

Solar City, and SpaceX. *Id.* at 2. The Appellant asked for expedited processing and a waiver of all fees associated with processing the request. *Id.* at 4-5.

Addressing the criteria for expedited processing, the Appellant asserted that it is a representative of the news media and is engaged in disseminating information. *Id.* at 4. The Appellant further argued that there is an “urgency to inform” the public about communications between the DOE and Mr. Musk regarding the use of taxpayer funds, as evidenced by the substantial news coverage of Tesla and Mr. Musk. *Id.* at 5. In arguing for a fee waiver, the Appellant asserted that “it provides research to major online news organizations viewed by millions of voters” and that disclosure of the information would not primarily be in its own commercial interest. *Id.* at 4.

In an initial response to the Appellant’s FOIA request, OPI provided the Appellant with its response to the 2009 Request. Email from OPI to Appellant (February 13, 2018). As to the additional records sought by the Appellant, the OPI opened a new FOIA request. Interim Response from DOE to Appellant (February 1, 2018) (“Interim Response”) at 2. With respect to that new request, OPI denied the Appellant’s request for expedited processing, finding that the Appellant had not demonstrated the required “urgency to inform” the public. *Id.* OPI denied the Appellant’s fee waiver request on the grounds that the Appellant had not demonstrated its “actual ability to disseminate information to the public or . . . [its] ability to take raw data on this matter and turn it into a product from which the general public would benefit.” *Id.* OPI categorized the Appellant as a “commercial” requester required to pay fees for search, review, and duplication costs. *Id.*

In its Appeal, the Appellant argues that its latest FOIA request is eligible for expedited processing because “lives are at stake.” Email from Appellant to OPI (March 15, 2018) (“Appeal”) at 2.² The Appellant contends that news headlines reveal that there are “massive and dangerous defects” in Tesla products and that Tesla owners have been injured or killed as a result.³ *Id.* The Appellant also challenges OPI’s fee categorization and OPI’s denial of a fee waiver. *Id.* at 1. Regarding its fee categorization, the Appellant argues that it is a “non-commercial entity” and that it is filing the request “on behalf of the taxpaying public.” *Id.* at 2. During the course of this appeal, the Appellant identified a web site, <http://www.transparency1.com>, as a site that its “task force” uses to disseminate information. Email from Appellant to Gregory Krauss, OHA (April 4, 2018).

II. Analysis

A. Expedited Processing

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

² The Investigation Team sent an email to OPI on March 15, 2018 to challenge the determinations in OPI’s Interim Response, but did not specify that the email should be treated as an administrative appeal. OPI forwarded the email to OHA. On March 28, 2018, the Appellant verified that it wished for the email to be treated as an appeal. Email from Appellant to Gregory Krauss, OHA (March 28, 2018).

³ The Appellant also argues that people are being killed as part of an effort to cover up government corruption involving the clean tech industry. *See* Appeal at 2. It provides a list of names of individuals who it claims have died and states that “all of these deaths cannot be coincidental.” *Id.* at 2, Attachment 3. The Appellant suggests that expedited processing could help it to reduce these deaths. *Id.* at 2.

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).

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 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 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).

The Appellant contends in its Appeal that a failure to obtain the records on an expedited basis could pose an imminent threat to an individual’s life or physical safety. As noted, one of the Appellant’s arguments is that release of the records could shed light on dangerous defects in Tesla products. Although this is the most plausible argument that the Appellant advances,⁴ we find it unpersuasive as a basis for expedited processing. The DOE is not the federal agency responsible for regulating automobile safety. The Appellant has not provided an explanation as to why it believes that records in DOE’s possession could be expected to reveal information that would prevent automobile accidents. The FOIA requires that there be a reasonable *expectation* that a processing delay would result in an imminent threat to an individual’s life or physical safety. Accordingly, the Appellant has not met its burden of demonstrating that a failure to obtain the records on an expedited basis could reasonably be expected to pose a threat to an individual’s life or physical safety. *See* 5 U.S.C. § 552(a)(6)(E)(i)(I) (stating that the requester must demonstrate a compelling need for expedited processing); *See Al Fayed*, 254 F.3d at 305 n. 4 (noting that the requester has the burden of demonstrating a compelling need).

