

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

In the Matter of Jason Leopold )  
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Filing Date: August 24, 2022 )  
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Case No.: FIA-22-0025

Issued: September 12, 2022

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**Decision and Order**

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On August 24, 2022, Jason Leopold (Appellant) appealed an interim response letter from August 24, 2022, issued by the National Nuclear Security Administration (NNSA). The letter responded to Request No. 22-0279-M, a request filed by the Appellant under the Freedom of Information Act (FOIA), 5 U.S.C. § 522, as implemented by the DOE in 10 C.F.R. Part 1004. The Appellant seeks records from the NNSA related to presidential records of Donald Trump stored at Mar-a-Lago and asks for expedited processing of these records. FOIA Request from Jason Leopold at 2 (Aug. 17, 2022). NNSA denied Appellant’s request for expedited processing of his FOIA request. Interim Response Letter from Christina Hamblen to Jason Leopold at 2 (Aug. 24, 2022). Appellant appeals that decision. Appeal Letter Email from Jason Leopold to OHA Filings at 1 (Aug. 24, 2022). In this Decision, we deny the appeal.

**I. Background**

On August 17, 2022, Appellant submitted the FOIA request to the DOE and NNSA. The request was as follows:

1. All records, which includes emails, memos, reports, letters, talking points, mentioning, or referring to Trump presidential records stored at Mar-a-Lago, the FBI search of Mar-a-Lago and the retrieval from Mar-a-Lago of presidential records, including records marked as Top Secret/Sensitive Compartmented Information or TS/SCI, from Mar-a-Lago.
2. All records, such as those described in part 1, mentioning or referring to an August 12, 2022, Washington Post news report that alleged the records retrieved from Mar-a-Lago “were classified documents related to nuclear weapons.”
3. Emails, memos, text messages, letters, sent to and received by officials from the National Archives, Department of Justice, FBI, Defense Intelligence Agency, CIA, NSA and ODNI mentioning or referring to Mar-a-Lago, classified records, and classified documents related to nuclear weapons.

FOIA Request at 1. Additionally, Appellant noted specific components of DOE and NNSA that he wished to be searched. *Id.* at 2.

In his request, Appellant also laid out his argument for expedited processing, saying:

The circumstances surrounding the FBI search of the former president's Mar-A-Lago residence last week to recover documents, some marked as top secret and classified, is unprecedented in our nation's modern history. The decisions that led to the search have dominated the news cycle for the past week and have raised important questions about the government's decision making process that led to it as well as what role the various government agencies, such as NNSA and DOE, [sic] in facilitating or [sic] this unprecedented decision or the role the agency played in the matter and the responses to numerous inquiries from lawmakers, the public and journalists that have followed. There is widespread and exceptional media interest in this matter and many questions have been raised concerning the government's integrity in conducting this investigation. These records are needed on an urgent, expedited basis so that I may inform the public about actual government activity about this matter.

As senior investigative reporter at Bloomberg News, I am a full-time member of the news media. I therefore qualify as a person primarily engaged in disseminating information. The very purpose of the FOIA is to lessen the public's dependency on official government statements and open the underlying documents to public scrutiny. This is clearly an instance in which expedited processing of a FOIA request is warranted. These records are not being requested for commercial purposes. I intend to use these records to write news stories and inform the public.

FOIA Request at 2. NNSA issued an interim response letter on August 24, 2022. The letter informed the Appellant that the NNSA had received his request and informed him that the NNSA and DOE portions of his request would be processed separately. Interim Response Letter at 1-2. The letter also explained that the NNSA was denying his request for expedited processing because the Appellant had not demonstrated a "compelling need" for a faster response to the request. *Id.* at 2.

Appellant timely appealed the decision to deny his request for expedited processing on August 24, 2022. Appeal Letter Email at 1. The Appellant argues that because he is a "journalist who is primarily engaged in disseminating information to the public" seeking records that are "urgently needed so [he] can inform the public about a matter of widespread interest," he has demonstrated a compelling need for expedited processing. *Id.*

## 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 their FOIA request "could reasonably be expected to pose an imminent threat to the life or physical safety of an individual." *Id.* § 552(a)(6)(E)(v)(I). Alternatively, the person might

show that they are “primarily engaged in disseminating information” and that there is an “urgency to inform the public concerning actual or alleged Federal Government activity.” *Id.* § 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). As the Appellant has not alleged any “imminent threat to the life or physical safety of an individual,” our analysis considers only the second test for compelling need.

As Appellant is a journalist, FOIA Request at 2, he is clearly a person “primarily engaged in disseminating information.” *See Landmark Legal Found. v. EPA*, 910 F. Supp. 2d 270, 275 (D.D.C. 2012) (noting that courts have found that reporters and members of the media qualify as “[people] primarily engaged in disseminating information”). Therefore, our decision turns on whether the Appellant has demonstrated 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).

