UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHARIF MOBLEY, *et al.*,	*	
	*	
Plaintiffs,	*	
	*	
v.	*	
	*	Civil Action No. 1:11-cv-02074 (BAH)
DEPARTMENT OF HOMELAND SECURITY,	*	
	*	
	*	
Defendant.	*	
	*	

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MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs respectfully move the Court for a preliminary injunction enjoining Defendant Department of Homeland Security from refusing to process Plaintiffs' FOIA/PA Request No. DHS/OS/PRIV 11-1218 under the Privacy Act.

In support of this Motion, the Court is respectfully referred to Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Motion for a Preliminary Injunction.

A proposed Order consistent with the relief sought also accompanies this Motion.

Date: January 23, 2012

Respectfully submitted,

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PLAINTIFFS' STATEMENT OF MATERIAL
FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to Local Rule 65.1(d), Plaintiffs submit this statement of material facts as to which there is no genuine issue:

1. Defendant Department of Homeland Security ("DHS") operates and maintains a mirror copy of the Federal Bureau of Investigation ("FBI") Terrorist Screening Database ("TSDB"). 76 Fed. Reg. 39315 (July 6, 2011). This mirror copy constitutes a system of records under the control of DHS which is subject to the Privacy Act. *Id*.

2. DHS and the FBI have jointly established the DHS Watchlist Service ("WLS"). *Id.* The WLS constitutes a system of records under the control of DHS which is subject to the Privacy Act. *Id*.

3. On 23 August 2011, Plaintiffs by and through counsel submitted to DHS a FOIA/PA request for "all records about [them] located in the Terrorist Screening Database or the DHS Watchlist Service." This request also requested a public interest fee waiver and expedited processing. (Compl. ¶ 9.)

4. On 8 September 2011, DHS acknowledged receipt of this request and assigned it Request No. DHS/OS/PRIV 11-1218. (*Id.* ¶ 11.)

5. On 21 December 2011, DHS denied Plaintiffs' request, citing the Proposed Rule published in the *Federal Register*, 76 Fed. Reg. 39315 (July 6, 2011), as support for its exemption of the relevant system of records from the Privacy Act. (*See* Answer, Ex. 7.)

6. On 29 December 2011, DHS published a Final Rule in the *Federal Register* exempting the relevant system of records from the Privacy Act. 76 Fed. Reg. 81787 (Dec. 29, 2011). "This final rule is effective December 29, 2011." *Id.*

7. Mobley is being held prisoner at the "Central Prison" in Yemen after being seized by agents of the Yemeni security services. (Pls.' Mem. P. & A. Supp. Pls.' Mot. Prelim. Inj., Ex. A, Dkt. #7-1 ¶¶ 3-4 [hereinafter Crider Decl.].) *See also* Peter Finn, *The Post-9/11 Life of an American Charged with Murder*, Wash. Post (Sept. 4, 2010), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/09/04/AR2010090403328.html (last accessed Jan. 23, 2012) [hereinafter *Post-9/11 Life*].

8. Mobley has been in Yemeni custody since 26 January 2010, after he was shot during the abduction and sent to the hospital in police custody. (Crider Decl. ¶¶ 5-8.)

9. Mobley is facing the death penalty for allegedly murdering a guard in an attempted escape from the hospital on 7 March 2010. (*Id.*) *See also Post-9/11 Life*.

10. Mobley maintains that his seizure was a kidnapping carried out at the behest of the U.S. government. (Crider Decl. ¶ 10.) There are provisions of Yemeni law which suggest that it is legal to use deadly force to escape a kidnapping. (*Id.* ¶ 11.)

