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BY EMAIL
Hon. Jed S. Rakoff
Unites States Court for the Southern District of New York
500 Pearl Street, Rm. 1340
New York, New York 10007

February 14, 2012

Re: Nat'l Immigration Project v. DHS, 11 Civ. 3235 (JSR)

Dear Judge Rakoff:

Plaintiffs write in response to the defendant Government's February 10, 2012 letter requesting a stay of the Court's Order dated February 7, 2012 (the "Order"). Plaintiffs oppose the Government's request because the Government has not met its burden of justifying further delay in providing critical information contained in the Office of the Solicitor General emails regarding a purported government policy and practice for returning deported individuals who prevail in their cases.

The four-factor test for granting a stay is well-established: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *In re: World Trade Center Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007). "A party who moves for a stay pending appeal bears the burden of showing the balance of the four factors weighs in favor of the stay . . . ." *People for the Am. Way Found. v. Dep't of Educ*., 518 F. Supp. 2d 174, 177 (D.D.C. 2007); *see also Front Carriers Ltd. v. Transfield Cape Ltd*., No. 07 Civ 6333 (RJS), 2010 WL 571967, at *1 (S.D.N.Y. Feb. 15, 2010); *Doe v. Lee*, No. 3:99CV314 (RNC), 2001 WL 536730, at *1 (D. Conn. May 18, 2001).

The Government has not made a strong showing that it is likely to succeed on the merits. The Government claims that in applying the waiver doctrine to the factual statements in the emails, this Court failed to consider whether these emails would be "routinely" or "normally" disclosed in litigation.[1] However, the issue raised in the case that the Government cites, *FTC v. Grolier*, 462 U.S. 19, 26–27 (1983), is separate and distinct from the issue of testimonial use waiver. The *Grolier* court was concerned with ensuring that Exemption 5 continues to apply to

[1] The Government raises this argument for the first time in its Stay Letter.

materials that may otherwise be obtained in discovery based on a particularized showing of substantial need by a given litigant. In contrast, this Court found that waiver had occurred by looking to the Solicitor General's "unilateral testimonial use" of the factual statements in the emails, not by looking to the balancing of needs. The Government's interpretation, on the other hand, would mean that waiver would never apply in Freedom of Information Act (FOIA) claims, and certainly other courts have not adopted this position. *See Williams & Connolly v. S.E.C.*, 662 F.3d 1240, 1243–45 (D.C. Cir. 2011) (analyzing Exemption 5 and observing that waiver of attorney work product and attorney-client privilege may occur if there is voluntary disclosure); *Hanson v. U.S. Agency for Int'l Dev.*, 372 F.3d 286, 293–94 (4th Cir. 2004) (contemplating waiver of attorney-client privilege under FOIA Exemption 5); *United States v. Metropolitan St. Louis Sewer Dist.*, 952 F.2d 1040, 1045 (8th Cir. 1992) (holding that voluntary disclosure of otherwise exempt material on a selective basis to third parties acts as a waiver to Exemption 5); *Mobil Oil Corp. v. U.S. E.P.A.*, 879 F.2d 698, 700–01 (9th Cir. 1989) (recognizing the possibility of voluntary waiver of privilege under FOIA exemptions).

Second, this Court carefully grounded its analysis in the factual record which shows that the email discussion is the sole factual basis identified by the Solicitor General for its assertion of a policy and practice to the Supreme Court, and no other documents have been provided by the Government to corroborate that statement. While it is extremely convenient for the Government to claim that there is a "possibility that oral communications may have supplemented, clarified or entirely superseded" the factual assertions in the emails, such alleged communications would still not permit the Government to escape its obligation to point to some unprivileged statement of its policy. Further, one would presume that oral communications that serve as the basis for a statement of fact to the Supreme Court would at least be memorialized in some document. Yet, in addition to being unwilling or unable to point to any other documents supporting the substantive statement of policy and practice, the Government has failed to produce any other documents that would shed light on how such a statement was made to the Supreme Court. The Court rightly pointed out that FOIA § 552(a)(2)(B) bars agencies from "intending to keep statements of their policy confidential." Order at 16.

