IN THE UNITED STATES DISTRICT COURT
FOR THE DISTICT OF COLUMBIA

NATIONAL WHISTLEBLOWERS CENTER, *et al*,	)	
Plaintiff,	)	
v.	)	Civil Action No. 1:10-cv-02120-JEB
DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al*,	)	
Defendant.	)	

NATIONAL WHISTLEBLOWERS CENTER'S MOTION
FOR A PRELIMINARY INJUNCTION FOR PARTIAL EXPEDITED PROCESSING

Pursuant to Fed. R. Civ. P. 65, plaintiff National Whistleblowers Center ("Whistleblowers Center" or "Center") respectfully moves for entry of a preliminary injunction to enjoin defendant Department of Health and Human Services' ("Defendant," "HHS," or "Agency") from failing to comply with FOIA's statutory requirements for expedited processing and the statutory deadlines set forth in the Act. Plaintiff seeks an order requiring defendant to expedite the processing of plaintiff's Freedom of Information Act ("FOIA") request for records concerning the warrantless surveillance program and to complete the processing of the documents requested within 40 days from the date of this Court's order.

The grounds for this motion are set forth in the accompanying Memorandum of Points and Authorities. A proposed Order is attached. According to Local Rule 7(m), plaintiffs' counsel contacted Agency for consent for a preliminary injunction. Agency has not granted consent.

Plaintiff asks that the Court, pursuant to Local Rule 65.1(d), schedule a hearing on this application for a preliminary injunction within 21 days.

Respectfully submitted,

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FOR THE DISTICT OF COLUMBIA

NATIONAL WHISTLEBLOWERS CENTER, *et al.*, Plaintiff, v. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*, Defendant.	Civil Action No. 1:10-cv-02120-JEB

MEMORANDUM OF POINTS AND AUTHORITY IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION FOR PARTIAL EXPEDITED PROCESSING

Plaintiff National Whistleblowers Center respectfully submits this Memorandum of Points and Authorities in support of its Motion for a Preliminary Injunction for Partial Expedited Processing.

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INTRODUCTION

This action is filed by the National Whistleblowers Center ("Whistleblowers Center" or "Center") under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, seeking a partial preliminary injunction for expedited processing and release of agency records. This partial request concerns a subset of the original FOIA requests. Specifically, Whistleblowers Center requests documents related to the Department of Health and Human Services' ("Defendant," "HHS," or "Agency") policy of conducting covert, warrantless surveillance of whistleblowers' private email correspondence.

STATEMENT OF FACTS

I. HHS'S WARRANTLESS ELECTRONIC SURVEILLANCE OF DISSENTING SCIENTISTS AND SUSPECTED WHISTLEBLOWERS

A. The FDA Is Overruling or Suppressing the Opinions of its Own Scientists to Approve Medical Devices the Scientists Believe Are Dangers to the Public Health, Welfare, and Safety

The subject matter underlying the FOIA requests and this Motion for Preliminary Injunction concern matters of extraordinary public interest. The initial public interest in the case surrounded the release of a letter to then President-Elect Barack Obama's transition team. The letter was signed by nine scientists working in the U.S. Food and Drug Administration's ("FDA") Center for Devices and Radiological Health ("Devices Center" or "CDRH") in January 2009. *See* Letter to John Podesta, Exh. 1 (Jan. 7, 2009). The letter alleged that the FDA's Devices Center was suppressing the findings of its own scientists or pressuring them to change their scientific findings to inappropriately approve medical devices for marketing in the United States. *Id.* at 1. "[T]he scientific review process for medical devices at FDA has been corrupted and distorted by current FDA managers, thereby placing the American people at risk." *Id.*

The letter singled out one class of devices—computer-aided detection devices—as an example of the problems within the FDA. In their letter to President-Elect Obama, the FDA 9 alleged that Agency managers knowingly disregarded clinical evidence of device shortcomings, ignored recommendations of a panel of independent experts, and rubberstamped device approvals. *See* Letter to John Podesta, Exh. 1 (Jan. 7, 2009). The FDA's disregard of their own experts endangered the public by approving ineffective and potentially harmful cancer detection devices. *Id.*

The letter received extraordinary Congressional and public scrutiny and widespread media attention. *See* Google Search Results, Exh. 2 (searching "FDA scientists letter Obama" for the calendar year 2009, resulting in 36,000 results, of which the first 50 are shown). Four members of the "FDA 9," as the scientists who signed the letter became known, are plaintiffs in this case. Two other members of the FDA 9 who are not a party to this litigation have signed privacy waivers to allow the Whistleblowers Center to obtain documents involving them.

At some point after the FDA 9 wrote their letter, the FDA began covert and warrantless intercepts of the private emails of members of the FDA 9. Some of the intercepted emails contained correspondence between members of the FDA 9 and the offices of members of Congress. *See* Emails, Hardy to Royce,[1] Exh. 3 (Jan. 9, 2009). Other evidence indicates that the FDA began surveillance of correspondents with the FDA 9. *See, e.g.*, "Memorandum of Caution," Exh. 4 (Feb. 25, 2011).

Furthermore, strong evidence indicates that the FDA intercepted correspondence between the FDA 9 and the Equal Employment Opportunity Commission ("EEO"), the Office of Special Counsel ("OSC"), and their own attorneys. *See* Surveillance of EEO Activity, OIG-000515,

[1] At the time, Joanne Royce was senior counsel for the House Energy and Commerce Committee.

Exh. 5 (Aug. 20, 2010) (an intercept produced by the OIG with an email from Hardy to Smith and Czerska, containing a draft EEO complaint with edits); Surveillance of OSC Activity, Exh. 6 (June 28, 2010) (the head of the FDA's Devices Branch requests the OIG to open an investigation into FDA scientists based on a draft OSC complaint); Email Chain Referring to Attorney-Client Communications, Exh. 7 (June 17, 2010) ("As both Nelson and I are involved in litigation regarding [redacted], please make sure that neither one of us is provided any documents that were shared between [redacted] and her attorney at all."). Based on the OIG production, the Center believes that other protected activities were also intercepted, including the FDA scientists' correspondence with the HHS Office of Inspector General and with FDA's Assistant Commissioner for Integrity William McConagha.

Upon initiating the surveillance, the FDA created at least one system of records to maintain surveillance documents. The Center provided the FDA with some of the known locations of the electronic intercepts within this system. *See, e.g.*, Email, "FOIA – Server Locations," Exh. 8 (March 14, 2012). The FDA Devices Center has not produced any documents from these record systems through FOIA in response to plaintiffs' request.

Through its FOIA requests, the Whistleblower Center hopes to learn the precise timing and trigger for the warrantless surveillance of these whistleblowers. Known evidence indicates that the intercepts began as early as January 2009, triggered by the FDA 9's letter to President-Elect Obama's transition team. *See, e.g.*, Emails, Hardy to Royce, Exh. 3 (Jan. 9, 2009) (produced through the EEO process)[2]; Gardiner Harris, "Dissidents at FDA Complain of Inquiry," N.Y. TIMES, A19, Exh. 9 (Jan. 28, 2009).

[2] These emails are covered under the current FOIA requests. Despite knowing what the documents are, where they are, what they contain, and having already cleared them for release, the FDA has *still* failed to produce these documents through FOIA.

B. CT Colonography, CARESTREAM, and the Suppression of FDA Scientists

On March 28, 2010, the FDA whistleblower-scientists' concerns came to the public's attention once again. The *New York Times* published an article describing the FDA's significant internal dispute about the safety and efficacy of CT colonography—medical devices that could cause thousands of cancers, according to the FDA scientists. *See* Gardiner Harris, "Scientists Say F.D.A. Ignored Radiation Warnings," N.Y. TIMES, A14, Exh. 12 (March 29, 2010). The article quoted two plaintiffs in this case, Dr. Julian Nicholas and Dr. Robert Smith, who warned that using CT scanners for the screening of colon cancer could itself cause cancer. According to Dr. Nicholas, "I was first ignored, then pressured to change my scientific opinion, and when I refused to do that, I was intimidated and ultimately terminated." *Id.*

In addition, the *New York Times* addressed issues raised by the FDA whistleblowers in an editorial. *See* Editorial, "Is That Device Safe?" N.Y. TIMES, Exh. 13 (Jan. 27, 2009). The concerns raised by Drs. Smith and Nicholas were widely covered, including a worldwide broadcast on ABC News. *See* "Radiating America," ABC News (March 30, 2010), *available at* http://abcnews.go.com/WNT/video/radiating-america-10245013.

