

1 conflicting results with the above-captioned case. For these reasons, plaintiff's administrative
2 motion should be denied.

3 BACKGROUND

4 Plaintiff has filed three Freedom of Information Act ("FOIA") lawsuits in this district
5 challenging the government's processing of three distinct FOIA requests related to amendments
6 to the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1801 *et seq.*, as amended.
7 Although all three FOIA requests seek records that are similar in subject matter, the requests
8 seek records created at different periods of time.

9 First, on October 17, 2007, plaintiff filed *EFF v. ODNI*, 07-5278 SI (hereinafter "*EFF*
10 *#1*"). This lawsuit challenged ODNI's processing of an August 31, 2007 FOIA request seeking
11 "all agency records from April 2007 to the present [*i.e.*, August 31, 2007] concerning briefings,
12 discussions, or other exchanges that Director McConnell or other ODNI officials have had with":
13 1) "members of the Senate or House of Representatives"; and 2) "representatives of
14 telecommunications companies concerning amendments to FISA." *See* Complaint (dkt. no. 1).
15 On December 10, 2007, ODNI released all non-exempt, responsive records to plaintiff in
16 response to the FOIA request at issue. Thereafter, on March 5, 2008, Judge Illston dismissed the
17 case. *See* Stipulation Of Dismissal (dkt. no. 46).

18 Second, on February 20, 2008, plaintiff filed the above-captioned case (hereinafter "*EFF*
19 *#2*") challenging ODNI and DOJ's processing of a series of FOIA requests, dated December 21,
20 2007, seeking "all agency records from September 1, 2007 to the present [*i.e.*, December 21,
21 2007] concerning briefings, discussions, or other exchanges that" ODNI and DOJ official have
22 had with "1) members of the Senate or House of Representatives" and 2) "representatives or
23 agents of telecommunications companies concerning amendments to FISA." *See* Complaint
24 (dkt. no. 1). Plaintiff filed a motion to have *EFF #2* designated as a related case to *EFF #1*, but
25 Judge Illston denied that motion. *See EFF #1* (dkt. no. 45) (order attached as Exhibit 1). *EFF*
26 *#2* was subsequently assigned to the Honorable Jeffrey S. White. On April 21, 2008, ODNI and
27 DOJ released over 900 pages of non-exempt, responsive records in response to the FOIA

1 requests at issue in *EFF #2*. See Defendants' Response To Court's April 4, 2008 Order Granting
2 Preliminary Injunction (dkt. no. 44). ODNI and DOJ withheld approximately 200 pages of
3 records, in whole and in part, pursuant to various FOIA exemptions and this Court recently
4 established a briefing schedule to address the parties' cross-motions for summary judgment with
5 respect to the withholding of those records. See dkt. no. 55. Defendants' summary judgment
6 motion is due to be filed on August 1, 2008, and the Court has scheduled a hearing on the matter
7 for October 3, 2008. See *id.*

8 Third, on June 17, 2008, plaintiff filed *EFF v. ODNI et al.*, No. 08-2997 EMC
9 (hereinafter "*EFF #3*"). This case challenges the processing of a distinct set of FOIA requests
10 submitted to ODNI and DOJ on April 24, 2008. See Complaint ¶ 34 (dkt. no. 1). Specifically,
11 plaintiff seeks all agency records from "December 21, 2007 to the present [*i.e.*, April 24, 2008]
12 concerning briefings, discussions, or other exchanges that" ODNI and DOJ officials have had
13 with 1) "any member of the Senate or House of Representatives or their staffs" and 2)
14 "representatives or agents of telecommunications companies concerning amendments to FISA."
15 *Id.* Additionally, plaintiff seeks all records "concerning any communications, discussions, or
16 other exchanges regardless of subject" that DOJ and ODNI officials have "had with Charlie
17 Black, Wayne Berman, Dan Coats, Tom Donilon, Jamie Gorelick or Brad Berenson." *Id.*
18 (emphasis in original). Plaintiff also seeks agency records from January 1, 2007 to the present
19 that are responsive to the categories described above, but were not been produced in response to
20 plaintiff's prior FOIA requests in *EFF #1* and *EFF #2*. See *id.*

21 **LEGAL STANDARD: LOCAL CIVIL RULE 3-12**

22 Cases filed in the Northern District of California are "assigned blindly and at random by
23 the Clerk by means of a manual, automated or combination system approved by the Judges of the
24 Court." General Order 44 ¶ D(2). Such a rule "guarantees fair and equal distribution of cases to
25 all judges, avoids public perception or appearance of favoritism in assignments, and reduces
26 opportunities for judge-shopping." *Tripp v. Executive Office of the President*, 196 F.R.D. 201,
27 202 (D.D.C. 2000) (construing analogous D.D.C. rule). Civ. L.R. 3-12, however, provides for

1 reassignment of a case to the judge presiding over an earlier-filed case when those cases are
2 related. “[T]he primary reasons” for Civ. L.R. 3-12 are “to avoid unduly burdensome
3 duplication of labor and expense, and conflicting opinions before different judges.” *Bacon v.*
4 *City and County of San Francisco*, No. C04-3437 TEH, 2005 WL 1910924, *1 n.1 (N.D. Cal.
5 August 10, 2005). Accordingly, the rule defines cases as related when “(1) The actions concern
6 substantially the same parties, property, transaction or event; and (2) It appears likely that there
7 will be an unduly burdensome duplication of labor and expense or conflicting results if the cases
8 are conducted before different Judges.” *See* Civ. L.R. 3-12(a).

