetsky <vbaranetsky@revealnews.org>

Cc: Therese Y. Cannata <tcannata@cofolaw.com>; Zachary E. Colbeth <zcolbeth@cofolaw.com>; Danielle Ott <dott@cofolaw.com>

Subject: Re: [EXTERNAL] Re: Available for a call?

Pam,

In cases involving access to public records, prompt access is important and often essential to ensuring that information reaches the public in time to be useful. As the Ninth Circuit recently reaffirmed, “The newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression.” *Courthouse News Serv. v. Planet*, 947 F.3d 581, 594 (9th Cir. 2020) (internal citation and quotation marks omitted).

Given, among other things, the great public interest in access to the information at issue here, the years that DOL took to process CIR's and Mr. Evans's requests prior to this lawsuit, the time that has passed since this lawsuit was filed, the absence of any specific justification for a further extension from your e-mail (let alone for the open-ended stay you propose), our assessment that an appeal by DOL would not succeed on the merits, and CIR's prior stipulation to the generous extension DOL requested last year, we respectfully decline the proposed stipulation.

Regards,

Aaron Field

Aaron Field

Attorney at Law



100 Pine Street, Suite 350

San Francisco, California 94111

Telephone (Firm): 415.409.8900

Telephone (Direct): 415.842.2285

Fax: 415.409.8904



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From: Johann, Pamela (USACAN) <Pamela.Johann@usdoj.gov>

Sent: Wednesday, February 14, 2024 2:35 PM

To: Aaron R. Field <afield@cofolaw.com>; Victoria Baranetsky <vbaranetsky@revealnews.org>

Cc: Therese Y. Cannata <tcannata@cofolaw.com>; Zachary E. Colbeth <zcolbeth@cofolaw.com>;

Danielle Ott <dott@cofolaw.com>

Subject: RE: [EXTERNAL] Re: Available for a call?

Hi Aaron,

Hoping to follow up on this. Can you let me know if you agree to this stipulation?

Thanks,
Pam

Pam Johann

Assistant United States Attorney, Deputy Civil Chief

Northern District of California

T: 415-436-7025

From: Johann, Pamela (USACAN)
Sent: Tuesday, February 13, 2024 4:10 PM
To: Aaron R. Field <arfield@cofolaw.com>; Victoria Baranetsky
<vbaranetsky@revealnews.org>
Cc: Therese Y. Cannata <tcannata@cofolaw.com>; Zachary E. Colbeth
<zcolbeth@cofolaw.com>; Danielle Ott <dott@cofolaw.com>
Subject: RE: [EXTERNAL] Re: Available for a call?

Hi Aaron et al.,

Given your tight schedules, perhaps we can avoid a call altogether. As you know, we are one week away from the appeal deadline and disclosure deadline. The decision of whether to appeal is still under consideration by the Solicitor General. Given this, we are requesting that Plaintiffs agree to stay the disclosure order (1) pending the resolution of an appeal, if a notice of appeal is filed; or (2) in the event a notice of appeal is not filed, 21 days after the deadline for filing a notice of appeal.

Please let me know if this is acceptable to you, and I will prepare a stipulation to submit to the Court.

Thanks,
Pam

Pam Johann

Assistant United States Attorney, Deputy Civil Chief

Northern District of California

T: 415-436-7025

From: Aaron R. Field <arfield@cofolaw.com>
Sent: Tuesday, February 13, 2024 12:47 PM
To: Victoria Baranetsky <vbaranetsky@revealnews.org>; Johann, Pamela (USACAN) <PJohann@usa.doj.gov>
Cc: Therese Y. Cannata <tcannata@cofolaw.com>; Zachary E. Colbeth <zcolbeth@cofolaw.com>; Danielle Ott <dott@cofolaw.com>
Subject: Re: [EXTERNAL] Re: Available for a call?

Pam,

I am also not available for a call today. I am flexible tomorrow afternoon. however. If you would like to connect, please let me know what you would like to discuss, so that I can prepare for our call, and when you are available tomorrow afternoon. If tomorrow afternoon does not work for you, please let me know, and I will send you some possible times on Thursday.

As a reminder, please copy me, my law partners Therese and Zach, and our paralegal Danielle, on all e-mail correspondence in this matter, in addition to Vickie. Thank you.

Regards,

Aaron Field

Aaron Field

Attorney at Law



100 Pine Street, Suite 350

San Francisco, California 94111

Telephone (Firm): 415.409.8900

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Fax: 415.409.8904



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From: Victoria Baranetsky <vbaranetsky@revealnews.org>

Sent: Tuesday, February 13, 2024 12:28 PM

To: Johann, Pamela (USACAN) <Pamela.Johann@usdoj.gov>; Aaron R. Field <afield@cofolaw.com>

Subject: Re: [EXTERNAL] Re: Available for a call?

Hi Pam.

I'm in wall to wall meetings until 5pm today. Can you reach out to Aaron, please.

Vickie

On Tue, Feb 13, 2024 at 11:59 AM Johann, Pamela (USACAN) <Pamela.Johann@usdoj.gov> wrote:

|

Hi Vickie,

Do you have time this afternoon for a quick chat?

Thanks,
Pam

Pam Johann

Assistant United States Attorney, Deputy Civil Chief

Northern District of California

T: 415-436-7025

HON. WILLIAM ALSUP
United States Senior District Judge

Defendant.

**[PROPOSED] ORDER GRANTING MOTION
FOR STAY**

Dated: _____