Drs. Nicholas' and Smith's concerns were also part of a larger discussion within the medical community about the safety and efficacy of CT colonography for population screening. For example, in March 2010, the Centers for Medicare and Medicaid decided against covering CT colonography. *See* Medicare Decision Memo, Centers for Medicare and Medicaid Services [hereinafter "Medicare"], Exh. 14, 2 (May 12, 2009). "The evidence is inadequate to conclude that CT colonography is an appropriate colorectal screening test . . . ." *Id.*

The American College of Gastroenterology also noted that the use of CT colonography posed significant cancer risks that were not addressed. "Medical researchers, as well as FDA

physicians and scientists, have concluded that this risk of harmful radiation may not outweigh the clinical benefit for asymptomatic patients." *See* Philip O. Katz, President, American College of Gastroenterology, "Device Improvements to Reduce Unnecessary Radiation Exposure from Medical Imaging," Exh. 15, 2 (April 15, 2010).

The U.S. Office of Special Counsel ("OSC") (the official agency within the United States government with authority to investigate whistleblower claims) opened an investigation into the treatment of the FDA whistleblowers. On October 7, 2011, after conducting a preliminary investigation, the OSC filed a brief before the Merit Systems Protection Board ("MSPB") seeking to stay the "negative and apparently retaliatory performance evaluation" of plaintiff Hardy. *See* Request for Stay of Personnel Action, Office of Special Counsel, CB-1208-12-0002-U-1, Exh. 10, 1 (filed Oct. 7, 2011). The negative performance evaluation resulted in the termination of Hardy from the U.S. Public Health Service ("PHS"). *Id.* In particular, the OSC cited Mr. Hardy's refusal to recommend the approval of the Carestream Health Inc. KODAK DirectView Computed Radiography Mammography ("Carestream") device. *Id.* at 2. The Carestream device is a digital mammography device used to diagnose breast cancer, as addressed in the letter to President-elect Obama's transition team. *Id.*

On November 23, 2011, the MSPB denied the Special Counsel's request for lack of jurisdiction over any and all PHS personnel. *See Hardy v. Dep't of Health and Human Servs.*, 2011 M.S.P.B. 96, 1-2, 5, Exh. 11 (2011). The Hardy case thereafter was and still is the subject of public debate. The *Washington Post* reported on the case, and subsequently, it was the basis for the Senate passing an amendment to the FDA reauthorization act ensuring that PHS employees are protected under federal whistleblower laws. *See* Press Release, "FDA Legislation Now Better Protects Whistleblowers," Grassley.Senate.gov, Exh. 28, 1 (May 24, 2012); Joe

Davidson, "For Public Health Service Officers, No Protection for Whistleblowing," *Washington Post*, Exh. 33 (March 14, 2012).

C. The FDA Initiates Warrantless Electronic Surveillance of the Private Correspondence of Its Dissenting Scientists

In or about April 2010, the FDA initiated a new internal inquiry into Dr. Smith based on the March 28, 2010, *New York Times* article. *See* OIG Email, "Case Presentation," OIG-000554, Exh. 16, 3 (Oct. 6, 2010); *see also* Ellen Nakashima and Lisa Rein, "FDA Says It Monitored Workers' E-Mail to Investigate Potential Leak," WashingtonPost.com, Exh. 17 (Feb. 9, 2012).

The warrantless surveillance of Dr. Smith revealed his correspondence with other FDA employees when they used personal web-based email accounts to share information about medical devices under FDA review. OIG Email, "Case Presentation," OIG-000554, Exh. 16, 3 (Oct. 6, 2010). Soon thereafter, the FDA began warrantless surveillance of other FDA scientists, including Dr. Ewa Czerska, Mr. Paul T. Hardy, Dr. Lakshmi Vishnuvajjala, and Ms. Nancy Wersto. The Center believes that all of the individually named plaintiffs in this case were targeted based on their correspondence with Dr. Smith or their activity as whistleblowers.

Based on the documents available to Whistleblowers Center,[3] it is likely that the FDA intercepted numerous private emails and that these documents are centrally located and easily identifiable for production. *See* Email, "Re: Ewa Letter," Exh. 18, 1 (demonstrating that a large number of the surveillance documents were assembled in a single location for review by FDA

[3] The FDA's Devices Center is primarily responsible for the surveillance program and all of the alleged misconduct complained about by the FDA scientists. The Devices Center has yet to produce documents about the initiation, nature, scope, or status of the surveillance. Instead, the Whistleblowers Center's evidence comes from documents obtained primarily through Dr. Ewa Czerska's and Mr. Paul T. Hardy's termination proceedings, a reprimand of Dr. Lakshmi Vishnuvajjala, and documents produced by HHS's OIG as part of this FOIA litigation.

employees and managers). These documents also show that a limited number of employees and managers within the Devices Branch were involved. *Id.* at 1-2.

Many of the intercepted emails evidence statutorily protected activity. The Center highlights the following intercepts:

- The Agency intercepted correspondence between Mr. Hardy and Congressional staffers dated Jan. 29, 2009, *see* Exh. 3;
- The Agency intercepted a draft EEO Complaint of Dr. Ewa Czerska dated August 20, 2010, *see* Exh. 5;
- The Agency intercepted a draft OSC Complaint of Dr. Ewa Czerska dated June 25, 2010, *see* Exh. 6;
- The Agency intercepted emails between Mr. Hardy and Congress dated October 15, 2010, *see* Exh. 19.

The above-listed intercepts were subsequently used as the basis for investigations of the FDA scientists, to harass the authors or other FDA scientists who were party to the communications, or to recommend the removal of FDA scientists. Despite knowing who had possession of the intercepts, where they are located, and how they were used in termination or disciplinary proceedings, the FDA's Devices Center has not produced any of these documents through the FOIA process.

II. THE NATIONAL WHISTLEBLOWERS CENTER

The National Whistleblowers Center is primarily engaged in the dissemination of information. The mission of the Whistleblowers Center is "to serve as an information and advocacy center and provide the general public and whistleblowers with relevant, up-to-the-minute news and information about whistleblower rights." Williams Affidavit [hereinafter "Williams Affidavit I"], [Doc. 85-1, ¶ 3] (dated Feb. 28, 2012).

The Whistleblowers Center has various methods to disseminate information. The Center

runs a web site, www.whistleblowers.com, with over 117,000 unique viewers and 160,000 visits in 2011. Williams Affidavit I, [Doc. 85-1, ¶ 7(d)]. The Center maintains a web log with daily updates at www.whistleblowersblog.org, which received approximately 190,000 unique visitors and 50,000 repeat visitors. *Id.* at ¶ 7(b). The Center hosts a weekly radio show called "Honesty Without Fear," www.whistleblowersradio.org. *Id.* at ¶ 7(a). The Center also runs an action alert program with over 31,000 members to encourage the public to contact their representatives and become involved in public debates about whistleblowers. *Id.* at ¶ 7(c).

One of the most important ways the Center disseminates information, though, is by examining issues of public concern and working with the national news media to bring such issues to light. *See, e.g.*, Williams Affidavit [hereinafter "Williams Affidavit II"], Exh. 20, ¶ 11 (dated April 19, 2012). For example, a recent front page story on the FBI's crime lab was a joint effort between the Center and the *Washington Post*. *See id.* at 5. The report exposed the fact that the FBI was still using tainted evidence in criminal trials. The report created major changes in FBI procedure and even resulted in some defendants being released from jail. *Id.*

A similar process occurred in this case. The Center examined the allegations and documentation of the FDA scientists and made an independent determination that the allegations were credible and of extraordinary public interest. *See id.* at ¶¶ 10-12. By their nature, the information touches upon the delivery of medical care for millions of Americans and may save or prevent early deaths in thousands of cases. *See id.* at ¶ 13. In the work context, the FDA's surveillance has impeded the ability of its scientists to give honest, effective, science-based recommendations. This, in turn, touches upon the larger question of whether the FDA itself serves as an effective regulator.

More broadly, the specific means the FDA used to track the scientists—warrantless

electronic surveillance of private correspondence—challenges the fundamental ability of *any* federal employees to bring *any* information concerning waste, fraud, abuse or public health, welfare, and safety to the public's attention without fear of retaliation. Pretext for termination may be established easily with access to the entirety of any person's private correspondence. *See* Williams Affidavit II, Exh. 20, ¶¶ 12-13.

III. THE FEDERAL GOVERNMENT'S SURVEILLANCE OF PRIVATE EMAILS HAS GARNERED EXTRAORDINARY PUBLIC INTEREST IN THE FORM OF NATIONWIDE MEDIA ATTENTION, CONGRESSIONAL INVESTIGATIONS, SPECIAL COUNSEL INVESTIGATIONS, A REVIEW OF FEDERAL SURVEILLANCE POLICIES, AND NEW LEGISLATION

In order to call public attention to the issues related to this motion, the individually named plaintiffs approached the Whistleblowers Center with information about their underlying personnel actions and concerns about public health, welfare, and safety. Upon review, the Whistleblowers Center determined that this was a major case deserving of national attention and then acted, pursuant to its mission, to disseminate the information to the public. Williams Affidavit I, [Doc. 85-1, ¶¶ 10-11]. Among others, the Whistleblowers Center provided this information to the *Washington Post* for public dissemination. *Id.* at ¶15. The information provided by the Center received wide-spread media attention and created extraordinary public interest across the United States, as highlighted below.