In its Request, the Appellant put forth a different argument for expedited processing; it argued that there is a “compelling need” for expedited processing because there exists an “urgency to inform” the public about DOE communications and decisions regarding Tesla. This argument also is unavailing. A showing that a FOIA request relates to an important public policy matter is not enough to satisfy the first two factors in the “urgency to inform” test. For a matter to have the required exigency, it should be one which 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) (denying expedited processing for records that could inform the public debate on immigration policy). For example, an active debate on pending legislation has been found to create the necessary exigency. *ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24, 29-30 (D.D.C. 2004) (granting

⁴ As noted, the Appellant’s other argument about the potential loss of life involves a theory that individuals are being killed in an effort to shield criminal activity connected with the DOE. Because the standard for expedited processing incorporates a standard of reasonableness, we conclude that this argument is without merit.

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 OPI properly denied the Appellant's request for expedited processing.

B. Fee Categorization

In addition to challenging the denial of expedited processing, the Appellant challenges OPI's determination that it is a "commercial" requester. The FOIA provides for three categories of requesters: (1) commercial use requesters; (2) educational institutions, non-commercial scientific institutions, and representatives of the news media; and (3) all requesters who do not fall within either of the preceding two categories. *See* 5 U.S.C. § 552(a)(4)(A)(ii). A "commercial use" request is defined in the DOE regulations as a "a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or person on whose behalf the request is made." 10 C.F.R. § 1004.2(c). The FOIA directly defines "a representative of the news media" as "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii)(III); *see also* 10 C.F.R. § 1004.2(m).

OPI provided several reasons why it categorized this requester as a commercial use requester. First, OPI informed us that it could locate no web site belonging to the "Investigation Team" and had no evidence, other than the Appellant's own claims, to indicate that the Appellant is a representative of the news media. Memorandum of Telephone Conversation between Gregory Krauss, OHA, and OPI (March 26, 2018). Second, OPI received information suggesting that the Appellant may, in fact, be an individual named Scott Douglas Redmond, and that Mr. Redmond may have filed this request for his own commercial benefit.⁵ Mr. Redmond is involved in litigation against the DOE related to companies in which he has been the principal. Memorandum of Telephone Conversation between Gregory Krauss, OHA, and Loan Programs Office (April 3, 2018); *see also* *Limnia, Inc. v. U.S. Dep't of Energy*, 857 F.3d 379 (D.C. Cir. 2017). OPI indicated its belief that Mr. Redmond may have filed both the 2009 Request, and the instant Request, in order to obtain information that could benefit his business or litigation interests. *See* April 2 Memo. Third, OPI stated it had characterized Mr. Redmond as a commercial use requester in previous FOIA requests and that it did not find a reason to change that designation in this instance. *See* March 27 Memo.

⁵ Specifically, on January 22, 2018, an individual identifying himself as Scott Douglas Redmond contacted OPI to request the documents released in response to the 2009 Request. *See* Email from OPI to Hayden Bergman (January 29, 2018). OPI subsequently contacted the law firm of Hayden Bergman, which informed OPI that "we made the [2009] request on behalf of Scott Redmond." Email from Hayden Bergman to OPI (January 29, 2018). Given that the Investigation Team, in the instant Request, identified the 2009 Request as its own, and that Hayden Bergman identified the 2009 Request as having been filed by Mr. Redmond, OPI concluded that Mr. Redmond had filed both requests and that he and the Investigation Team are essentially the same requester. Memorandum of Telephone Conversation between Gregory Krauss, OHA, and OPI (March 27, 2018) ("March 27 Memo"); Memorandum of Telephone Conversation between Gregory Krauss, OHA, and OPI (April 2, 2018).

At the outset, we observe that when determining the proper fee category for a FOIA request, a requester's categorization in a previous request is not determinative, since facts and circumstances can change. Even if Mr. Redmond was involved in filing this FOIA request and was properly characterized as a "commercial use" requester in a different matter, we would not be at the end of our analysis.⁶ Moreover, an association with a commercial entity does not disqualify a requester from being treated as a "representative of the news media." *See Lieberman v. U.S. Dep't of Transp.*, 227 F. Supp. 3d 1, 11 (finding that a blog associated with a for-profit industry research firm could be a "representative of the news media"); *see also* 52 Fed. Reg. 10,012, 10,019 (Mar. 27, 1987) (providing that a FOIA request supporting the news dissemination function of a commercial news-media entity "shall not be considered to be a request that is for a commercial use").