When determining whether such an urgency exists “courts must consider at least 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*, 254 F.3d at 310; *see also Energy Policy Advocates v. DOI*, 2021 U.S. Dist. LEXIS 180480 (D.D.C. Sept. 22, 2021). There is no question that the Appellant’s request concerns federal government activity, so we consider the remaining two factors.

In his original request and in his appeal, Appellant asserts that his request is urgent because:

[t]he decisions that led to the search have dominated the news cycle for the past week and have raised important questions about the government’s decision making process that led to it as well as what roles the various government agencies, such as NNSA and DOE, [sic] in facilitating or [sic] this unprecedented decision. . . .

FOIA Request at 2; *see also* Appeal at 1. In response to the Appeal, NNSA argues that the Appellant “did not identify an actual alleged activity that poses any ‘urgency to expedite’ his request,” nor did he “meet the prongs of the ‘compelling need’ standard as articulated in *Al-Fayed*.” Email from Delilah Perez to Erin Weinstock at 1 (Aug. 30, 2022). OHA asked the Appellant if he wanted to provide further information to support his contentions, set a deadline for those submissions at 5:00 PM ET August 31, 2022, and informed him that the deadline could be extended if he asked for additional time. Email from Erin Weinstock to Jason Leopold at 1 (Aug. 29, 2022). Appellant replied stating that he was interested in submitting more information but failed to provide any submissions before the stated deadline or ask for an extension. Email from Jason Leopold to Erin Weinstock at 1 (Aug. 31, 2022). After the deadline had passed, the Appellant submitted an email reiterating his view that the information he sought related to a breaking news story with national security angles. Email from Jason Leopold to Erin Weinstock at 1 (Sept. 9, 2022).

With respect to the first factor, Appellant must demonstrate that “the request concerns a matter of current exigency to the American public.” *Al-Fayed*, 254 F.3d at 310. The federal courts have found “current exigency” in a variety of different scenarios. *See, e.g., Wadelton v. Dep’t of State*, 941 F. Supp. 2d 120, 123 (D.D.C. 2013) (finding that a “breaking news story of general public interest” would be a matter of current exigency under the Department of State’s regulations, but a new story only of interest to the foreign service community would not be); *Gerstein v. CIA*, No. C-06-4643 2006 U.S. Dist. LEXIS 89847 at \*18 (N.D. Ca. November 29, 2006) (finding that a FOIA request was about a matter of current exigency when the request “[s]ought] documents concerning the government’s ongoing efforts to address leaks of classified information, an issue that is not only newsworthy, but was the subject of an ongoing national debate at the time he made his FOIA requests”); *ACLU v. Dep’t of Justice*, 321 F.Supp.2d 24, 29 (D.D.C. 2004) (finding that public debate over the renewal of the USA PATRIOT Act was a current exigency). Here, the Appellant asserts that the recent widespread media coverage of the FBI’s search at Mar-a-Lago is sufficient to demonstrate exigency. FOIA Request at 2. We agree that the request concerns a current matter that is of great public interest, and therefore find that that the Appellant has met his burden with regard to this factor.

With respect to the second prong, Appellant must prove that a delayed response would “compromise a significant recognized interest.” *Al-Fayed*, 254 F.3d at 310. Courts have granted expedited review where the results of the FOIA request could enhance public debate on legislative action that Congress is actively considering, *Gerstein*, No. C-06-4643 at \*20, but not where the relevant audience was narrow, *Wadelton*, 941 F.Supp. 2d at 123, or where there was no proof of substantial public interest in the topic of the request, *Allied Progress v. CFPB*, No. 17-686 2017 U.S. Dist. LEXIS 67889 at \*15 (D.D.C. May 4, 2017). While the Appellant asserts that a delayed response would compromise a significant recognized interest, his assertion is conclusory and does not identify a recognized interest that would be harmed by NNSA processing his request in the order it was received. As such, we do not find that the Appellant has proven a delayed response would compromise a significant recognized interest.

Ultimately, “[t]he requester bears the burden of showing that he or she is entitled to expedited processing.” *Legal Eagle, LLC v. NSC Recs. Access and Info. Security Mgmt. Directorate*, No. 20-1732 2021 U.S. Dist. LEXIS 50637 at \*5 (D.D.C. Mar. 18, 2021) (citing *Al-Fayed*, 254 F.3d at 305 n.4 (D.C. Cir. 2001)). Here, the Appellant did not provide sufficient information to support his claim that his FOIA request was urgent. Even taking into consideration the new information that the Appellant submitted after the deadline, Appellant does not establish what significant recognized interest would be compromised by a delayed FOIA response. As such, we have no basis to conclude that processing this request in the order that it was received would have any negative consequences on a significant recognized interest. Accordingly, we find that the Appellant has not met his burden to show that there is an urgency to inform the public about the subject of his FOIA request, and therefore, we find his request should not be granted expedited processing.

### III. Order

It is hereby ordered that the Appeal filed on August 24, 2022, by Jason Leopold, FIA-22-0025, 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. § 522(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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