On January 29, 2012, based on information primarily provided by the Whistleblowers Center as well as interviews arranged and facilitated by the Center, the *Washington Post* published a Page One article on the government's warrantless surveillance of FDA scientists, including all of the named plaintiffs. *See* Ellen Nakashima and Lisa Rein, "FDA Staffers Sue Agency Over Surveillance of Personal E-mail," WASHINGTON POST, A1, [Doc. 80-6] (Jan. 29, 2012) (receiving over 500 public comments accepted prior to the *Washington Post* shutting down

the comments).

The *Post* published many of the emails that the Whistleblowers Center had provided to the *Post* on its website. *See* "FDA Surveillance of Whistleblowers Document Set," WashingtonPost.com, Exh. 21 (Jan. 29, 2012); Williams Affidavit I, [Doc. 85-1, ¶¶ 16-18]. The *Washington Post* linked the Whistleblowers Center website as the source for relevant documents, where the Center directly published information and documents concerning the surveillance on its website and blog. *Id.* at ¶18.

The next day, the *Washington Post* published a follow-on article discussing the issues of privacy, technology, and work. *See* Ellen Nakashima, "FDA Surveillance Lawsuit Raises Complex Issues," WashingtonPost.com, Exh. 22 (Jan. 30, 2012).

On Jan. 31, 2012, Senator Charles Grassley, Ranking Member, Committee on the Judiciary, opened an investigation into the FDA's surveillance, as reported by the *Washington Post* on Feb. 1, 2012. *See* Letter, Grassley to Hamburg, [Doc. 80-4] (Jan. 31, 2012). This investigation was initiated in large part based on documents provided by the Whistleblowers Center. Williams Affidavit I, [Doc. 85-1, ¶20].

The *Washington Post*'s series of articles triggered massive nationwide media attention. The articles were republished hundreds of times in newspapers and web sites across the country, as well as posted and discussed in weblogs. Over 500 media outlets covered the story within days of its release. Williams Affidavit I, [Doc. 85-1, ¶19].

On February 1, 2012, the *Washington Post* reported that "Public Health Service officers do not have protection from retaliation under federal whistleblower laws, an exemption the lawsuit, the special counsel's office and Grassley are seeking to change." Ellen Nakashima and Lisa Rein, "Grassley Opens Investigation into FDA Surveillance," WashingtonPost.com, Exh. 23

(Feb. 1, 2012).

On February 4, 2012, the *Washington Post* published a letter to the editor from the Whistleblowers Center's Director of Advocacy and Development, Lindsey M. Williams. "[T]he FDA's program was not routine monitoring. The scientists were targeted for surveillance only after reporting the approval of unsafe medical devices to President-elect Obama." Lindsey Williams, Letter to the Editor, "Whistleblowers Are Protected," WASHINGTON POST, Exh. 24 (Feb. 4, 2012).

The Whistleblowers Center also directly published information from the FDA whistleblower surveillance program. This included four radio programs aired on the Progressive News Network, numerous newsletter-styled email Action Alerts and numerous blog and other internet postings. Williams Affidavit I, [Doc. 85-1, ¶¶ 25-32].

On February 15, 2012, Senator Charles Grassley and Congressman Darrel Issa, Chairman, Committee on Government Oversight and Reform, jointly asked the U.S. Office of Special Counsel to conduct an independent investigation of the FDA. Press Release, Grassley.Senate.gov, Exh. 25 (Feb. 15, 2012). The investigation would focus on the FDA's "monitoring of personal email accounts used by nine employees to communicate safety concerns about medical devices to Congress." *Id.*

"We are writing to request that the [OSC] investigate whether the Food and Drug Administration (FDA) violated the Whistleblower Protection Act (WPA) or the Stored Communications Act (SCA) by covertly monitoring employees who communicated confidentially with Congress about a potential danger to public health . . . . The FDA used information collected from Hardy's personal e-mail account to build the case for firing him." Letter, Grassley and Issa to Special Counsel, [Doc. 80-3] (Feb. 15, 2012).

The OSC immediately complied with these congressional requests. "The Office of Special Counsel (OSC) has broadened the scope of an existing investigation into the surveillance of employees' emails by the Food and Drug Administration (FDA)." OSC Press Release, "Office of Special Counsel Broadens Investigation into FDA's Surveillance of Employees' E-mail," Office of Special Counsel, [Doc. 80-2] (Feb. 15, 2012). The investigation specifically cited to "documents obtained through FOIA" as a source of its concern, and that "[m]onitoring communications with OSC is unacceptable." *Id.* The OSC then expanded its goal to include agencies beyond HHS. "We encourage other agencies to review their policies to ensure that they are not monitoring or otherwise impeding employee disclosures to OSC or Congress." *Id.*

On February 15, 2012, the *New York Times* published an editorial in support of the FDA scientist-whistleblowers. *See* Editorial, "Pursuit of the Whistle-Blowers," N.Y. TIMES, A24, [Doc. 80-1] (Feb. 15, 2012). "A federal lawsuit filed against the Food and Drug Administration raises disturbing questions about whether the agency retaliated against whistle-blowers for trying to warn Congress that medical devices were being pushed toward approval despite safety concerns. . . . If the court finds that the F.D.A. acted improperly, the agency should punish the managers responsible." *Id.* Much of the information underlying this editorial also came from the Whistleblowers Center. Williams Affidavit I, [Doc. 85-1, ¶24].

On March 5, 2012, Congressman Issa and Senator Grassley sent a letter to the Office of Management and Budget ("OMB"). *See* Press Release, "Sen. Grassley and Rep. Issa Request Assessment from OMB of Federal Guidelines for Employee Personal Email Monitoring," Exh. 26 (March 6, 2012). The letter expanded their joint inquiry beyond the Department of Health and Human Services, and began to inquire into the entirety of the federal government's policies on surveillance of its whistleblowers:

> Our investigation of FDA's surveillance of whistleblowers has given rise to a broader question about the policies and practices for electronic surveillance at other federal agencies. . . . We request that OMB conduct a ***comprehensive survey of all federal agencies*** to determine agencies' policies with respect to monitoring federal employees' personal e-mail account.

Letter, Issa and Grassley to OMB, Exh. 27 (March 5, 2012) (emphasis added). Among many issues, Senator Grassley and Congressman Issa wished to know whether "the policy defines protected disclosures to OSC and/or Congress to be official, authorized use of government computers and devices, and if not, why." *Id.*

On May 23, 2012, Senator Grassley introduced legislation to expand whistleblower protections to members of the Public Health Service. *See* Press Release, "FDA Legislation Now Better Protects Whistleblowers," Grassley.Senate.gov, Exh. 28, 1 (May 24, 2012). This legislation was inspired by Mr. Hardy's situation, when the "FDA read messages on the employees' personal email accounts to learn about the communication." *Id.* ""The situation was egregious for a number of reasons, including the fact that the FDA went after an employee who wasn't covered by the Whistleblower Protection Act." *Id.* The Senate approved the PHS-whistleblower amendment, and that provision is *now* the subject to debate and consideration within the House of Representatives.

These events have been reported throughout the national news media, in outlets large and small. Between Jan. 29, 2012 and May 29, 2012, over 10,100 news outlets have reported on the FDA surveillance issues. *See, e.g.*, Google Search, Exh. 29 (conducted May 29, 2012) (showing results for a search of "FDA Surveillance of Whistleblower Scientist," and showing exerpts from the first 50 results).

Currently, the Whistleblowers Center is providing information to the U.S. Congress and the Office of Special Counsel. These entities are reviewing policies (and debating legislation)

related to the surveillance of whistleblowers, and the information provided (or which will be provided) by the Center is a critical part of this debate. The recommendations of these agencies, along with new rules or policies of these issues can occur at any time. *See* Williams Affidavit I, [Doc. 85-1, ¶ 37]. The Center has been asked to weigh in on these policy decisions. *Id.* at ¶ 34. Any delay in obtaining information pursuant to this FOIA lawsuit will be highly prejudicial to the Center's ability to participate in the debate on these surveillance practices, with official decision makers, the press, and the public. *Id.* at ¶¶ 35-36; Williams Affidavit II, Exh. 20, ¶¶ 16-17. The current public interest and any potential changes in policies and procedures are time sensitive. Williams Affidavit II, Exh. 20, ¶¶ 15-17.

Finally, the Center is in current contact with highly respected representatives of the national news media. These journalists are currently pressing the Center for additional information about the FDA's actions. Williams Affidavit II, Exh. 20, ¶ 15.

Based on the failure of the FDA to expedite the FOIA request, the Center has not been able to appropriately respond to these requests from some of our nation's most respected journalistic outlets. *Id.* Because of the highly prejudicial delay in the production of surveillance-related FOIA documents, the Center requested that the FDA provide a "clear timetable" for the production of such documents. *Id.* at ¶ 18. The Center asked that this timetable be produced no later than April 29, 2012. As of this date, the FDA has failed to respond to this request and other repeated requests to agree either to expedite the FOIA request or set forth any form of timetable for production.