Further, the balance of equities is strongly in Plaintiffs' favor. A delay in the release of the factual portions of the emails would cause substantial harm to Plaintiffs and the public interest. The urgency to Plaintiffs and the public in having these documents released expeditiously stems from the fact that the Supreme Court's statement in *Nken v. Holder*, 129 S.Ct. 1749 (2009), continues to be relied upon in the Government's opposition to stays of removal and courts' decisions to deny stays. *See, e.g.*: *Villajin v. Mukasey*, 2009 U.S. Dist. LEXIS 48295, 9–11 (D. Ariz. May 22, 2009) ("Removal from the United States is not a categorically irreparable injury. . . . [I]f Petitioner ultimately succeeds on the merits of her claims, she can be reunited with her children.") (citing *Nken*, 129 S.Ct. 1749); *Spence v. Holder*, 414 Fed. Appx. 637, 639 n. 4 (5th Cir. Feb. 8, 2011) (noting government's argument in its brief that "[c]ontrary to petitioner's assertion, he would not be 'denied legal redress' by removal"); *Mhanna v. United States Dep't of Homeland Sec. Citizenship*, 2010 U.S. Dist. LEXIS 13139, 15–16 (D. Minn. Feb. 16, 2010) ("In an order dated December 9, 2009, the court denied Mhanna's motion for a stay of removal pending review, citing *Nken v. Holder* . . . ."). The uncorrected existence of a misleading finding in a Supreme Court opinion has ongoing ramifications that weaken the integrity of our judicial process and impose a serious disservice to the public. This finding has continued to be used to support deportations of immigrants who seek judicial review. Moreover, the Government has not taken any of the possible steps to remedy this

harm, such as admitting the misrepresentation, halting oppositions to stays of removal based on this argument, or implementing an effective policy and procedure for returning individuals who prevail in their cases from abroad.

That documents released to the public cannot be taken away is not sufficient reason to grant a stay. Congress clearly did not intend to grant the Government an automatic stay every time a court orders the release of documents. FOIA requires the prompt disclosure of government records. 5 USCS § 552(a)(3). Therefore, in the context of FOIA, it is particularly inappropriate to allow the Government a blanket, unquestioned right to deny Plaintiffs the statutory right to disclosure without delay, simply to preserve the right to appellate review. Further, there is a four-part standard to be applied in granting a stay, and the Government has failed to show that one is justified here. The public has a very strong interest in knowing how misrepresentations of fact were presented to the Supreme Court, whether it was by inaccurate information being given to the Solicitor General's office by other government officials, or by creative writing by attorneys. The Government's argument to the contrary—that the public interest is in some way served by the protection of misrepresentations before the Court—has no basis.

In addition, "[a] stay is not a matter of right, even if irreparable injury might otherwise result. It is instead an exercise of judicial discretion and the propriety of its issue is dependent upon the circumstances of the particular case." *Natural Res. Def. Council v. U.S. Envt'l. Prot. Agency*, No. 09 Civ. 4317 (DLC), 2010 WL 431885, at *3 (S.D.N.Y. Feb. 8, 2010) (citation omitted); *see also United States v. Dist. Council of N.Y. City*, 2009 U.S. Dist. LEXIS 78171 (S.D.N.Y. Aug. 17, 2009); *Nken*, 129 S. Ct. at 1757. This Court has reviewed these documents *in camera* and found that limited disclosure of portions of the emails is in the public's interest and will not result in harm to the Government.

Plaintiffs are eager to end further government delay and resolve the disputed issues as soon as possible. It is ironic that the Government makes broad arguments for a stay that would apply to all FOIA cases, given that the underlying issue here is that the Government misrepresented the need for a stay for immigrants pursuing appeals. A stay for 60 days, or even longer pending appeal, is unwarranted as any appeal is unlikely to succeed, and the harm to Plaintiffs and the public from further delay would be substantial. For all these reasons, Plaintiffs respectfully request that the Court deny a stay and order expeditious disclosure.

Sincerely,

By: /s/ Nancy Morawetz

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