

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

In the Matter of Michael Kaplan)
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Filing Date: February 3, 2022) Case No.: FIA-22-0005
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Issued: February 8, 2022

Decision and Order

On February 3, 2022, Mr. Michael Kaplan (Appellant) appealed an interim response letter issued by the United States Department of Energy’s (DOE) Office of Public Information (OPI) regarding Request No. HQ-2022-00419-F. In that letter, OPI acknowledged receipt of Appellant’s request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE regulations codified at Part 1004 of Title 10 of the Code of Federal Regulations (C.F.R.), in which Appellant sought records related to a DOE investigation of a Massachusetts Institute of Technology (MIT) professor. Appeal Attachment (Att.) 1 at 1. OPI denied Appellant’s request for expedited processing of his FOIA request. *Id.* at 1–2. Appellant appealed OPI’s decision not to grant his request for expedited processing. Appeal at 1. For the reasons set forth below, we deny Appellant’s appeal.

I. Background

Appellant submitted a FOIA request to DOE for “any and all memorandum of investigative activity prepared by [DOE] related to the prosecution of [MIT] professor Gang Chen.” Appeal Att. 1 at 1. Appellant requested expedited processing of his request on the basis that he is an Investigative Producer for CBS News working “on deadline and the information is in the public interest.” *Id.* On February 3, 2022, OPI responded to Appellant’s request. *Id.* OPI denied Appellant’s request for expedited processing because he failed to demonstrate a “compelling need.” *Id.* at 2.

On February 3, 2022, DOE’s Office of Hearings and Appeals (OHA) received Appellant’s appeal. The appeal represented that there was a compelling need to expedite the processing of Appellant’s FOIA request because:

- (a.) [Appellant is] a journalist primarily engaged in disseminating information and
- (b.) there is an urgency to inform the public concerning actual or alleged Federal Government activity. The activity in question is the federal government’s investigations of Asian-Americans and the information is critical into understanding whether the federal government engages in racial profiling.

Appeal at 1.

On February 3, 2022, OHA acknowledged receipt of Appellant’s appeal and invited Appellant to submit additional information on or before February 7, 2022, to establish significant public interest in the specific subject of his FOIA request and describe the anticipated consequences of delaying a response. Letter from OHA to Michael Kaplan at 1 (February 3, 2022). Appellant did not respond to OHA’s letter.

II. Analysis

Agencies must grant expedited processing to FOIA requests “in cases in which the person requesting the records demonstrates a compelling need.” 5 U.S.C. § 552(a)(6)(E)(i)(I). A person may demonstrate a compelling need in one of two ways. First, the person might show that failure to expedite his or her FOIA request “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). Alternatively, the person might show that he or she is “primarily engaged in disseminating information” and that there is an “urgency to inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II). These criteria are applied narrowly to avoid unduly delaying responses to requests that do not qualify for expedited processing and to ensure that meritorious requests for expedited processing can be processed with appropriate haste “because prioritizing all requests would effectively prioritize none.” *Al-Fayed v. CIA*, 254 F.3d 300, 310 (D.C. Cir. 2001).

Appellant asserted that his FOIA request should be granted expedited processing because he is primarily engaged in disseminating information and there is an urgent need to inform the public concerning “the federal government’s investigations of Asian-Americans and . . . whether the federal government engages in racial profiling.” Appeal at 1. It is readily apparent that Appellant, a representative of CBS News, is primarily engaged in disseminating information. Thus, we need only consider whether Appellant’s justification for expedited processing of his FOIA request demonstrates an urgency to inform the public concerning actual or alleged Federal Government activity.

In considering whether an urgency to inform the public exists, courts consider:

- (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;
- (3) whether the request concerns Federal Government activity; and,
- (4) the credibility of allegations regarding governmental activity.

Al-Fayed, 254 F.3d at 308, 310.

In assessing whether a request “concerns a matter of current exigency to the American public,” courts consider whether the specific subject matter of the FOIA request “is the subject of a currently unfolding story” of interest to the American public or the media. *Id.* at 310–11. Courts have found such an “unfolding story” when, for example, a requester sought records concerning alleged ongoing surveillance under the Patriot Act to inform the public in advance of Congress’ consideration of legislative proposals to amend the Patriot Act. *ACLU v. DOJ*, 321 F.Supp.2d 24, 30 (D.D.C. 2004). There has been some recent media coverage of the dismissal of the charges against Dr. Chen. *E.g.*, Ellen Barry, ‘*In the End, You’re Treated Like a Spy, Says M.I.T. Scientist*,

N.Y. TIMES, Jan. 24, 2022, <https://www.nytimes.com/2022/01/24/science/gang-chen-mit-china.html> (summarizing the history of Dr. Chen's prosecution and reflecting Dr. Chen's perception of the negative consequences to himself and the scientific community). However, Appellant has provided no evidence that there is significant media or public interest in whether a potential investigation of Dr. Chen by DOE is part of alleged racial profiling against Asian Americans by the Federal Government as his appeal claims. Thus, Appellant has not shown that the records he is seeking are part of an "unfolding story" that is a matter of current exigency to the American public.

Additionally, Appellant has provided no information on the anticipated consequences of processing his FOIA request in the order in which it was received. Courts have found that delaying a response would compromise a significant recognized interest where the FOIA request pertained to a potential ongoing, significant harm to the public. *See* 321 F.Supp.2d at 30 (finding that delay would compromise a significant recognized interest based on the ACLU's claims that its FOIA request could reveal ongoing invasions of personal privacy under the Patriot Act and that the information was necessary to inform public debate before Congress acted on proposed legislation related to the Patriot Act); *see also Bloomberg, L.P. v. FDA*, 500 F.Supp.2d 371, 378 (S.D.N.Y. 2007) (ordering expedited processing of a FOIA request for records concerning data related to suicidal thoughts or actions triggered by anti-epileptic drugs based on potential ongoing harm to public health resulting from use of the drugs). As the charges against Dr. Chen have been dismissed, and Appellant's FOIA request does not relate to any identifiable ongoing case, we have no basis to conclude that processing Appellant's FOIA request in the order that it was received would have any negative consequences on the public.

While Appellant's FOIA request concerns alleged federal government activity, Appellant failed to provide information showing that his request concerns a matter of current exigency to the American public or that delay in processing his request would compromise a significant recognized interest. Moreover, we have no basis to infer that Appellant's allegations supporting his request for expedited processing are credible. Accordingly, we find that Appellant has not met his burden to show that there is an urgency to inform the public concerning the subject matter of his FOIA request and that his request should not be granted expedited processing.

III. Order

It is hereby ordered that the Appeal filed by Michael Kaplan on February 3, 2022, No. FIA-22-0005, 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 the right to pursue litigation. OGIS may be contacted 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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