IV. PLAINTIFF'S FOIA REQUESTS AND REQUEST FOR EXPEDITED PROCESSING

On or about October 5, 2010, prior to the discovery of the Agency's surveillance program, the Whistleblowers Center made FOIA requests jointly with individual FDA scientist

plaintiffs. The scope of these requests were extremely broad and have been the subject of numerous discussions between the plaintiffs and attorneys for FDA concerning the scope of the requests and potential limitations. Given the broad scope of the requests, documents related to the surveillance of all plaintiffs and the critical issues directly tied to plaintiffs (health & safety and retaliation) are unquestionably covered within the scope of the original, broad FOIA requests.

For example, the requested documents include "All documents directly or indirectly related to communications or suspected communications" involving the whistleblowers and:

- concerns about FDA management, ¶¶ 7-8, 11,
- concerns about medical device safety and efficacy of products, ¶ 9,
- regulatory concerns, ¶ 10,
- the Office of Inspector General, ¶ 13-14,
- the U.S. Congress, ¶ 15, 17,
- the media, ¶ 16,
- the whistleblowers' First Amendment rights, ¶ 18.

See, e.g., FOIA Request, [Doc. 1-1] (Oct. 5, 2010). The FOIA requests requested expedited processing. *See, e.g., id.* at pp. 11-12.[4]

As these paragraphs of the original FOIA requests demonstrate, the requests encompass all documents pertaining to the Agency's surveillance of its scientists, as long as the document concerns the named requesters.

[4] The Center is specifically not requesting expedition of the entire request. Instead, at this time, the Center is limiting this request for a preliminary injunction to the documents related to the surveillance, retaliation based on surveillance documents, and the specific public health and safety issues that triggered these events.

On February 12, 2012, the Center and the other plaintiffs filed their Third Amended Complaint [Doc. #71-1]. The Thirty-Fourth Cause of Action challenges the Agency's denial of expedited processing for the NWC in FOIA Nos. 2010-7572 (NWC / Czerska), 2010-7574 (NWC / Nicholas), and 2010-5769 (NWC / Smith). Other counts in the Third Amended Complaint challenge the Agency's constructive denial of production. *See* Third Amended Complaint, [Doc. #84] (Third, Ninth, and Sixteenth Causes of Action).

V. HHS'S RESPONSES TO PLAINTIFF'S REQUEST FOR EXPEDITED PROCESSING AND SUBSEQUENT FAILURE TO TIMELY COMPLY WITH PLAINTIFF'S FOIA REQUESTS

It is clear that the vast majority of surveillance-related information is contained within or has passed through the FDA's Devices Center. All named-plaintiffs worked within the FDA's Devices Center (CDRH), and all the documents known to the Whistleblowers Center indicate that the epicenter of the surveillance was the FDA's Devices Center. Yet, the Devices Center has denied the specific request of the Whistleblowers Center to expedite production of information related to such surveillance.

Documentation relevant to the Agency's surveillance of its own scientists has been subject to a pattern of delay and denial. It has been one year and seven months since the Whistleblowers Center filed its FOIA requests in October 2010. In the interim:

- On October 6, 2010, Agency responded to the Whistleblowers Center's FOIA requests. HHS did not inform plaintiff of an anticipated date for the completion of the processing of plaintiff's FOIA requests.

- On August 12, 2011, Agency requested an Open America stay of three years, with an additional two years to process the full FOIA requests. Although Agency withdrew its request for Open America Stay, they provided documentation that set forth the Agency's position that the release of documents could take up to two years once they commence the review.

- On February 28, 2012, the Center officially requested expedited processing of surveillance documents and notified the Agency of the media coverage of the FDA's surveillance of its scientists in support of its request for expedited processing. The Center provided by sworn affidavit a detailed justification for the expedition of all FOIA requested documents related to the surveillance of the FDA scientists. The Agency ignored the Center's request.

- On April 19, 2012, Whistleblowers Center submitted a second affidavit with additional sworn testimony to the FDA and a second request for expedited processing. The affidavit further demonstrated the extraordinary public interest justifying expedited processing. The Agency ignored the Center's request.

- The Agency has refused in writing to agree to any expedition, full or partial, or any timetable for production, full or partial.

The Center's February 28, 2012, affidavit from Ms. Williams sets forth in detail the facts underlying the legal justification for requiring HHS to expedite the production of documents related to the FDA's surveillance program. The Center did not request in this affidavit that the entire original FOIA request be produced. Instead, the Center asked that documents related to the current extraordinary public interest be produced within the time frames required under FOIA. The limited nature of the renewed request for expedited processing was clear and unequivocal. *See* Williams Affidavit I, [Doc. 85-1, Headnote VI, ¶¶ 41-42]. The request for expedition set forth in the affidavit was ignored by the FDA.

This triggered a follow-up affidavit by Ms. Williams, dated April 19, 2012. *See* Williams Affidavit II, Exh. 20. In the second affidavit, Ms. Williams provided the FDA with additional examples of how the Whistleblower Center's program to disseminate information to the public is highly respected and effective. Ms. Williams documented how the Whistleblowers Center worked jointly with the *Washington Post* to ensure that FOIA-produced documents were publicly disseminated in an influential series on the FBI's forensic science misconduct. *See id.* at ¶¶ 2-12.

Williams' second affidavit also explained how "delay in production has been severely prejudicial to the [Center's] ability to disseminate information to the public." *See id.* at ¶ 15. Consistent with the requirements of FOIA, Williams asked the FDA FOIA office to respond to her request for expedited processing within 10 days, and warned that the failure to respond would result in the Whistleblowers Center seeking a preliminary injunction. *See id.* at ¶¶ 18-20.

To date, HHS has not completed the processing of plaintiff's FOIA requests or informed the Center of an anticipated date for the completion of the processing of the requests. It has also exceeded the generally applicable twenty-day deadline for the processing of *any* FOIA request. 5 U.S.C. § 552(a)(6)(A). The Agency's adamant refusal to provide expedition makes it clear that any production of surveillance documents will be inordinately delayed should this court not grant the relief requested.

ARGUMENT

The Center requests a preliminary injunction to order expedited production of those documents related to the surveillance of its scientists' private email correspondence (hereinafter "Surveillance Documents") for which there is extraordinary public interest. The documents are defined further below and in the proposed order. The essential issues in determining whether those documents should be granted expedited processing are two-fold. First, does the Whistleblowers Center meet the requirements for a preliminary injunction for expedited processing? If so, what if any deadlines should be imposed upon the Agency?

The answer to the first question is undeniably yes. For persons engaged primarily in the dissemination of information, expedited processing is required when there is an urgent need. The Agency has already acknowledged that the Whistleblowers Center is primarily engaged in the dissemination of information, and Whistleblowers Center has an urgent need for the

documents to participate in the public debate over the FDA's surveillance of its own scientists.

The underlying issues concern the suppression of views by FDA scientists who express concerns about the safety of medical devices approved for marketing in the United States. As such, the matter is inherently of public concern. There has been widespread media interest, both before and during the pendency of the FOIA requests. Furthermore, Congress, the Office of Special Counsel, and the Office of Management and Budget are conducting investigations and reviews of the surveillance, which may result in new policies for the entire federal work force.

The answer to the second question is also yes, deadlines for production are required. Defendant HHS has gone well past its statutory 20-day deadline for regular processing of FOIA requests. The surveillance documents, their location, and their contents are largely known. Yet this request has been pending for nineteen months with little produced in the way of the surveillance documents most easily obtained. Furthermore, HHS's refusal to grant expedited processing of the Whistleblowers Center's FOIA requests with respect to surveillance documents in light of the extraordinary public interest in these matters has produced undue delay. The agency's failure to process plaintiff's requests constitutes a continuing impediment to the Whistleblowers Center's and the public's ability to examine HHS's policy of targeted surveillance of whistleblowers and to participate in the debate over the legality of that activity.

The Agency's actions should be enjoined.

I. THE COURT HAS JURISDICTION TO GRANT THE REQUESTED RELIEF

Congress expressly required agencies to make determinations on request for expedited processing within ten calendar days, 5 U.S.C. § 552(a)(6)(E)(ii)(I), and provided for immediate judicial review of adverse determinations, 5 U.S.C. § 552(a)(6)(E)(iii). These provisions demonstrate Congress' intent that the courts should act quickly to vindicate the right to

expedition. *See, e.g., Am. Civil Liberties Union v. DOJ*, 321 F. Supp. 2d 24, 28-29 (D.D.C. 2004) (complete exhaustion of administrative remedies not a prerequisite to judicial review of agency expedition decisions).

The FOIA provides, in pertinent part:

> On complaint, the district court of the United States . . . in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter *de novo* . . . .

5 U.S.C. § 552(a)(4)(B); s*ee also EPIC; Al-Fayed v. CIA*, 254 F.3d 300, 304 (D.C. Cir. 2001). The statute further provides:

> Any person making a request to any agency for records . . . shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph.

