

**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of USA Today)
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Filing Date: May 16, 2012)
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Case No.: FIA-12-0028

Issued: June 5, 2012

Decision and Order

On May 16, 2012, Gregory Korte, on behalf of USA Today, filed an appeal from a determination the Department of Energy’s (DOE) Office of Information Resources (OIR) issued on April 12, 2012. In its determination, OIR responded to a request for documents that Mr. Korte submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require OIR to expedite the processing of Mr. Korte’s FOIA request.

I. BACKGROUND

The FOIA generally requires that documents held by federal agencies be released to the public on request. In the absence of unusual circumstances, agencies are required to issue a response to a FOIA request within 20 working days of receipt of the request. 5 U.S.C. § 552(a)(6)(A)(i). The FOIA also provides for expedited processing of requests in certain cases. 5 U.S.C. § 552(a)(6)(E).

On March 30, 2012, Mr. Korte filed a request with OIR for records pertaining to a loan guarantee application filed by the United States Enrichment Corporation (USEC) for the American Centrifuge Project. Mr. Korte asked for expedited processing of the request, stating that the requested information was urgently needed to inform the public about Congressional oversight of energy loan guarantee and grant programs and would enhance public debate on a transportation reauthorization bill that included \$106 million in research, demonstration, and development grants for the American Centrifuge Project.

OIR issued a determination on April 12, 2012, finding that Mr. Korte’s request did not satisfy the requirements for expedited processing. Determination Letter from OIR to Mr. Korte (April 12, 2012) (Determination). Specifically, OIR found that Mr. Korte did not provide material establishing any threat to the life or safety of an individual that would justify expedited processing, or identify “any actual or alleged activity that poses any particular urgency that requires the dissemination of information in an expedited manner.” *Id.* at 2-3. On May 16, 2010, we received Mr. Korte’s Appeal of OIR’s denial of expedited processing. Appeal Letter from Gregory Korte, USA Today, to OHA (May 8, 2012).

II. ANALYSIS

Agencies generally process FOIA requests on a “first in, first out” basis, according to the order in which they are received. Granting one requester expedited processing gives that person preference over previous requesters, by moving his or her request “up in line” and delaying the processing of earlier requests. Therefore, the FOIA provides that expedited processing is to be offered only when the requester demonstrates a “compelling need,” or when otherwise determined by the agency. 5 U.S.C. § 552(a)(6)(E)(i). “Compelling need,” as defined in the FOIA, arises in either of two situations. The first is when the failure to obtain the requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. The second situation occurs if the requester is primarily engaged in disseminating information and has an “urgency to inform” the public about an activity of the federal government. 5 U.S.C. § 552(a)(6)(E)(v). The request at issue in this Appeal clearly does not involve information which could reasonably be expected to pose an imminent threat to the life or safety of an individual. Therefore, our analysis turns to the second situation – the “urgency to inform.”

In order to determine whether a requester has demonstrated an “urgency to inform” and, thus, a “compelling need,” we consider at least three factors: (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. *Al-Fayed v. CIA*, 254 F.3d 300, 310 (D.C.Cir. 2001); *see also Southeastern Legal Foundation, Inc.*, Case No. TFA-0389 (2010);* *Center for Investigative Reporting*, Case No. TFA-0200 (2007).

In its determination, OIR cited the above three factors and, in denying Mr. Korte’s request for expedited processing, found that the “request does not address factor two.” Determination at 3. Mr. Korte, however, contends in his appeal that “USA Today did address this criterion, noting that Congress is considering legislation directly related to the American Centrifuge Project loan guarantee.” Appeal at 1. Mr. Korte cites a federal court decision finding “a significant recognized interest in enhancing public debate on potential legislative action.” Appeal at 1 (quoting *Gerstein v. C.I.A.*, No. C-06-4643 MMC, 2006 WL 3462658, at *7 (N.D. Cal. Nov. 29, 2006)).

We agree with Mr. Korte that the courts have found sufficient urgency to grant expedited processing where there is a significant interest in quickly disseminating news regarding a subject currently under debate by Congress. In *Gerstein*, for example, the court granted expedited processing of a request for documents related to unauthorized disclosure of classified information, based upon the requester’s assertion that members of Congress were considering legislation to address leaks of classified information and that the subject had been discussed in hearings before the Senate Intelligence Committee. *Id.* at *1, *7; *see also Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (granting expedited processing to requester who was “monitoring election law reform and coordinating the legislative campaign to reauthorize provisions of the Voting Rights Act”); *American Civil Liberties Union v. United States Department of Justice*, 321 F. Supp. 2d 24 (D.D.C. 2004) (granting expedited processing where a principal “aim of plaintiff’s FOIA request is to provide information for the ongoing national debate about whether Congress should renew Section 215 and other Patriot Act surveillance provisions before they expire”).

* OHA FOIA decisions issued after November 19, 1996 may be accessed at <http://www.oha.doe.gov/foia1.asp>.

In the present case, Mr. Korte notes that the President

has included \$150 million in his FY 2013 budget for a research and demonstration project for the centrifuge technology that is the subject of the loan application. There are now provisions pending in both the House and the Senate that would fund the project, with the expressed intent to provide a “bridge” to the loan guarantee. That is, there is a direct connection between the pending legislation and the requested records.

Appeal at 1-2. Subsequent to filing the present Appeal, Mr. Korte reported in USA Today that a “\$150 million ‘backdoor earmark’ for a uranium processing facility survived a vote in the House on Friday, [May 18,] keeping the Ohio project alive while the company seeks \$2 billion in federal loan guarantees.” Gregory Korte, *House Preserves 'Backdoor Earmark' for Ohio Nuclear Facility*, USA Today, May 18, 2012, <http://www.usatoday.com/news/washington/story/2012-05-18/USEC-earmark/55056188/1>. The article noted that “the provision still must be negotiated with the Senate, which included similar language in a 2012 transportation bill.” *Id.*

Given the pendency of legislation before Congress concerning funding of the American Centrifuge Project, we find that Mr. Korte has demonstrated a sufficient “urgency to inform” the public regarding the actions of the government with respect to the project. We therefore find that the DOE should grant Mr. Korte’s request for expedited processing of his request for documents related to USEC’s loan guarantee application. Accordingly, we are remanding this matter to OIR, which “shall process as soon as practicable” Mr. Korte’s FOIA request. 5 U.S.C. § 552 (a)(6)(E)(iii).

It Is Therefore Ordered That:

- (1) The Appeal filed on May 16, 2012, by USA Today, OHA Case No. FIA-12-0028, is hereby granted in part, as set forth in Paragraph (2) below, and denied in all other respects.
- (2) This matter is hereby remanded to the Department of Energy’s Office of Information Resources, which shall issue a new determination in accordance with the instructions set forth in the above Decision.
- (3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: June 5, 2012