In the present matter, the Appellant, during the processing of this appeal, did make statements to OHA that would suggest that it is seeking to further its own commercial interests.⁷ On the other hand, the Appellant has characterized itself as a "representative of the news media." It has affirmed that it will share the information with the public and has provided a link to a web site that it claims it will use to disseminate the information. Our review of the web site found that it contains links to news articles. Assuming that the Appellant plans to produce an article about the information it obtains, it is possible that the Appellant could be an entity that gathers information of interest to a segment of the public, uses editorial skills to turn raw materials into a distinct work, and distributes that work to an audience.⁸

Taking into account the above, we find that the proper fee category for the requester remains unclear. Office of Management and Budget Guidelines state that "where an agency has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, agencies should seek additional clarification before assigning the request to a specific category." 52 Fed. Reg. 10,012, 10,018 (Mar. 27, 1987). Here, OPI did not seek additional clarification from the Appellant about how the records would be used before placing it in the "commercial use" category. Memorandum of Telephone Conversation between Gregory Krauss, OHA, and OPI (April 3, 2018). Because there exists doubt about the appropriate fee category, we will remand this matter to OPI so that it may seek additional clarification from the Appellant. OPI should also provide the Appellant with an opportunity, if the Appellant so wishes, to demonstrate why it should be considered a representative of the news media.

⁶ For its part, the Appellant has stated that Mr. Redmond is "one of our associates." Email from Appellant to Gregory Krauss, OHA (April 2, 2018). However, the Appellant argues that there is a distinction between the Investigation Team and Mr. Redmond, stating "'Scott Douglas Redmond' is not the Investigation Team." *Id.*

⁷ For instance, in one of its emails to OHA, the Appellant asked, "Where is the money for our damages?" and "Do you have our damages reimbursement yet?" Email from Appellant to Gregory Krauss, OHA (April 2, 2018).

⁸ To be sure, particularly because the Appellant does not appear to be "an entity with an extensive record" as a news media operation, it would be helpful to the DOE's deliberations if the Appellant were to provide information that would enable a review of whether "its past record, current operations, and future plans jointly suffice to qualify it as a representative of the news media." *Cause of Action v. FTC*, 799 F.3d 1108, 1124 (D.C. Cir. 2015) (*Cause of Action*).

C. Fee Waiver

The FOIA generally requires that requesters pay fees associated with processing their requests. 5 U.S.C. § 552(a)(4)(A)(i); *see also* 10 C.F.R. § 1004.9(a). However, the FOIA provides for a reduction or waiver of fees if a requester can satisfy a two-part test. The requester must show that disclosure of the information: (1) is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and (2) is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii); 10 C.F.R. § 1004.9(a)(8). With respect to first prong in this test, there are two considerations: (a) the degree to which the “‘understanding’ of government activities will be advanced by seeing the information;” and (b) “the extent of the ‘public’ that the information is likely to reach.”⁹ *Cause of Action*, 799 F.3d at 1116. The FOIA “does not require that the requester be able to reach a wide audience. Rather . . . the relevant inquiry is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.” *Id.* (internal quotation marks and citations omitted).

In the instant matter, questions remain about issues such as how the Appellant plans to disseminate the requested information, whether a reasonably broad audience would be reached, and the degree to which the Appellant filed this request in order to serve a commercial interest. Having decided to remand this matter so that OPI may obtain additional information about the proper fee category for the requester, we find that it would be premature for us to reach a decision regarding a fee waiver. Accordingly, on remand, OPI should review the information it obtains from the Appellant and decide whether a fee waiver would be appropriate.

III. Conclusion

Based on the foregoing, we find that OPI properly denied the Appellant’s request for expedited processing, but that it should review its determinations regarding the fee category in which the Appellant should be placed and whether a fee waiver is appropriate.

IV. Order

It is hereby ordered that the Appeal filed on March 28, 2018, by the Investigation Team, Case No. FIA-18-0019, is granted in part.

This matter is hereby remanded to the Department of Energy’s Office of Public Information, which shall issue a new determination in accordance with the instructions set forth in the above Decision.

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.

⁹ Although DOE regulations set forth four factors, *see* 10 C.F.R. § 1004.9(a)(8)(i), the United States Court of Appeals for the District of Columbia has provided these two factors to use when examining the public interest prong. *See Cause of Action*, 799 F.3d at 1116. We have cited these two factors.

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