5 U.S.C. § 552(a)(6)(C). *See also Oglesby v. Dep't of the Army*, 920 F.2d 57, 62 (D.C. Cir. 1990).

Defendant HHS has failed to respond within the generally applicable twenty working-day time limit established by 5 U.S.C. § 552(a)(6)(A). Plaintiff's claim is thus ripe for adjudication, as all applicable administrative remedies have been exhausted. According to the FOIA, each agency is generally required to "determine within 20 days (except Saturdays, Sundays, and legal public holidays) after the receipt of . . . [a] request whether to comply with such request and shall immediately notify the person making such request of such determination[.]" 5 U.S.C. § 552(a)(6)(A)(i). If the agency grants expedited treatment, the agency is obligated to process the request "as soon as practicable." 5 U.S.C. § 552(a)(6)(E)(iii).

II. PLAINTIFF IS ENTITLED TO ENTRY OF A PRELIMINARY INJUNCTION FOR EXPEDITED PROCESSING

It is well established that federal courts can grant a preliminary injunction for expedited

processing of a FOIA request. *See, e.g.*, "DOJ Guide to the Freedom of Information Act," *supra* at 725-26 (citing *Electronic Privacy Info. Ctr. v. DOJ*, 416 F. Supp. 2d 30, 36 (D.D.C. 2006)).

When considering a motion for preliminary injunction, the Court must weigh four factors: (1) the likelihood of success on the merits; (2) the likelihood that the movant would suffer irreparable injury if the injunction is not granted; (3) the likelihood that an injunction would not substantially injure other interested parties; and (4) the likelihood that the public interest would be furthered by the injunction. *See Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1066 (D.C. Cir. 1998) (quoting *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995)).

"These factors interrelate on a sliding scale and must be balanced against each other." *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998). "If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak." *CityFed Fin. Corp.*, 58 F.3d at 747. Injunctive relief may be proper "where there is as particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury." *Id.*; *see also Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 57 (D.C. Cir. 1977) (citing *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *A Quaker Action Grp. v. Hickel*, 421 F.2d 1111, 1116 (D.C. Cir. 1969); *Elec. Privacy Info. Ctr. v. DOJ*, 416 F. Supp. 2d 30, 35-36 (D.D.C. 2006); *Leadership Conf. on Civil Rights v. Gonzalez*, 404 F. Supp. 2d 246 (D.D.C. 2005); *Elec. Frontier Foundation v. Off. of the Dir. of Nat'l Intel.*, 542 F. Supp. 2d 1181 (N.D. Cal. 2008); *Aguilera v. FBI*, 941 F. Supp. 144 (D.D.C. 1996); *Washington Post v. Dep't of Homeland Security*, 459 F. Supp. 2d 61 (D.D.C. 2006).

Consideration of these factors in this case firmly establishes plaintiff's entitlement to injunctive relief.

A. Whistleblowers Center Is Likely to Prevail on the Merits

In the context of expedited processing litigation, the "likelihood of success on the merits" prong distills down to whether or not the plaintiffs are entitled to expedited processing. According to FOIA, "Each agency, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records—in cases in which the person requesting the records demonstrates a compelling need; and in other cases determined by the agency." 5 U.S.C. § 552 6(E)(i)(I)(II). FOIA further explains that "notwithstanding clause (i), regulations under this subparagraph must ensure—that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request within 10 days after the date of the request; and expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing." *Id.*

In this case, the Whistleblowers Center demonstrates a compelling need under FOIA's expedited processing provision: "with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. § 552(a)(6)(E)(v)(II).

1. The Center is primarily engaged in disseminating information

In *Leadership Conference on Civil Rights*, the court found that the plaintiff was primarily engaged in the dissemination of information regarding civil rights. *See* 404 F. Supp. 2d at 260. The court noted that plaintiff's mission was to "serve as the site of record for relevant and up-to-the minute civil rights news and information . . . to educate the public, promote effective civil rights laws, and ensure their enforcement . . . ." *Id.* The court cited to plaintiff's website for confirmation. *Id.*

In this case, the Agency has not challenged the Center's status as an entity primarily

engaged in disseminating information. HHS has recognized the Center's status as a representative of the news media in all its requests where a determination of fee category was made. By definition, the Center satisfy the requirement that the requester be primarily engaged in disseminating information.

Independent examination of Williams' affidavits, the National Whistleblowers Center's website, and prior and ongoing activities confirms the Agency's determination. As set forth in the affidavits of Ms. Williams, the Center is primarily engaged in the dissemination of information. *See, e.g.*, Williams Affidavit I, [Doc. 85-1, ¶¶ 3-9, 15-33]; Williams Affidavit II, Exh. 20, ¶¶ 2-13. The Center's web log, updated daily, maintains 190,000 unique visitors on top of the website's following of 117,000 unique visitors in 2011. The Center's "Action Network" currently has 31,000 active members. The Whistleblowers' Radio Show conducts one-hour weekly programs every Tuesday on the Progressive News Network. The Center disseminates further information to the public by providing information to national news media, which has proven to be very successful on every major news show. The Whistleblowers Center's stories have been reported and/or covered on *60 Minutes*, ABC, NBC, CBS, FOX, Nightline, the Today Show, Prime Time Live, and every major TV, radio and newspaper outlet. *See, e.g.*, Williams Affidavit I, [Doc. 85-1, ¶ 19].

Specific to these documents, the Whistleblowers Center has a page dedicated to informing the public about the FDA's surveillance of its employees. *See* "Home > FDA," WhistleblowersBlog.org, *available at* http://www.whistleblowersblog.org/tags/fda/.

2. The Center has a demonstrated "urgent need" to obtain the requested documents under the three-part *Al-Fayed* test

Under FOIA, the term "compelling need" means: "with respect to a request made by a person primarily engaged in dissemination information, urgency to inform the public concerning

actual or alleged Federal Government activity." 5 U.S.C. § 552 6(E)(v)(II). The D.C. Circuit has established a three-part test for determining the existence of such an "urgency to inform the public." *Al-Fayed*, 254 F.3d at 306. The considerations for the Court are:

1. Whether the request concerns a matter of current exigency to the American public;

2. Whether the consequences of delaying a response would compromise a significant recognized interest; and

3. whether the request concerns federal government activity.

Id. at 310.

Courts do not always strictly apply the *Al-Fayed* test, often treating "urgency to inform the public" as a more holistic concept. For example, in *Natural Resources Defense Council*, the court looked to whether the material is of "extraordinary public interest." *See* 191 F. Supp. 2d at 43. In *ACLU of Northern California v. DOD*, the court considered whether the material concerned a "breaking news story." *See* No. C-06-01698-WHA, 2006 U.S. Dist. LEXIS 36888, at *18 (N.D. Cal. May 25, 2006). In *Gerstein v. CIA*, the court considered the fact that the information sought was "newsworthy [and] the subject of an ongoing national debate." No. C-06-4643 MMC, 2006 U.S. Dist. LEXIS 89847, at *18-19 (N.D. Cal. Nov. 29, 2006).

In *Natural Resources Defense Council*, the court ordered expedited processing of a request for documents concerning energy policy and President Bush's Energy Task Force. 191 F. Supp. 2d at 43. The court concluded that the request concerned material of "extraordinary public interest" and of "enormous concern to consumers, to environmentalists, to the Congress, and to industry." *Id.*

As in *Natural Resources Defense Council*, this Court should order the FDA to expedite processing of the Whistleblowers Center's FOIA requests because of extraordinary public

interest. FDA's scientists engaged in activity to bring to public attention FDA's approval of medical devices that are dangerous to the public health, welfare, and safety. For their efforts, the FDA has instigated surveillance of these employees, specifically based upon their whistleblower activities, in an effort to suppress the airing of the scientists' concerns. The FDA's surveillance activity has led directly to extraordinary media attention and has spawned investigations by Congress and the Office of Inspector General. It also has the potential to further affect the federal government's policy of surveillance of its entire work force through new guidelines issued through the Office of Management and Budget's Office of Personnel Management. Currently before Congress is a bill to expand whistleblower protections to the Public Health Service based on the FDA's actions. Given the attention that currently exists, these documents are "of extraordinary public interest," and therefore deserving of expedited processing.

In *Electronic Privacy Information Center v. DOJ* [hereinafter "EPIC"], plaintiff EPIC requested expedited processing of their FOIA request for documents about the National Security Agency's ("NSA") warrantless domestic surveillance, based on urgency to inform the public. *See* 416 F. Supp. 2d 30, 36 (D.D.C. 2006). EPIC noted that the NSA program "raises serious legal questions about the government's intelligence activity" and "hundreds of local and national media organizations reported on this matter throughout the United States . . . ." *Id.* at 34. EPIC also noted the pendency of Congressional hearings. *Id.* Under these circumstances, the agency itself admitted that expedited processing was appropriate. *Id.* Given the circumstances, the court in *EPIC* ordered not just expedited processing, but set deadlines for production. *Id.* at 39-40.

