UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, IMMIGRANT DEFENSE PROJECT, POST-DEPORTATION HUMAN RIGHTS PROJECT, and RACHEL ROSENBLOOM,	:	
Plaintiffs,	:	
-v-	:	11 Civ. 3235 (JSR)
UNITED STATES DEPARTMENT OF HOMELAND SECURITY, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, UNITED STATES CUSTOMS AND BORDER PROTECTION, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES DEPARTMENT OF STATE,	:	MEMORANDUM ORDER
Defendants.	:	

JED S. RAKOFF, U.S.D.J.

Like a flatworm cut in half that returns as two flatworms,[1] this case just gets curiouser and curiouser. Many months ago, in response to plaintiffs' request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, the Government identified a six-page chain of emails that it represented were the documents of the Office of the Solicitor General ("OSG") responsive to the request but as to which the Government claimed privilege. But no sooner had the Court issued its Opinion and Order of February 7, 2012 (full familiarity with which

[1] Peter W. Reddien & Alejandro Sanchez Alvarado, "Fundamentals of Planarian Regeneration," 20 Annual Review of Cell and Developmental Biology 725 (2004).

is here presumed) rejecting those claims of privilege than the Government identified, on February 16, 2012, an additional 16 pages of OSG emails responsive to the request, as to which it also claimed privilege. No explanation was offered for the failure to disclose these emails earlier, even though some of them were effectively part of the email chain previously disclosed. The Government did, however, submit to the Court unredacted copies of the new emails, so that the Court could evaluate the claims of privilege. (As in the case of the previously submitted emails, an unredacted copy of the newly-submitted emails will be filed under seal.) Additionally, the Government, having previously moved on February 9 for a 60-day stay of the Court's February 7 ruling so that the Government could decide whether or not to appeal that ruling, now requests that any such stay also apply to any portions of the new emails that the Court might order disclosed to plaintiffs.

Turning first to whether any portions of the new emails should be disclosed to plaintiffs, the Government concedes that the new emails are of the same kind as those on which the Court previously ruled. Although some of the new emails were sent after the Government filed the Supreme Court brief in Nken v. Holder that made the representation about the Government's "policy and practice" in alien removal cases that is the subject of plaintiffs' FOIA request, those emails, prepared in anticipation of oral argument before the Supreme

Court, reflect the OSG's further inquiries about the alleged policy and practice, and the Government does not dispute that they are within the scope of the FOIA request. Both sides agree, moreover, that the new emails do not present any claims of privilege different in any relevant respect from those previously considered by the Court.

Applying to the new emails, therefore, the same legal principles set forth in the Court's February 7 Opinion and Order, the Court orders disclosure of:

(1) the document attached to the email sent Friday, January 9, 2009 at 3:57 PM, i.e., pages 15 and 16 of the newly produced documents; and

(2) in the email sent Friday, January 16, 2009 at 11:54 AM, the entire fifteen-line second paragraph.

Turning to the Government's motion for a 60-day stay while it considers whether to appeal,[2] a court considers four factors when deciding whether to grant a stay pending appeal: "(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 Ctr. Disaster Site

[2]The Government indicates that, if it does appeal, it will seek a further stay from this Court, but that request is not yet ripe for decision.

Litig., 503 F.3d 167, 170 (2d Cir. 2007) (quoting Hilton v. Braunskill, 481 U.S. 770, 776 (1987)).

With respect to the first factor, the Government fails to make any particularized arguments of any material weight. Aside from claims that the email segments ordered to be disclosed are not severable from other, privileged segments (a claim refuted on the face of the emails) and that the segments to be disclosed contain "impressions" rather than "facts" (again refuted on the face of the emails), the Government offers only two arguments as to why the February 7 Opinion and Order was (allegedly) erroneous. See Government letter dated February 10, 2012, at 2-3.

