

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

In the Matter of the)	
American Civil Liberties Union Foundation)	
Filing Date: March 25, 2016)	Case No.: FIA-16-0024
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Issued: April 1, 2016

Decision and Order

On March 25, 2016, the American Civil Liberties Union Foundation (Appellant) filed an Appeal from a Freedom of Information Act (FOIA) determination issued by the Office of Information Resources (OIR) of the Department of Energy (DOE) (FOIA Request No. HQ-2016-00656-F). In that determination, the OIR denied the Appellant’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 the OIR to expedite the processing of the Appellant’s FOIA request.

I. Background

The Appellant filed a FOIA request with the DOE, seeking records relating to the use of prepublication review. Request from Benjamin Good, American Civil Liberties Union, to DOE dated March 3, 2016 (Request) at 4-6. The request, which the Appellant also addressed to more than 15 other agencies or agency components handling classified information, describes prepublication review as a process in which agencies require government employees “to submit any works—written and oral, fiction and non-fiction—that discuss their government service for security review before public release.” *Id.* at 4. In the request, the Appellant asks for seven types of records on the subject of prepublication review ranging from policies to certain statistics. *Id.* at 5-6. The Appellant also sought expedited processing and a fee waiver. *Id.* at 6, 10-11.

The OIR, in an interim response, granted a fee waiver. Interim Response from Alexander C. Morris, OIR, to Appellant dated March 24, 2016 (Interim Response) at 2. However, the OIR made a determination that expedited processing was not merited and therefore denied the Appellant’s expedited processing request. *Id.* The Appellant has filed an Appeal challenging the OIR’s denial. Appeal from Appellant to Director, OHA, dated March 25, 2016 (Appeal).

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 a preference over previous requesters, by moving his 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); *see also* 10 C.F.R. § 1004.5(d)(6).

A “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 a 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 determining 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).

As an initial matter, we note that the Appellant has not claimed that a failure to expedite the processing of its FOIA request would pose any type of threat to an individual’s life or physical safety. The Appellant asserts that expedited processing is appropriate because it is an organization primarily engaged in disseminating information and because the records it seeks are urgently needed. Request at 6. Accordingly, the question before us is whether the Appellant’s FOIA request meets the requirements of the second situation above.

There is no doubt that the Appellant, a well-known organization dedicated to protecting civil liberties, is engaged in the dissemination of information. Furthermore, with regard to the three-factor “urgency to inform” test, there is no dispute that the request concerns a federal activity, thereby satisfying the third factor. Regarding the first two factors, the Appellant argued in its request that the use of prepublication review by federal agencies has generated “widespread public controversy and media attention.” *Id.* at 10. OIR concluded in its interim response that this explanation “does not adequately address” the first two factors. Interim Response at 2.

In its Appeal, the Appellant asserts that its FOIA request is an urgent matter because the prepublication review process places a burden on the speech rights of current and former government employees and limits the information available to the public on government activities. Appeal at 2. The Appeal reiterates that the issue has received media attention and cites numerous publications discussing the issue. *Id.* As to the consequences of a failure to expedite the processing of its request, the Appellant indicates that the public’s “interest in understanding the operations and activities of the government” would be compromised. *Id.*

In short, the Appellant has shown that it filed a FOIA request on an issue that has received media attention and that the information it requests may contribute to an important public debate. However, a showing that a FOIA request relates to an important public policy matter is not enough

to satisfy the first two factors. *See Long v. Dep't of Homeland Sec.*, 436 F. Supp. 2d 38, 43 (D.D.C. 2006) (denying expedited processing for records that could inform the public debate on immigration policy). In *Long*, the U.S. District Court for the District of Columbia found that a FOIA request has the required exigency when it involves “an ongoing public controversy associated with a specific time frame.” *Id.* For example, in a case involving the Appellant, the same Court found that an active debate on pending legislation creates the necessary exigency. *ACLU v. Dep't of Justice*, 321 F. Supp. 2d 24, 29-30 (D.D.C. 2004) (granting expedited processing where the requested records would assist in debate on the renewal of a provision of the Patriot Act). Here, the Appellant has provided no time frame that would support a finding of exigency or illustrate the consequences of a delay. Thus, we find that the first two factors do not weigh in the Appellant’s favor and that the Appellant has not demonstrated an “urgency to inform.” Accordingly, we have determined that the OIR properly denied the Appellant’s request for expedited processing.

It Is Therefore Ordered That:

- (1) The Appeal filed on March 25, 2016, by the American Civil Liberties Union Foundation, Case No. FIA-16-0024, 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.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect the right to pursue litigation. FOIA requesters may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740
Web: ogis.archives.gov
Email: ogis@nara.gov
Telephone: 202-741-5770
Fax: 202-741-5769
Toll-free: 1-877-684-6448

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Date: April 1, 2016