As in EPIC, the FDA's warrantless surveillance of its employees on suspicion of whistleblower activity raises "serious legal questions about the government's intelligence activity." This is demonstrated by Congressional and OSC investigations into the legality of the

practice. As in EPIC, the FDA's surveillance of its scientists has also received national media attention in major national outlets such as the *Washington Post* and the *New York Times*, as well as hundreds of media outlets across the nation. *See, e.g.*, Google Search Results, Exh. 34. OPM, in cooperation with Congress and the Special Counsel, is likely to craft new regulations on the federal government's policy on surveillance of its employees. For the Whistleblowers Center to participate in the public debate and contribute to the public record, the Whistleblowers Center must receive the documents *prior* to the conclusion of the investigations, and *prior* to the crafting of the new regulations. As in EPIC, the FDA should have granted expedited processing at the time the surveillance issues garnered such widespread interest. The FDA has refused.

In *ACLU of Northern California*, the court held that existing media coverage would "eliminate urgency only if *all* major news . . . had been reported, i.e., if there were nothing more to say. . . . If anything, extensive media interest usually is a fact *supporting* not *negating* urgency in the processing of FIOA request[s]." 2006 U.S. Dist. LEXIS 36888 at *21-22. In this case, during the course of and based in part upon documents released under the Center's FOIA requests, the subject of surveillance documents were a "breaking news story" at both the national and international level. Documents obtained through the Whistleblowers Center's request for expedited processing will shed further light on the FDA's surveillance and will no doubt lead to more media coverage. This is especially so, given that the Whistleblowers Center serve as the basis for much of the media coverage already in existence. *See, e.g.*, Nakashima & Rein, "FDA Staffers Sue Agency Over Surveillance of Personal E-mail," WASHINGTON POST, A1 (Jan. 29, 2012) ("The screenshot and other materials were compiled . . . on behalf of the National Whistleblower[s] Center . . . ."). There are also current requests by the national news media for additional information. *See* Williams Affidavit I, [Doc. 85-1, ¶ 33].

In *Leadership Conference on Civil Rights*, the court granted plaintiff's motion for a preliminary injunction for expedited processing of a FOIA request for documents regarding the DOJ's manual for prosecution of election offenses. 404 F. Supp. 2d at 250-51. The court held that the urgency requirement was met because of the upcoming expiration of the Voting Rights Act. *Id.* at 260. "Plaintiff's FOIA requests could have a vital impact on development of the substantive record in favor of re-authorizing or making permanent the special provisions of the Voting Rights Act." *Id.* Additionally, the court cited the "news reports and magazine articles" regarding the subject matter of the DOJ manual and the Voting Rights act, i.e., minority voter intimidation and vote suppression. *Id.*

As in *Leadership Conference on Civil Rights*, the Whistleblowers Center has an urgent need for these documents, as Congressional and Special Counsel investigations are ongoing, and new regulations from the Office of Personnel Management are in the process of being developed. The Center's FOIA request "could have a vital impact on development of the substantive record" in favor of tightening the entire federal government's employee surveillance policies. Of particular note, documents already obtained from these FOIA requests are partially responsible for the current public interest, both in government and the media.

The court in *Gerstein* ordered the expedited release of records concerning "the government's ongoing efforts to address leaks of classified information." 2006 U.S. Dist. LEXIS 89847 at *18. The information was "not only newsworthy, but was the subject of an *ongoing* national debate at the time [Gerstein] made his FOIA requests." *Id.* at *18-19 (emphasis added). As in *Gerstein*, the information sought in this FOIA case is "newsworthy and the subject of an *ongoing* national debate." As previously described, the subject of these FOIA requests is independently newsworthy, and the subject of national media attention prior and subsequent to

the filing of the Center's FOIA requests. The public interest in this issue is ongoing, as there are numerous requests for information from the national news media to the Whistleblowers Center.

The Center also has an aggressive public outreach program to encourage active democracy, for citizens to read, learn, and participate in the crafting of government policies. It is critical that the public receives information so they can inform their representatives and speak intelligently on this subject. Thousands have already participated, and the Center expects continued public pressure through its outreach program as documents become available through this FOIA litigation. *See* Williams Affidavit I, [Doc. 85-1, ¶ 7(c)].

B. Plaintiff Will Suffer Irreparable Injury in the Absence of the Requested Injunctive Relief

Unless HHS's unlawful failure to comply with its obligation to expedite the processing of plaintiff's FOIA request is immediately enjoined, plaintiff will suffer irreparable harm.[5] The very nature of the right that plaintiff seeks to vindicate in this action—expedited processing—depends upon timeliness. *See Edmonds v. FBI*, 417 F.3d 1319, 1323-24 (D.C. Cir. 2005) ("Plainly, there is value to obtaining something earlier than one otherwise would. That is why people commonly pay—and delivery services charge—a premium for next-day delivery of important documents."). Courts have recognized that the requisite injury is present, and preliminary injunctive relief is

[5] Given the strength of plaintiff's position on the merits, even a "relatively slight showing of irreparable injury" is adequate to justify the issuance of a preliminary injunction. As the D.C. Circuit has held:

> The test is a flexible one. "If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak." We have often recognized that injunctive relief may be justified, for example, "where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury."

CSX Transp., Inc. v. Williams, 406 F.3d 667, 670 (D.C. Cir. 2005) (quoting *CityFed Fin. Corp.*, 58 F.3d at 747). Nonetheless, plaintiff's showing of harm here is substantial.

appropriate, in cases where "time is of the essence." *See, e.g., United States v. BNS, Inc.*, 858 F.2d 456, 465 (9th Cir. 1988); *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982); *EPIC, 416 F. Supp. 2d 30*.

If a plaintiff demonstrates that expedited processing is appropriate because of an urgent need to inform the public, then by definition, the plaintiff has demonstrated that "time is of the essence." Thus, under the statutory scheme Congress established in the FOIA, "time is of the essence" where expedited processing is required, and that any further delay in the processing of plaintiff's request will cause irreparable injury.

In addition to the loss of its clearly established statutory right, any further delay in the processing of plaintiff's FOIA request will irreparably harm plaintiff's ability, and that of the public, to obtain in a timely fashion information vital to the current and ongoing debate surrounding the legality of the Administration's surveillance of whistleblowers. Williams Decl., ¶¶ 13-15. That debate has already garnered extraordinary public interest.

If there is to be a meaningful public debate on this issue, and if the American people are going to "look at this" in a serious way, the examination cannot be based solely upon information that the Administration voluntarily chooses to disseminate. Indeed, the public oversight mechanism provided by the FOIA is central to open and democratic debate on critical policy issues such as this. As the Supreme Court has Case observed, the Act is "a means for citizens to know 'what the Government is up to.' This phrase should not be dismissed as a convenient formalism. *It defines a structural necessity in a real democracy*." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171-172 (2004) (emphasis added; citation omitted).

In *Electronic Frontier Foundation v. Office of the Director of National Intelligence*, the court granted a preliminary injunction for expedited processing. 542 F. Supp. 2d 1181 (N.D.

Cal. 2008). In part, the court reasoned that the unpredictability of legislation due to an ongoing debate is cause for expedition and that delay would cause irreparable harm. *Id.* at 1187. "[D]elayed disclosure of the requested material may cause irreparable harm to a vested constitutional interest in 'the uninhibited, robust, and wide-open debate about matters of public importance that secures an informed citizenry.'" *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

Such is the case here. Legislation to address but one part of the surveillance issue is imminent. On top of which, both Congress and the Office of Special Counsel are conducting investigations that may lead to new legislation, new rules, and new policies. The timing of the legislation and the conclusion of such investigations are expected in the very near future. This creates an urgent need to procure documents so the Center can participate in the public debate on these matters, use its public information program to education the public on these issues and stimulate further public participation in the ongoing debate.

It is clear that the information plaintiff seeks, if it is to contribute to the public debate on whistleblower surveillance, must be disclosed expeditiously. There is, as defendant HHS was constrained to acknowledge, "an urgency to inform the public about" the Department's role in the surveillance program. "The importance of this issue is paramount and expedition of these documents" is crucial because the release of the information will permit the public, Congress, the OSC, and the NWC to fully participate in a "real" democratic process. *Leadership Conference of Civil Rights*, 404 F. Supp. 2d 246. Because time is of the essence in this matter, plaintiff will be irreparably harmed unless the Court acts now, "when it [is] still possible to grant effective relief," and before "all opportunity to grant the requested relief [is] foreclosed." *Local Lodge No. 1266, Int'l Ass'n of Machinists and Aerospace Workers v. Panoramic Corp.*, 668 F.2d 276, 290

(7th Cir. 1981).[6]

C. Injunctive Relief Will Not Burden Others Interests

Defendant HHS cannot be said to be "burdened" by a requirement that it comply with the law. *See Electronic Frontier Foundation v. Office of the Director of Nat'l Intelligence*, 2007 WL 4208311, *7 (N.D. Cal. Nov. 27, 2007). The immediate relief the Whistleblowers Center seeks will require nothing more of the government that what the law already mandates—the expedited processing of plaintiffs FOIA requests. Nor will the requested relief burden the interests of other parties who have submitted FOIA requests to the HHS in any manner beyond that foreseen by Congress. *Cf. id.* In providing for expedited processing of qualifying requests, Congress intended that such requests would take precedence over those that do not qualify for such treatment. Fulfillment of the legislative intent cannot be characterized as a burden on any party's interests.