11. The Yemeni prosecutorial file contains no records prior to 7 March 2010. (*Id.* ¶ 13.) For this reason, there is no evidence that is available to the Yemeni court regarding how

Mobley came to be in police custody, his interrogation by U.S. government agents while in the hospital, his inhumane treatment at the hospital, or why he would have felt compelled to escape. (*Id.*)

12. The Yemeni judicial system does not allow for any significant discovery procedures for exculpatory information. (*Id.* ¶ 14.) Therefore, the records at issue in this request are necessary to support his defense. (*Id.*)

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	*	

* * * * * * * * * * * * *

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs Sharif Mobley ("Mobley"), an American citizen seized and imprisoned in Yemen at the behest of the United States government, and Nzinga Islam, his wife (collectively "Plaintiffs"), commenced this litigation pursuant to the Freedom of Information Act ("FOIA") and the Privacy Act (collectively "FOIA/PA") to obtain records from the Department of Homeland Security ("DHS") about themselves in the DHS systems of records known as the Terrorist Screening Database ("TSDB") and the DHS Watchlist Service ("WLS"). (Compl. ¶¶ 7-9.) Despite not having properly promulgated a rule exempting the relevant system of records from the Privacy Act until 29 December 2011, four months after Plaintiffs' FOIA/PA request was filed and five weeks after they filed suit, DHS refuses to process Plaintiffs' request under the Privacy Act, arguing that its publication of a Proposed Rule in the *Federal Register* was sufficient to exempt the system of records under Privacy Act Exemptions (k)(1) and (k)(2). (*See* Answer, Ex. 7.) DHS' position has no merit, and Plaintiffs' need is compelling enough to warrant a Preliminary Injunction on this issue.

ARGUMENT

When considering a motion for a Preliminary Injunction, the Court must traditionally 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 Lab., 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 (noting that injunctive relief may be proper "where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury").

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

It is axiomatic that records responsive to a FOIA/PA request must be exempt under *both* FOIA and the Privacy Act before they can be withheld from a requester. *Martin v. Office of Special Counsel, MSPB*, 819 F.2d 1181, 1184 (D.C. Cir. 1987). The Privacy Act in turn requires that "[t]he head of any agency [must] promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from [the access provision]." 5 U.S.C. § 552a(k). DHS did not promulgate a rule, in accordance with the requirements of 5 U.S.C. §§ 553(b)(1)-(3), (c), and (e) until 29 December 2011. Moreover, even the Final Rule promulgated on 29 December

2011 states that it did not take effect until that date. 76 Fed. Reg. 81787 (Dec. 29, 2011) ("This final rule is effective December 29, 2011.")

DHS' position that it need only publish a Proposed Rule[1] in the *Federal Register* in order to exempt a system of records from the Privacy Act renders the remainder of the rule promulgation provision "insignificant, if not wholly superfluous." *Duncan v. Walker*, 533 U.S. 167, 167 (2001). Such a reading violates one of the central canons of statutory construction: "This Court's duty to give effect, where possible, to every word of a statute makes the Court reluctant to treat statutory terms as surplusage." *Id.* (citing *United States v. Menasche*, 348 U.S. 528, 538-539 (1955)). Simply put, if DHS' argument had merit, there would be no need for agencies to *ever* promulgate Final Rules exempting systems of records from the Privacy Act. If a case existed that held that publication of a Proposed Rule in the *Federal Register* was sufficient on its own to exempt a system of records from the Privacy Act, Defendants would have cited it. Moreover, DHS' argument defies basic common sense; it would have the Court accept that even though the Final Rule did not take effect until 29 December 2011, the Proposed Rule, which was nothing but a *Notice* of Proposed Rulemaking, somehow immediately took independent effect in July when *it* was published.

For the foregoing reasons, the Court should find that Plaintiffs are likely to succeed on the merits with respect to DHS' refusal to process Plaintiffs' request under the Privacy Act.

