

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

In the Matter of National Review)
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Filing Date: May 29, 2015) Case No.: FIA-15-0030
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Issued: June 9, 2015

Decision and Order

On May 29, 2015, National Review (Appellant) filed an Appeal from a Freedom of Information Act (FOIA) interim response issued by the Department of Energy’s (DOE) Office of Information Resources (OIR). In that interim response, OIR denied National Review’s request for expedited processing of its request for information filed under the 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 the Appellant’s FOIA request.

I. Background

On May 4, 2015, the Appellant filed a request with the DOE Office of Inspector General (OIG) for “certain DOE records on Closed Cases Regarding Child Pornography,” which the Appellant specifically identifies as “Case Number 10-0175-I”. FOIA Request from Jillian Melchior, National Review, to Elizabeth Sullivan, OIG (May 1, 2015). In its FOIA request, the Appellant also requested expedited processing. *Id.* On May 6, 2015, OIR sent an interim response to the Appellant denying the request for expedited processing. Interim Response from Alexander C. Morris, FOIA Officer, OIR, to Jillian Melchior, National Review (May 6, 2015). On May 29, 2015, the Appellant appealed the interim response denying expedited processing. Appeal Letter from Jillian Melchior, National Review, to Director, OHA (May 20, 2015).

II. Analysis

Generally, agencies 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 a preference over previous requesters, by moving that request “up the 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 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. 5 U.S.C. § 552(a)(6)(E)(v)(I). The second situation occurs when the requester, who is primarily engaged in disseminating information, has an “urgency to inform” the public about an activity of the federal government. 5 U.S.C. § 552(a)(6)(E)(v)(II). In order to determine whether a requester has demonstrated an “urgency to inform,” courts, at a minimum, must consider 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. C.I.A.*, 254 F.3d 300, 310 (D.C. Cir. 2001); *Wadelton v. Dep’t of State*, 941 F. Supp. 2d 120, 133 (D.D.C. 2013).

In support of its request for expedited processing, the Appellant claims that there is a compelling need for the documents requested “because prohibited and illegal activity has a deleterious effect on public confidence in clean government ... [and] the public deserves to know about any instances where such behavior has occurred.” FOIA Request from Jillian Melchior, National Review, to Elizabeth Sullivan, DOE, OIG (May 1, 2015). Additionally, in its Appeal, the Appellant asserts that its request meets the “urgency to inform” standard because (1) possible criminal activity involving minors on government property is a matter of current exigency to the American public; (2) delaying a response would compromise a breaking news story; and (3) the request concerns federal government activity. Appeal Letter from Jillian Melchior, National Review, to Director, OHA (May 20, 2015).

We first note that the Appellant has not made a claim that failure to grant expedited processing would pose any type of threat to an individual’s health or safety as required by the first “compelling need” standard. With regard to the “urgency to inform” three-factor test outlined above, there is no doubt that the Appellant, a national media organization, is engaged in the dissemination of information. Furthermore, there is no dispute that the request concerns a federal activity, satisfying the third factor and leaving only the first and second factors at issue. Though the sexual exploitation of minors on government property and on the taxpayer’s dime is a matter of public interest, a general interest is not a “matter of current exigency to the American public.” Case law provides that “only public interest in the specific subject of a FOIA request is sufficient to weigh in favor of expedited processing.” See *EPIC v. Dep’t of Def.*, 355 F. Supp. 2d 98, 102 (D.D.C. 2004). Here, as with the plaintiffs in the *Al-Fayed* decision, the Appellant has failed to present the agency with evidence there is “substantial interest” in the “particular aspect” of Appellant’s FOIA request. *Id.* Moreover, the Appellant has identified no “significantly recognized interest” that would be compromised by having its FOIA request processed by the regular procedures employed by the OIR. After reviewing the Appellant’s arguments, we find that OIR properly denied the request for expedited processing.

III. Conclusion

After considering the Appellant’s claim, we conclude that the request for expedited processing, as stated in the FOIA request, was appropriately denied.

It Is Therefore Ordered That:

- (1) The Appeal filed on May 29, 2015, by National Review, Case No. FIA-15-0030, is hereby denied.
- (2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 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.

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Poli A. Marmolejos
Director
Office of Hearings and Appeals

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