First, the Government argues that the Court misapplied the "testimonial use" exception to the work-product protection offered under FOIA's exception 5, which requires that the documents in issue be "routinely" or "normally" disclosed. Cf. FTC v. Grolier, Inc., 462 U.S. 19, 26-27 (1983). In Grolier, the Supreme Court held that the fact that the documents in issue had been ordered to be disclosed in a prior, separate litigation did not by itself override the work-product protection in a subsequent litigation, because "[i]t is not difficult to imagine litigation in which one party's need for otherwise privileged documents would be sufficient to override the privilege, but that does not remove the documents from the category of the normally privileged." Id. at 28. But the reference to "testimonial use" in the Court's February 7 Opinion and Order was in the context of

finding that the Government had waived any work-product privilege regarding the segments here disclosed by disclosing their alleged gist (the alleged "policy and practice"). The Government does not cite to any case in which a court has concluded that a party can reclaim a privilege that it has previously waived. Accordingly, the Court finds that this argument does not provide a basis for concluding that the Government will likely succeed on appeal.

Second, the Government argues that the Court's reliance on the provision of 5 U.S.C. § 552(a)(2)(B) that requires disclosure of "statements of policy . . . which have been adopted by the agency" was erroneous because "an informal discussion among attorneys does not 'adopt[]' a policy." Govt. Letter, 2/10/12 at 3 (citing Wood v. FBI, 432 F.3d 78, 84 (2d Cir. 2005)). This argument completely misapprehends the Court's Opinion and Order. It was the OSG itself, in its brief in Nken, that expressly represented to the Supreme Court that the Government had adopted a particular "policy" that the Court should rely on. Whether the representation was accurate or inaccurate (which, even with the submission of the new emails, remains problematic), agencies must publish statements of policies they have adopted, see 5 U.S.C. § 552(a)(2)(B), and the only thing the Government has listed in response to plaintiffs' FOIA request that even comes close to a particularized statement of the alleged policy and practice is the factual description of it in the email chain, the

only part of the chain that the Court has ordered disclosed to plaintiffs.

Despite these weaknesses, however, the Government makes a global argument to the effect that it shows a likelihood of success on appeal simply by pointing out that this case presents some unusual issues as to which very little prior caselaw exists. The Court agrees that the case is, in some respects, a case of first impression. In the analogous context of certifying interlocutory appeals, the Second Circuit has found that the fact "that . . . issues are difficult and of first impression" favors certification. Klinghoffer v. S.N.C. Achille Lauro, 921 F.2d 21, 25 (2d Cir. 1990). The same logic applies here: where the district court has had to address issues as to which the appellate courts have provided little direct guidance, the likelihood that an appellate court will take a different approach increases. In such circumstances, a court should hesitate to impose irreparable harm on a party who may seek appeal.

Moreover, the Court finds that the second, third, and fourth factors do, in fact, favor the Government:

With respect to factor two (irreparable injury to the Government) it is obvious "once there is disclosure, the information belongs to the general public." Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 174 (2004). Thus, failure to stay the disclosure required by the Order would cause the Government irreparable injury if the ruling was erroneous.

With respect to factor three (injury from the stay to other parties), a stay will cause comparatively little harm, if any, to plaintiffs. Although plaintiffs argue strenuously that the Government continues to deport aliens based on the holding in Nken, they refer the Court to no specific cases and they offer nothing more than speculation for the claim that disclosure will induce courts to distinguish Nken's holding and prohibit deportation in the relevant circumstances. The proximate harm to plaintiffs themselves, in any event, is simply the delay itself. Although this might loom large if a long delay was granted, at this point the only stay ripe for decision is a stay for 60 days.

With respect to factor four (the public interest), while the Court agrees with plaintiffs that the public has a substantial interest in receiving the information here at issue, the public also has an interest in having disclosures of secretive government documents reviewed by an appellate court.

Accordingly, the Court finds, that the Government has satisfied all of the four factors, warranting a 60-day stay in the case. The Court therefore grants that stay, effective today.

SO ORDERED.

JED S. RAKOFF, U.S.D.J.

Dated: New York, New York
February 24, 2011