

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

AMERICAN CIVIL LIBERTIES UNION OF
MASSACHUSETTS, INC.,

Plaintiff,

v.

THE CENTRAL INTELLIGENCE AGENCY,
THE OFFICE OF THE DIRECTOR OF
NATIONAL INTELLIGENCE, THE UNITED
STATES DEPARTMENT OF DEFENSE, and
THE NATIONAL SECURITY AGENCY,
Defendants.

Civil Action No. 22-CV-11532-DJC

PLAINTIFF'S OPPOSITION TO DEFENDANTS'
MOTION FOR 30-DAY EXTENSION OF TIME

The government does not assert that it cannot comply with the existing May 25 deadline, or even that there is any specific obstacle to the Solicitor General making an appeal decision prior to that deadline. It appears that the government simply disagrees with the Court's decision and wants to preserve the status quo pending a potential appeal. Disagreement with the Court's order is not a recognized basis to modify a scheduling order, *see* Fed. R. Civ. P. 16(b)(4) (schedule may be modified only for good cause), or to seek reconsideration of an order, *see Davis v. Lehane*, 89 F. Supp. 2d 142, 147 (D. Mass. 2000) (court should grant motion for reconsideration of interlocutory order only when movant demonstrates (1) intervening change in law; (2) discovery of new evidence not previously available; or (3) clear error of law in first order).

Rather, the Supreme Court and the First Circuit have held that a party seeking to preserve the status quo pending the exercise of appellate rights must satisfy the four-part test articulated in *Nken v. Holder*: (1) whether the stay applicant has made a strong showing that it 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. *See Nken v. Holder*, 556 U.S. 418, 434 (2009); *Does 1-3 v. Mills*, 39 F.4d 20, 25 (1st Cir. 2022). Here, the government did not address this standard or attempt to make such a showing. Its motion should therefore be denied without prejudice to any future motion for a stay pending appeal.

The government indicates in a footnote that it anticipates moving for a stay pending appeal. *See* D.E. 34 at 3 n.1. It is free to do so, but ACLUM would likely oppose, and the *Nken* factors should be fully briefed by both sides before any decision. The Court denied the government’s motion for summary judgment because the government has not shown a “logical or plausible” basis to conclude that responding to ACLUM’s FOIA request will interfere with its investigation. D.E. 33 at 22. Thus, the first two prongs of the *Nken* test are essentially merged and would not support a stay. *See Does 1-3*, 39 F.4d at 24-25 (“The first two factors are the most critical.”) (internal quotation marks omitted). And although the government asserts in a footnote that compliance with the Court’s order would “let the cat out of the bag” and moot the issue for appeal, *see* D.E. 34 at 3 n.1, that fact alone would not justify a stay pending appeal. *See Does 1-3*, 39 F.4d at 24-25; *see also Nken*, 556 U.S. at 427; *SEC v. Biochemics, Inc.*, 435 F. Supp. 3d 281, 297 (D. Mass. 2020).

Lastly—whether considered under the *Nken* standard or otherwise—delaying these disclosures is not in the public interest. While the defendants and the Department of Justice have been silent, former President Trump has not. Just last week, during a televised town hall event on CNN, Mr. Trump asserted once again that the records found in the Mar-a-Lago Club had been “automatically declassified.”¹ “I was there and I took what I took and it gets declassified,” he said.

¹ CNN, *Transcript of CNN’s Town Hall with Former President Donald Trump* (May 11, 2023), <https://www.cnn.com/2023/05/11/politics/transcript-cnn-town-hall-trump/index.html>.

Members of the public need reliable information now to help them evaluate Mr. Trump's continuing public statements.

For these reasons, the plaintiff respectfully requests that the Court deny the defendants' Motion for 30-Day Extension of Time, without prejudice to their filing a motion for a stay pending appeal.

Dated: May 16, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed through the Court's ECF system and will therefore be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Natalie F. Panariello
Natalie F. Panariello