

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

In the Matter of the Environmental Defense Fund)
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Filing Date: May 31, 2017) Case No.: FIA-17-0014
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Issued: June 8, 2017

Decision and Order

On May 31, 2017, the Environmental Defense Fund (Appellant) filed an Appeal from a Freedom of Information Act (FOIA) determination issued by the Department of Energy’s (DOE) Office of Public Information (OPI) (HQ-2017-01091-F). In that determination, OPI 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 DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require OPI to expedite the processing of the Appellant’s FOIA request.

I. Background

On May 12, 2017, the Appellant, an “organization that provides information that is in the public interest,” filed an expedited processing request with OPI for records of the DOE “concerning the ‘Study Examining Electricity Markets and Reliability’ requested in the [Secretary of Energy’s] April 14, 2017 memorandum to the [DOE] Chief of Staff,” also termed the “Baseload Study.” FOIA Request from the Environmental Defense Fund (EDF) (May 12, 2017). On May 19, 2017, OPI issued an interim response finding that the Appellant’s request did not satisfy the requirements for expedited processing. Interim Response from Alexander C. Morris, OPI, to EDF (May 19, 2017). On May 31, 2017, the Appellant appealed the expedited processing denial. Appeal from EDF to OHA Filings (May 31, 2017).

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); *see also* 10 C.F.R. § 1004.5(d)(6).

“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).

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 must therefore demonstrate an “urgency to inform” the public about an activity of the federal government. In its initial request, the Appellant stated that the “records will inform the public about DOE’s approach to critical issues” and relationships available to DOE. FOIA Request at 3. Appellant stated that the Secretary of Energy “indicated that the topic of [the] FOIA request is a matter of current exigency with potentially ‘profound’ effects on the U.S. economy and national security.” *Id.* Finally, the Appellant stated that the consequences of delaying a response would be to compromise “the public’s ability to understand the preparation of the Baseload Study while there is still time to engage with government officials.” *Id.*

In its Interim Response, OPI stated that the Appellant failed to identify “an actual or alleged activity that poses any particular urgency that requires the dissemination of information in an expedited manner.” Interim Response at 3. OPI therefore determined that the Appellant did not sufficiently address factors one or two of the “compelling need” test. *Id.*

In its Appeal, the Appellant states that “the exigency to the American public has only increased [as] [m]ultiple news stories...demonstrate that the Baseload Study generates enormous public interest.” Appeal at 2-3. Additionally, the Appellant asserts that the “Baseload Study has been the subject of numerous reports and letters from concerned citizens and officials.” *Id.* at 3. Finally, the Appellant argues that the case law relied upon by OPI to deny expedited processing¹ does not adequately support the denial. Appeal at 3-4.

Although the Appellant’s FOIA request clearly concerns federal government activity, it fails to satisfy the first two factors of the three-factor “urgency to inform” test outlined above. First, the Appellant fails to establish that the request concerns a matter of current exigency to the American public. A typical scenario in which courts have found exigency is when a FOIA request involves “an ongoing public controversy associated with a specific time frame.” *Long v. Dep’t of Homeland Sec.*, 436 F. Supp. 2d 38, 43 (D.D.C. 2006); *see also* *ACLU v. Dep’t of Justice*, 321 F. Supp. 2d

¹ *Al-Fayed v. CIA*, 254 F. 3d 300, 310 (D.C. Cir. 2001); *Associated Press v. DOE*, Case No. TFA-0273 (2008).

24, 29-30 (D.D.C. 2004) (granting expedited processing where information would assist in debate on renewal of expiring provisions in the Patriot Act).

Here, the Appellant attempts to establish exigency through reference to the Secretary of Energy's language discussing the significance of a "reliable and resilient electrical system" in his memorandum directing the initiation of the study. Appeal at 2. While the Appellant states that the Secretary "has clearly indicated that the topic of [the] FOIA request is a matter of current exigency[.]" the Appellant does not explain its reasoning behind this conclusion. The Appellant fails to draw a link between Secretary's language recognizing the importance of the Baseload Study and the urgency in obtaining the requested records. *See In the Matter of Associated Press*, TFA-0273 (2008) ("Courts have denied requests for expedited processing if the requester fails to demonstrate urgency.").

The Appellant further attempts to establish exigency through references to "significant news media coverage" that the Appellant asserts "demonstrate[s] that the Baseload Study generates enormous public interest." Appeal at 2-3. Additionally, the Appellant claims that the Baseload Study "has been the subject of numerous reports and letters from concerned citizens and officials[.]" pointing to letters submitted to the Secretary of Energy by Senator Charles E. Grassley and the American Wind Energy Association, and reports and analyses "provid[ing] input to DOE." *Id.* at 3. However, "[s]ubstantial interest on the part of the American public does not amount to exigency." *In the Matter of Associated Press*, TFA-0273. While the Appellant asserts that its FOIA request is a "time-sensitive matter of immense public interest[.]" citing the June 18, 2017, deadline on which the Secretary of Energy ordered the Baseload Study be completed, Appeal at 4, the Appellant fails to identify "an imminent action indicating that the requested information will not retain its value if procured through the normal FOIA channels." *Long v. Department of Homeland Sec.*, 436 F. Supp. 2d 38, 10-11.

Regarding the second factor of the "urgency to inform" test, the Appellant fails to establish that the consequences of delaying a response would be to compromise a significant recognized interest. The Appellant asserts that "delaying a response would compromise...the public's ability to understand the preparation of the Baseload Study while there is still time to engage with government officials." Appeal at 5. The Appellant claims that the public's opportunity to "provide input on either the content or manner of the preparation of the Baseload Study would be severely prejudiced if the responsive records are not disclosed well in advance" of the completion of the study. *Id.* The Appellant indicates that the public may seek to engage directly with DOE by offering suggestions or analysis, or the public may wish to inform elected representatives of questions and concerns, and the value of this engagement would be "significantly diminished" after the study is completed. *Id.* However, the Appellant itself has indicated in its Appeal that the public and elected representatives have already been engaging with DOE through correspondence and providing "reports and analyses on topics pertinent to the Baseload Study." *Id.* at 3. Accordingly, we determine that the Appellant has not shown that delaying the response would compromise a significant recognized interest.

III. Conclusion

For the reasons above, we have determined that OPI appropriately denied the Appellant's request for expedited processing.

IV. Order

It is hereby Ordered that the Appeal filed by the Environmental Defense Fund, Case No. FIA-17-0014, is denied.

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 your right to pursue litigation. You may contact OGIS in any of the following ways:

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Date: June 8, 2017