[1] Even though DHS did publish both a Privacy Act Systems of Records Notice ("SORN") and a Notice of Proposed Rulemaking in the *Federal Register* on 6 July 2011 (Answer ¶ 8), the relevant language of the two documents is virtually identical (and both were addressed interchangeably in the Final Rule). However, even to the degree that they were technically separate publications, a Systems of Records Notice on its own is no more legitimate a means for exempting a system of records from the Privacy Act than a Proposed Rule, so any distinction between the two is ultimately irrelevant on this count. For this reason, this brief will only address the Proposed Rule.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF THE PRELIMINARY INJUNCTION IS NOT GRANTED

It is well-established that a plaintiff seeking a Preliminary Injunction regarding the timeliness of an agency's processing of his FOIA/PA request will succeed if he can show "(a) that [he] is facing grave punishment, (b) that there is a reason to believe that the information will be produced to aid in the individual's defense, and (c) that criminal litigation is presently pending." *Aguilera v. FBI*, 941 F. Supp. 144, 150 (D.D.C. 1996) (citing *Cleaver v. Kelley*, 427 F. Supp. 80 (D.D.C. 1976), and *Freeman v. U.S. Department of Justice*, Civ. No. 92-0557, slip. op. (D.D.C. Oct. 2, 1992)). *See also id.* at 151-52 (specifically applying the criminal prosecution calculus to the irreparable harm standard). Mobley easily satisfies these criteria.

Mobley is in a Yemeni prison awaiting trial for allegedly murdering a guard in an attempted escape, which in Yemen is punishable by public execution. (Pls.' Mem. P. & A. Supp. Pls.' Mot. Prelim. Inj., Ex. A, Dkt. #7-1 ¶¶ 3, 7 [hereinafter Crider Decl.].) *See also* Peter Finn, *The Post-9/11 Life of an American Charged with Murder*, Wash. Post (Sept. 4, 2010), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/09/04/AR2010090403328.html (last accessed Jan. 23, 2012). His criminal defense includes, *inter alia*, the arguments that: (1) his seizure was in fact an illegal extrajudicial abduction carried out at the behest of the U.S. government for intelligence purposes; and (2) the inhumane treatment he was receiving in custody would have compelled anyone to attempt escape. (Crider Decl. ¶¶ 10-12.) Under Yemeni law, it can be legal to use deadly force to escape an extrajudicial abduction. (*Id.* ¶ 11.) *See also* Republican Decree for Law No. 12 for the Year 1994 Concerning Crimes and Penalties Articles 27 and 28, *available at* http://www.unhcr.org/refworld/pdfid/3fec62f17.pdf (last accessed Jan. 23, 2012).

Furthermore, because Mobley's prosecutorial file does not contain any records regarding the circumstances surrounding his initial seizure and detention, and the Yemeni judicial system does not allow for any significant discovery procedures for exculpatory information, the information in the U.S. government's files regarding its interest in him and its role in his seizure, detention, and interrogation is vital to his defense in Yemeni court. (*Id.* ¶¶ 12-14.)

For the foregoing reasons, the Court should find that Mobley will suffer irreparable harm if this Preliminary Injunction is not granted.

III. DHS WOULD NOT SUFFER ANY HARDSHIP BY BEING ORDERED TO PROCESS PLAINTIFFS' REQUEST

DHS cannot be said to be burdened by a requirement that it comply with the law. The Privacy Act and the Administrative Procedure Act are quite clear on the precise sequence of steps an agency must take to properly exempt a system of records from the Privacy Act. As of the filing of Plaintiffs' FOIA/PA request and this lawsuit, DHS had only started down that road, and it cannot be allowed to argue that its initial steps were independently sufficient, or, to the extent it attempts to now invoke the Final Rule, that a Final Rule that took effect on 29 December 2011 nevertheless governed its actions before that date.

IV. THE PUBLIC INTEREST WILL BE SERVED BY A PRELIMINARY INJUNCTION

As *Aguilera* and *Cleaver* noted, "the public interest lies in assuring a complete and thorough adjudication of criminal matters." *Aguilera*, 941 F. Supp. at 152 (quoting *Cleaver*, 427 F. Supp. at 82). The fact that the death penalty case in question takes place in a foreign court plays no role in this requirement, especially given the fact that the U.S. government played an active role in the matter.

CONCLUSION

For the foregoing reasons, Plaintiffs are entitled to a Preliminary Injunction.

Date: January 23, 2012

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