

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

In the Matter of: CATO Institute)
)
Filing Date: July 31, 2020) Case No.: FIA-20-0040
)
)
_____)

Issued: August 13, 2020

Decision and Order

On July 31, 2020, CATO Institute (Appellant) appealed a Determination Letter issued to it from the National Nuclear Security Agency (NNSA) regarding Request No. NNSA 20-00197-AG. In that determination, NNSA denied a request for expedited processing of a request filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. Appellant appealed, arguing that he was a member of the news media reporting on government activity in which the public had an urgent interest. In this Decision, we deny the appeal.

I. BACKGROUND

On April 12, 2020, Appellant submitted a FOIA request to DOE, requesting the following information:

- DoE contacts with American university and college officials, associations or groups representing academics, unions representing university or college staff and employees, businesses with operations in China, and business trade associations regarding the activities of Chinese government, business or academic activities on American university and college campuses or with American businesses of interest to the Chinese government as intellectual property (IP) or technology theft targets.
- Records dealing with Chinese American individuals and organizations with whom DoE officials have been in contact with regarding the activities of Chinese government, business or academic activities on American university and college campuses of interest to the Chinese government as intellectual property (IP) or technology theft targets.
- Records dealing with Chinese government use of non-traditional intelligence collectors, including but not limited to Chinese national students in the United States, to target American citizens or organizations of interest to the Chinese government.
- Records dealing with Chinese government efforts to establish organizations on American university and college campuses dedicated to advancing Chinese government interests, acting as cover for intelligence collection operations, or for the purpose of said [sic]
- American businesses or the data of Americans in the possession of said businesses.

- Records regarding contacts by DoE officials with American scholars, researchers or academics who have written on issues involving China or Chinese American relations.
- Correspondence between DoE officials and Congress regarding any of the above matters.

...

- otherwise monitoring the activities of Chinese nationals as well as Americans. [sic]
- Records citing examples of Chinese government coercive methods, including legislation, regulation, or Chinese intelligence service activities, utilized against American businesses operating in China that have compromised the privacy and security of the communications of said American businesses or the data of Americans in the possession of said businesses.
- Records regarding contacts by DoE officials with American scholars, researchers or academics who have written on issues involving China or Chinese American relations.
- Correspondence between DoE officials and Congress regarding any of the above matters.

Request at 1–2. Appellant requested expedited processing of its request, stating that it is a representative of the news media, that the public has an urgent need for information on the requested topics, that the topics are a priority of both the news media and the current Administration, and that the topics were of intense public and Congressional interest. *Id.* at 3. DOE denied the request for expedited processing on April 20, 2020, stating that the request did not demonstrate that it concerned a matter of current exigency to the American public or that delaying a response would compromise a significant recognized interest. Interim Response at 3. The request was then referred to NNSA for processing. On July 27, 2020, NNSA sent another interim response letter denying expedited processing, stating that the criteria for such had not been met.

On July 31, 2020, Appellant appealed the denial, arguing that the letters did not explain how the request for expedited processing failed to demonstrate compelling need.

II. ANALYSIS

Agencies generally process FOIA requests on a “first in, first out” basis, according to the order in which they are received. 10 C.F.R. § 1004.5(d)(6). Granting one requester expedited processing gives that requester preference over previous requesters by moving their request “up in the line,” which results in a delay in the processing of earlier requests. As such, 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). “Compelling need” is defined in two ways. First, compelling need exists where failure to obtain 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). Compelling need may also exist “with respect to a request made by a person primarily engaged in disseminating information,” where 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). Appellant argues that the second definition of compelling need was met. The parties appear to agree that Appellant is a person primarily engaged in disseminating information, in the context of the FOIA. Request at 3; Determination Letter at 2. They also agree that the request concerned actual Federal Government Activity. Appeal at 1; Determination Letter at 3. Accordingly, we turn our attention to the question of urgency.

In determining whether a requester has demonstrated an “urgency to inform,” courts consider the following factors: (1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would result in the compromise of a significant recognized interest; and (3) whether the request concerns federal government activity. *ACLU v. United States DOJ*, 321 F. Supp. 2d 24, 29 (D.D.C. 2004). As neither party disputes that the Appellant’s request concerns federal government activity, we focus on the first two factors.