9 ARGUMENT

10 Plaintiff’s motion should be denied because *EFF #3* does not “concern substantially the
11 same parties, property, transaction or event” as *EFF #2*. Although the plaintiff and defendants
12 are the same in both cases, the “transaction or event” that forms the factual basis for *EFF #3* is
13 completely distinct from the facts underlying *EFF #2*. Put simply, the two cases involve entirely
14 separate FOIA requests. The *EFF #3* requests seek records for a different period of time than
15 *EFF #2* – that is, records created after the processing of the *EFF #2* requests. Whereas the FOIA
16 requests at issue in *EFF #2* involved records created between September 1, 2007 and December
17 21, 2007, the requests at issue in *EFF #3* seek records created *after* plaintiff submitted the *EFF*
18 *#2* requests (*i.e.*, from December 21, 2007 to April 24, 2008). Moreover, *EFF #3* seeks a distinct
19 category of records that was not at issue in *EFF #2* – all records of any communications, without
20 any limitation on subject, with Charlie Black, Wayne Berman, Dan Coats, Tom Donilon, Jamie
21 Gorelick or Brad Berenson. These factual differences are significant because FOIA requests are
22 handled on an individualized request basis, with agencies conducting specific searches for
23 records based on the terms of each request and analyzing whether the records found in response
24 to those requests are appropriate for release. Consequently, resolution of *EFF #3* will focus
25 exclusively on the manner in which the agencies searched for and processed the specific records
26 at issue, without regard to *EFF #2*.

27 Allowing *EFF #3* to remain with the presiding judge as a matter of course under General
28

1 Order 44 also will not result in unduly burdensome duplication of labor or conflicting results.
2 Notably, Judge Illston rejected an identical motion by plaintiff to designate *EFF #2* as a related
3 case to *EFF #1*. *See* Exhibit 1. This Court should follow the same approach here because *EFF*
4 *#2* and *EFF #3* do not present a situation in which two different judges of this district will be
5 duplicating their efforts by passing judgment on the same legal claims arising from the same set
6 of facts. The merits litigation of *EFF #2* is currently scheduled for summary judgment briefing
7 and the parties agree the case will likely be resolved without the need for additional proceedings.
8 In light of this posture, plaintiff does not even attempt to explain how resolution of *EFF #3*,
9 which will depend entirely upon the specific facts and records in that case, could conflict with
10 the resolution of *EFF #2* or lead to a duplication of labor. Accordingly, there is no risk, for
11 example, that different judges of this district will duplicate efforts or issue conflicting decisions
12 about whether the same agency records are exempt from disclosure under FOIA.

13 Plaintiff's motion ignores the separate and distinct nature of its FOIA requests and,
14 instead, contends that related case status is warranted because *EFF #2* and *EFF #3* involve "the
15 same legal issues and causes of action." *See* Plaintiff's Motion at 3. This argument is without
16 merit. The similarity of questions of law is irrelevant under Civil Local Rule 3-12,¹ and for good
17 reason: two separate FOIA cases are no more related than two Title VII employment cases.

18 CONCLUSION

19 Plaintiff has provided no persuasive reason to deviate from this Court's general rule of
20 random assignments, which "guarantees fair and equal distribution of cases to all judges, avoids
21 public perception or appearance of favoritism in assignments, and reduces opportunities for
22 judge-shopping." *Tripp*, 196 F.R.D. at 202. The Court should, accordingly, deny plaintiff's
23 administrative motion.

24
25
26 ¹ This decision is based on an explicit choice of the judges of this Court: a prior version
27 of Civil Local Rule 3-12(a)(1), now superseded, factored in whether two cases involved
28 "substantially the same . . . question of law." *See Wireless Consumers Alliance, Inc. v.*
T-Mobile USA, Inc., No. 03-3711-MHP, 2003 WL 22387598, *5 (N.D. Cal. October 14, 2003).
No. C. 08-1023 JSW – Defendant's Opposition To Plaintiff's Related Case Motion

1 Dated: June 23, 2008

Respectfully submitted,

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EXHIBIT 1

1 UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA
3 SAN FRANCISCO DIVISION

4 _____)
5 ELECTRONIC FRONTIER FOUNDATION,)
6 Plaintiff,)
7 v.)
8 OFFICE OF THE DIRECTOR OF NATIONAL)
9 INTELLIGENCE,)
10 Defendant,)
_____)

No. C 07-5278 SI
ORDER

11 Upon consideration of Plaintiff's Administrative Motion To Consider Whether Cases
12 Should Be Related (dkt. no. 40), and defendant's opposition thereto, it is hereby ORDERED as
13 follows

- 14 1) Plaintiff's motion is DENIED; and
15 2) *Electronic Frontier Foundation v. ODNI*, No. 08-1023 EDL, shall be assigned
16 pursuant to General Order 44 of this Court.

17
18 IT IS SO ORDERED.
19 2/29/08
20 Dated: March ____, 2008.

21 
22 _____
UNITED STATES DISTRICT JUDGE

1 UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA
3 SAN FRANCISCO DIVISION

ELECTRONIC FRONTIER FOUNDATION,)	No. 08-1023 JSW
Plaintiff,)	
v.)	ORDER
OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE and UNITED STATES DEPARTMENT OF JUSTICE,)	
Defendants.)	

12 Upon consideration of Plaintiff’s Administrative Motion To Consider Whether Cases
13 Should Be Related (dkt. no. 54), and defendants’ opposition thereto, it is hereby ORDERED as
14 follows

- 15 1) Plaintiff’s motion is DENIED; and
- 16 2) *Electronic Frontier Foundation v. ODNI et al.*, No. 08-2997 EMC, shall be assigned
17 pursuant to General Order 44 of this Court.

18
19 IT IS SO ORDERED.

20
21 Dated: June ____, 2008.

22
23 _____
UNITED STATES DISTRICT JUDGE