D. The Public Interest Favors the Requested Relief

The DOJ's FOIA guide succinctly describes the how release of documents under the FOIA Act is in the public interest. *See* "DOJ Guide to the Freedom of Information Act" [hereinafter "DOJ Guide"], 725-26 (2009 edition), *available at* http://www.justice.gov/oip/foia_guide09.htm. According to the DOJ, "[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." DOJ Guide, *supra* at 1 (citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). The "FOIA is often explained as a means for citizens to know 'what their Government is up to.'" *Id.* (citing *NARA v. Favish*, 541

[6] This Court has recognized that delay in the processing of FOIA requests "may well result in disclosing the relevant documents after the need for them in the formulation of national . . . policy has been overtaken by events." *Natural Resources Defense Council*, 191 F. Supp. 2d at 43 (granting motion for release of documents).

U.S. 157, 171-72 (2004) (quoting *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989))).

The Supreme Court stressed that "[t]his phrase should not be dismissed as a convenient formalism," rather, "[i]t defines a structural necessity in a real democracy." *Id.* at 172. As President Obama has declared, a "democracy requires accountability, and accountability requires transparency." Presidential Memo. for Heads of Exec. Dep't's and Agencies Concerning the Freedom of Info. Act, 74 FED. REG. 4683 (Jan. 21, 2009). The FOIA "encourages accountability through transparency." *Id.*; *accord* Attorney General Holder's Memo. for Heads of Exec. Dep't's and Agencies Concerning the Freedom of Info. Act, Exh. 35 (Mar. 19, 2009).

The final criterion for the issuance of a preliminary injunction is clearly satisfied in this case. The D.C. Circuit has long recognized that "there is an overriding public interest . . . in the general importance of an agency's faithful adherence to its statutory mandate." *Jacksonville Port Auth.*, 556 F.2d at 59 (D.C. Cir. 1977). Likewise, it is "axiomatic that an 'agency is required to follow its own regulations.'" *Edmonds v. FBI*, C.A. No. 02-1294, 2002 U.S. Dist. LEXIS 16578, at *9 n.3 (D.D.C. Dec. 3, 2002) (quoting *Cherokee Nat'l of Okla. v. Babbitt*, 117 F.3d 1489, 1499 (D.C. Cir. 1997)). Such adherence to statutory deadlines is all that plaintiffs seek here.

The public interest will also be served by the expedited release of the requested records, which will further the FOIA's core purpose of "shedding light on an agency's performance of its statutory duties." *Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989). As this Court has noted, "[t]here is public benefit in the release of information that adds to citizens' knowledge" of government activities. *Ctr. to Prevent Handgun Violence v. Dep't of the Treasury*, 49 F. Supp. 2d 3, 5 (D.D.C. 1999).

III. THE COURT SHOULD SET DEADLINES FOR THE PROCESSING OF THE CENTER'S FOIA REQUESTS

It is well established that in granting a preliminary injunction for expedited processing, the court can require and set firm deadlines. *See, e.g.*, *EPIC v. Dep't of Justice*, 416 F. Supp. 2d 30, 38 (D.D.C. 2006) (citing *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260-61 (D.D.C. 2005)). In *American Civil Liberties Union v. Dep't of Defense*, the court specifically rejected the agency's argument that because it was already expediting the plaintiff's request and ordered certain initial production within eleven days of the preliminary injunction hearing. 339 F. Supp. 2d 501, 501 (S.D.N.Y. 2004).

A. Proposal for Timeline for Expedition with Set Deadlines

The Center has an urgent need for the production of documents related to the FDA's surveillance programs, including the production of the documents intercepted by the agency, documents related to the decision-making process that triggered the surveillance, documents related to actions taken by the agency as a result of the surveillance and documents related to potential retaliation or agency misconduct arising from the surveillance program.

The Center requests that this Court issue specific time-deadlines for production on a staggered basis, and that all of the surveillance records be produced within 20-40 working days, depending on the records at issue. This staggered schedule is set forth in the attached Proposed Oder, and was designed to reduce the burden on the Agency by limiting the scope of the requests covered under this injunction, while producing the relevant documents in an orderly and expedited fashion.

B. Deadlines For Production Are Appropriate

In *EPIC*, this court held that "a *prima facie* showing of agency delay exists when an agency fails to process an expedited FOIA request within the [20 day] time limit applicable to standard FOIA requests." 416 F. Supp. 2d 30, 39 (D.D.C. 2006). The presumption is rebuttable

"if the agency presents credible evidence that disclosure within such time period is truly not practicable." *Id.* at 39. For disclosure to not be practicable, "exceptional circumstances" must exist to justify delay. *EPIC*, 416 F. Supp. 2d at 38; *accord EFF*, 2007 WL 4208311 at *5. Assertions "generically applicable to all FOIA requests" that would be received by a particular agency are not "exceptional circumstances." *EFF*, 2007 WL 4208311 at *5.

The court in *EPIC* also rejected the idea that it "take at face value an agency's determination that more time is necessary." *Id.* at 39; *accord Electronic Frontier Foundation v. Office of the Director of National Intelligence* [hereinafter "EFF"], No. C 07-5278 SI, 2007 WL 4208311, *5 (N.D. Cal. Nov. 27, 2007). Such a position "would give the agency unchecked power to drag its feet and pay lip service to a requester's statutory and regulatory entitlement to expedition." *EPIC*, 416 F. Supp. 2d at 37; *accord EFF*, 2007 WL 4208311 at *5. Instead, the court must look to "credible evidence," including analysis and statistics, to justify its delay. *EPIC*, 416 F. Supp. 2d at 40. In analyzing the case, the court in *EPIC* rejected the DOJ's "unsupported allegations that delay is necessary because EPIC's requests are 'broad' and involve classified documents." *Id.* "Vague assertions, unsupported by credible evidence, are insufficient to demonstrate that further delay is currently necessitated." *Id.*

In several recent cases, this Court and others have imposed specific processing deadlines on agencies, requiring the prompt delivery of non-exempt records to FOIA requesters. In *Judicial Watch, Inc.*, the court ordered the Commerce Department and the Transportation Department to process, respectively, 9,000 and 6,000 pages of material; to complete the processing within 60 days; and to provide the requester with a *Vaughn* index within 72 days. 191 F. Supp. 2d at 141. It is worth noting that the FOIA requests at issue in *Judicial Watch* were *not* claimed to be entitled to expedited processing.

Similarly, in *NRDC*, the Court ordered the Energy Department to process 7500 pages of material; to complete the processing of the "vast majority" of the material within 32 days; to complete all processing within 48 days; and to provide the requester with a *Vaughn* index within 63 days. 191 F. Supp. 2d at 43-44. Again, the FOIA request in *NRDC* had not been granted expedited treatment.

More recently, in *ACLU v. DOD*, a case involving an expedited request, the Court ordered a variety of agencies to "produce or identify all responsive documents," and to provide the requesters with a *Vaughn* index, within 30 days. 339 F. Supp. 2d at 505. In *Electronic Privacy Information Center v. Department of Justice*, Civ. No. 05-845, Exh. 36 (D.D.C. Nov. 16, 2005) (memorandum order), this Court ordered the FBI to "complete the processing of 1500 pages every 15 calendar days, and provide to Plaintiff all responsive non-exempt pages contained therein, until processing is complete," after the agency had granted a request for expedited processing but failed to produce any responsive records. *Id*. at 4.

In this case, the Agency has not reacted at all to Whistleblowers' requests for expedited processing based on the recent and extraordinary public interest in these documents. On Feb. 28, 2012, the Whistleblowers Center explicitly requested expedited processing of the FOIA requests, citing the extraordinary media interest, the Congressional investigations, the Special Counsel investigation, and the potential change in surveillance policies through the Office of Personnel management.

On April 19, 2012, the Whistleblowers Center again requested expedited processing of surveillance documents relevant to the extraordinary public interest in the FDA's surveillance of its own scientists. As of the filing of this Motion, the Agency has not responded to the request to either affirm or deny or to give the Center any estimate of when production is expected to be

finished. It has been well past 20 days since the Whistleblowers Center filed their renewed and never-answered request for expedited processing.