Current exigency exists when the request relates to 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). News reports may indicate current exigency to the American public, though they are not sufficient on their own unless they refer to the exact subjects of the FOIA request. *ACLU of N. Cal. v. DOJ*, No. C 04-4447 PJH, 2005 U.S. Dist. LEXIS 3763, at *36 (N.D. Cal. Mar. 11, 2005). Often, current exigency exists where the matter is “central to a pressing issue of the day,” such as public debate over renewal of the Patriot Act or reauthorization of the Voting Rights Amendment, as well as breaking news about domestic surveillance of anti-war protestors. *Wadelton v. Dep’t of State*, 941 F. Supp. 2d 120, 123 (D.D.C. 2013). Relatedly, compromise of a significant interest may present a missed opportunity, such as not being able to access the information before the date of a congressional vote, in addition to a more traditional presentation of violation of rights, such as potential harm to the public’s privacy interests. *ACLU*, 321 F. Supp. 2d 29–30.

At this time, and at the time of Appellant’s initial request, news media reports abound on alleged intellectual property theft by the Chinese government, as well as alleged intelligence recruitment in academia and research centers by the Chinese government. *See, e.g., China’s Strategy to Reorient U.S. Tech Companies Is Exposed—What’s Next*, THE HILL (April 18, 2020), <https://thehill.com/opinion/technology/493456-chinas-strategy-to-reorient-us-tech-companies-is-exposed-what-next>; *Responding Effectively to the Chinese Economic Espionage Threat*, Department of Justice China Initiative Conference, Center for Strategic and International Studies, FBI.GOV (Feb. 6, 2020), <https://www.cnbc.com/2019/02/28/1-in-5-companies-say-china-stole-their-ip-within-the-last-year-cnbc.html>; *Harvard University Professor and Two Chinese Nationals Charged in Three Separate China Related Cases*, U.S. DEP’T OF JUSTICE (Jan. 28, 2020), <https://www.justice.gov/opa/pr/harvard-university-professor-and-two-chinese-nationals-charged-three-separate-china-related>; *Chinese Government-Paid Scientists Plead Guilty to Stealing Research From an American Children’s Hospital*, THE DIPLOMAT (Aug. 8, 2020), <https://thediplomat.com/2020/08/chinese-government-paid-scientists-plead-guilty-to-stealing-research-from-an-american-childrens-hospital/>. The subject clearly is, and has been, of importance to the American public.

However, as much as the subject matter of Appellant’s request appears to be a matter of public interest, it is unclear how a standard processing time could cause compromise of a significant interest. Articles and reports on the topics have flowed freely since at least 2018. *See, e.g., Stopping China’s Intellectual Property Theft: What Trump Can Learn From His Predecessors*, THE DIPLOMAT (March 30, 2018), <https://thediplomat.com/2018/03/stopping-chinas-intellectual-property-theft-what-trump-can-learn-from-his-predecessors/>; *1 in 5 Corporations Say China Has Stolen Their IP Within the Last Year: CNBC CFO Survey*, CNBC (March 1, 2019), <https://www.cnbc.com/2019/02/28/1-in-5-companies-say-china-stole-their-ip-within-the-last-year-cnbc.html>; *Chinese Theft of Trade Secrets On the Rise, the US Justice Department Warns*,

CNBC (Sept. 22, 2019), <https://www.cnn.com/2019/09/23/chinese-theft-of-trade-secrets-is-on-the-rise-us-doj-warns.html>; *China's Thousand Talents Program Finally Gets the U.S.'s Attention*, BLOOMBERG (Dec. 12, 2019), <https://www.bloomberg.com/news/articles/2019-12-12/china-s-thousand-talents-program-finally-gets-the-u-s-s-attention>. There is no indication in either the original request or the appeal that Appellant will suffer any harm to a significant recognized interest if the request is processed under a normal track.. Accordingly, Appellant's request does not warrant expedited processing.

III. ORDER

It is hereby ordered that the Appeal filed on July 31, 2020, by the CATO Institute, No. FIA-20-0040, 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 one's 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: <https://www.archives.gov/ogis> Email: ogis@nara.gov
Telephone: 202-741-5770 Fax: 202-741-5769 Toll-free: 1-877-684-6448

Poli A. Marmolejos
Director
Office of Hearings and Appeals