United States Department of Energy
Office of Hearings and Appeals

In the Matter of Dell J. Cameron	)	
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Filing Date: February 2, 2017	)	Case No.: FIA-17-0003
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Issued: February 16, 2017

Decision and Order

On February 2, 2017, Dell J. Cameron (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) (FOIA Request No. HQ-2017-00461-F). In that determination, OPI denied the Appellant's request for expedited processing of his 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 January 25, 2017, the Appellant, a "full-time staff reporter employed by the Daily Dot," filed an expedited request with OPI for a copy of "any and all records relating to instructions . . . received by the [DOE] regarding" the DOE's ability to disseminate information to the public via traditional and social media. FOIA Request at 1-2 (January 25, 2017). The Appellant's request also included "internal memos" generated by DOE pertaining to the use of social media and to the FOIA. *Id.* at 1. On January 26, 2017, the Appellant contacted OPI to clarify that his request refers to "instructions that originate from the White House, which may have been relayed through another federal agency." Interim Response at 1 (January 31, 2017). On January 31, 2017, OPI issued an interim response finding that the Appellant's request did not satisfy the requirements for expedited processing. *Id.* at 2. On February 2, 2017, the Appellant appealed the expedited processing denial. Appeal (February 2, 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 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).

"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). "The public's right to know, although a significant and important value, would not by itself be sufficient to satisfy [the urgency to inform] standard." *Landmark Legal Found. v. E.P.A.*, 910 F. Supp. 2d 270, 276–77 (D.D.C. 2012).

As an initial matter, we note that the Appellant has not claimed that a failure to expedite the processing of his 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 his initial request, the Appellant stated that his request concerns "a matter of widespread and exceptional media interest in which there exists possible questions [sic] about the government's integrity which affect the public confidence." Request at 2. As support, the Appellant stated that the Associated Press (AP) reported that President Donald J. Trump issued a number of instructions that instituted a media blackout at the Environmental Protection Agency (EPA) and other agencies. *Id.*[1] The Appellant asserted that, if accurate, the AP report demonstrates a concerted effort by federal officials to prevent the public dissemination of information. *Id.* The Appellant also cited to news agencies that picked up and published the AP story, including the Public Broadcasting Service, The Boston Globe, and The Washington Post. *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." Response at 2. OPI therefore determined that the Appellant "did not sufficiently address factors one or two" of the "urgency to inform" test. *Id.*

In his Appeal, the Appellant states that the American public is deeply interested in President Trump's transition to power. Appeal at 1. Furthermore, the Appellant states that he intends to "identify other types of restrictions that may have been placed on other government agencies besides EPA." *Id.* The Appellant argues that the articles he cited demonstrate breaking news coverage of the subject of his request. *Id.* at 2. As such, the Appellant argues that "delaying the process would harm the media's interest in quickly disseminating breaking, general-interests news." *Id.* at 3. Finally, the Appellant concludes by arguing that the public, which pays for the generation of the requested information, "has the right to know that it is being withheld." *Id.*

[1] The New York Times web address that the Appellant provided for the main AP article is no longer active. However, the article appears to still survive on AP's website.

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). For example, an active debate on pending legislation has been found to involve the necessary exigency. *See, e.g.*, *ACLU v. Dep't of Justice*, 321 F. Supp. 2d 24, 29-30 (D.D.C. 2004) (granting expedited processing where requested records would assist in debate on renewal of a provision of the Patriot Act); *USA Today*, Case No. FIA-12-0028 (granting expedited processing where records sought would enhance debate on pending legislation concerning funding of a DOE research project).[2] Moreover, "[t]he case law makes it clear that only public interest in the specific subject of a FOIA request is sufficient to weigh in favor of expedited treatment." *Elec. Privacy Info. Ctr. v. Dep't of Def.*, 355 F. Supp. 2d 98, 102 (D.D.C. 2004). Here, the public's general interest in President Trump's administration does not weigh in favor of exigency. Furthermore, the Appellant does not provide any support that indicates the public has a specific interest in internal memoranda developed by the DOE. Further still, to the extent the Appellant demonstrates that the public has a specific interest in any instructions the DOE might have received from the White House regarding public communication, the Appellant fails to establish an ongoing public controversy associated with a specific time frame.

The only timeframe the Appellant references is the ephemeral nature of "breaking news." The Appellant relies upon *Am. Civil Liberties Union of N. Cal. v. United States Dep't of Def.*, 2006 WL 1469418, (N.D.Cal. May 25, 2006) (ACLU) to argue that the White House media instructions are a breaking news story, and therefore the Appellant's request satisfies the "urgency to inform" standard. *See* Appeal at 2. However, the Appellant's reliance on ACLU is misplaced. In ACLU, the Court applied the Department of Defense's (DOD) FOIA regulations which stated that the "urgency to inform" standard is satisfied if the information "has a particular value that will be lost if not disseminated quickly," such as breaking news. *See* ACLU at *5 (citing to 32 C.F.R. § 286.4(d)(3), (d)(3)(ii), (d)(3)(ii)(A)).[3] There is no such provision in 5 U.S.C. § 552(a)(6)(E) or 10 C.F.R. § 1004.5(d)(6).

Furthermore, the requestor in ACLU provided at least fifty-three separate articles, spanning a period of fifty-two days, on the specific subject of the FOIA request, which dealt with the domestic surveillance of protesters. *Id.* at *6-7. After reviewing the numerous articles, the ACLU Court stated that the news organizations "were competing with each other to get the latest scoop," and the requestor demonstrated a compelling need for the information "by showing it was a breaking story of significant importance to public policy and public protest. *Id*. Here, the Appellant only cited to five specific articles that span two days of interest in the reported White House media instructions. Three of the five news articles essentially republished the same AP article and credited the same authors, and the DOE is not mentioned in any of them. The interest surrounding the Appellant's present request does not reach the same intense public interest illustrated in ACLU. Our distinction comports with the reasoning of the ACLU Court, which distinguished between independently developed articles and

[2] Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at www.energy.gov/oha.

[3] The current DOD expedited processing provisions are provided in 32 C.F.R. § 286.8, and they no longer include the language quoted in ACLU.

content merely reprinted by different publications. *See* ACLU at *2 n.2. Therefore, the Appellant fails to demonstrate his request concerns a matter of current exigency to the American public.

Regarding the second factor, the Appellant fails to establish that the consequences of delaying a response would compromise a significant recognized interest. The only interest cited by the Appellant is the same interest referenced in ACLU: the "media's interest in quickly disseminating breaking, general-interest news." *See Id.* at *8. We have already stated that the Appellant's request does not establish a current exigency on the basis of breaking news. Consequently, the Appellant fails to demonstrate that any significant interest would be compromised if the DOE released the requested documents in the normal course of events. We therefore find that OPI properly denied the Appellant's request for expedited processing on the basis of an "urgency to inform."

III. Conclusion

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

It Is Therefore Ordered That:

(1) The Appeal filed by Dell J. Cameron, Case No. FIA-17-0003, 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 your right to pursue litigation. You may contact OGIS in any of the following ways:

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