In *EPIC v. Department of Justice*, 416 F. Supp. 2d 30 (D.D.C. 2006), plaintiff EPIC requested expedited processing of their FOIA request for documents about the National Security Agency's warrantless domestic surveillance. The NSA program raised "serious legal questions about the government's intelligence activity," was reported in "hundreds of local and national media organizations," and was the subject of pendant Congressional hearings. *Id.* at 34.

At this point in this case, according to the Agency, the current FOIA request is at the top of its processing queue. Yet still, the Agency has denied that expedited processing should be or has been in any way granted. The Agency has further denied that the Center's FOIA requests are due any type of priority outside of being at the top of the queue, and refuses to set a timetable for production. Without deadlines, the Center expects unnecessary delays based on the Agency's past behavior, and no court-imposed deadlines currently exist with respect to the production of these documents.

For example, on March 28, 2012, this Court ordered the Agency to remove the redactions and produce a series of other documents reviewed *in camera*. [Docs. # 89, 91]. A month later, having heard nothing from Agency as to when these documents would be produced, the Whistleblowers Center contacted the Agency to inquire as to the status of the documents that this Court ordered produced four weeks prior. On April 26, 2012, the Agency responded that no documents would be produced until this Court issued a final decision on the merits at the end of this case.

This position was extraordinary if not unprecedented. The Whistleblowers Center had to directly challenge the Agency's position and demand legal authority before the Agency agreed to

produce the documents. After the Agency reversed its position, it asked for another two weeks to produce the documents. On May 10, 2012, after almost six weeks, the Agency produced approximately 90 pages of documents according to this Court's order of March 28, 2012.

In all of this time, the only indication of how long production will last was the Agency's Motion for an Open America Stay in September 2011, which requested a three year stay with an additional two years to process the request itself.[7] This is indicative of the Agency's efforts to delay production.

It should be noted that the original reasons for the Agency to delay processing do not apply to the current request for *partial* expedited processing. As the Williams affidavits made clear, the request for expedition applies to a much more limited set of documents relevant to the FDA's surveillance program. Williams Affidavit I, [Doc. 85-1, § 6, ¶¶ 43]; Williams Affidavit II, Exh. 20, ¶¶ 13-17. The overwhelming majority of these documents are easily identified and readily accessible, and many of the locations are already known. *See, e.g.*, Email, "List of Locations to Search," Exh. 8 (March 14, 2012). The number of FDA personnel involved in the surveillance is limited to a finite set of managers, employees, and attorneys. Most of these people have already been named by the Center, and those names have been given to the Agency.

CONCLUSION

The Center has demonstrated that this request is relevant to extraordinary public interest, not least of which involves legislation pending within the U.S. Senate. The legislation is now pending in the House of Representatives, where it may be approved, disapproved or modified. If

[7] On March 14, 2012, the Agency represented to the Court that the Center's FOIA requests were at the top of the queue and ready to be processed, but no timetable for production has been provided by the Agency. Even if expedited processing is granted, Courts have ordered set deadlines even when Agency's have granted expedited processing. *See, e.g., Judicial Watch, Inc.*, 191 F. Supp. 2d at 43-44.

passed, the bill will expand whistleblower protection to thousands of uniformed federal employees in the Public Health Service where none existed before. The bill exists because of the extraordinary public interest in the FDA's warrantless surveillance program underlying this motion. Yet Defendants refuse to grant expedited processing.

Furthermore, the pending legislation is only one piece of a larger national conversation about how the federal government treats its employees who try to bring to light public waste, fraud, and abuse, or dangers to the public health, welfare, and safety. This conversation is being played out in newspapers and media outlets across the country, in federal investigative agencies, in the policy-setting Office of Management and Budget, and in Congress. The FDA's unprecedented use of targeted warrantless interception of emails and other data from whistleblowers is now a major part of this debate, and a catalyst for additional debate on the treatment of employee whistleblowers.

The Center has submitted affidavits and documents demonstrating the extraordinary public interest in the FDA's surveillance program. The Center has also pointed out exactly where to find many of the documents, has indicated that it is willing to limit its request to minimize the burden upon the Agency, and has worked for months with the Agency to find a way to resolve issues without requiring direct intervention by this Court in a timely manner. Nevertheless, Defendants refuse to grant expedited processing.

Even in the face of a direct Order from this Court to produce documents, the Agency initially refused to produce the documents until final judgment is reached in this case. Unless challenged, the Agency would have taken years to produce those documents.

Under these circumstances, expedited processing should be granted and strict deadlines are absolutely necessary. The Court should direct defendant HHS to expedite the processing of

documents related to the FDA's warrantless, covert surveillance of its scientists, and produce or identify all responsive records, in accordance with National Whistleblowers Center's proposed schedule. Such an order will allow the Whistleblowers Center and the American people to engage in informed participation in the public debate.

For the foregoing reasons, the Center's motion for a preliminary injunction should be granted. Plaintiff asks that the Court, pursuant to Local Rule 65.1(d), schedule a hearing on this motion within 21 days.

Respectfully submitted,

/s/ Stephen M. Kohn

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May 30, 2012

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WHISTLEBLOWERS CENTER, *et al.*,	)	
Plaintiff,	)	
v.	)	Civil Action No. 1:10-cv-02120-JEB
DEPEPARTMENT OF HEALTH & HUMAN SERVICES, *et al.*,	)	
Defendant.	)	

ORDER

UPON CONSIDERATION of Plaintiffs' Motion For A Preliminary Injunction For Partial Expedited Processing, the Defendant's Opposition thereto, and the record of this case, it is **HEREBY ORDERED**:

That Plaintiff's motion for Partial Preliminary Injunction is **GRANTED**; and it is hereby

FURTHER ORDERED that the Defendants shall expedite the production of all documents directly or indirectly related to the surveillance of FDA whistleblowers and any actual or proposed adverse actions taken against any FDA whistleblowers as a result of the surveillance, in whole or in part; it is

FURTHER ORDERED that production shall commence according to the following schedule:

1. Within 20 working days of the hearing on the preliminary injunction for partial expedited processing, production of all records that were intercepted or obtained from a warrantless search from any computer used by Czersak, Smith or Nicholas and/or any email sent by Czersak, Smith or Nicholas. This production would

include, but not be limited to: copies of the computer screens of Czerska's, Smith's, and Nicholas', in whole or in part, including records of the extracted text of the display or similar record (such as "screen shots").

2. Within 25 working days of the hearing on the preliminary injunction for partial expedited processing, production of all records of the contents of an email sent to or from any non-FDA email account, such as Google or Yahoo email accounts, including attachments;
3. Within 25 working days of the hearing on the preliminary injunction for partial expedited processing, production of all non-email records authored by the individually named plaintiffs and sent to, prepared for, or concerning the OSC, the EEO, Congress, or the HHS OIG, including draft complaints and email communications to and from Congress;
4. Within 30 working days of the hearing on the preliminary injunction for partial expedited processing, production of all documents related to the basis, inception, scope, and duration of the FDA surveillance of plaintiff FDA whistleblowers and their associates;
5. Within 30 working days of the hearing on the preliminary injunction for partial expedited processing, production of all records directly or indirectly related to the legality or appropriateness of the FDA surveillance program;
6. Within 35 working days of the hearing on the preliminary injunction for partial expedited processing, production of all records related to how the FDA used the surveillance documents, including records related to: (a)Any actual or proposed adverse personnel actions against any of the individually named plaintiffs (or

persons who signed Privacy Act waivers permitting the National Whistleblower Center to access documents related to them), based in whole or in part on information obtained from the FDA's surveillance program; (b) Whether the FDA intercepted personal information, including but not limited to correspondence involving family, loved ones, finances, and medical issues; (c) Whether, how, and why the FDA targeted whistleblowers for surveillance; and

7. Within 40 working days of the hearing on the preliminary injunction for partial expedited processing, production of all records related to the underlying safety concerns expressed by the FDA whistleblowers that triggered or contributed to the triggering of the FDA surveillance, including but not limited to production of records related to: (a) The safety of CT colonography devices as described in the New York Times article, Gardiner Harris, "Scientists Say F.D.A. Ignored Radiation Warnings," N.Y. Times, A14, Exh. 9 (March 29, 2010); (b) The safety of computer-aided detection devices, such as the Carestream mammography device, as described in the letter to President-elect Obama's transition team or referenced in the OSC brief to the MSPB. *See* Letter to John Podesta, Exh. 1 (Jan. 7, 2009); Request for Stay of Personnel Action, Office of Special Counsel, CB-1208-12-0002-U-1, Exh. 10, 1 (filed Oct. 7, 2011).

FURTHER ORDERED that Defendants shall produce all documents on a rolling basis to be completed within the time frames set forth herein; and it is

FURTHER ORDERED that Defendants shall produce a *Vaughn* index of withholdings within 5 days of the completion of each set of documents as enumerated above.

IT IS SO ORDERED.

_____ _____

DATE Hon. James E. Boasberg
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2012, the foregoing Motion for Preliminary Injunction for Partial Expedited Processing was served by this court's electronic case filing system on the following:

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