

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

In the Matter of America First Legal Foundation )

Filing Date: January 3, 2023 )

Case No.: FIA-23-0007

Issued: January 18, 2023

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**Decision and Order**

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On January 3, 2023, America First Legal Foundation (Appellant) appealed an interim response letter from November 22, 2022, issued by the Department of Energy’s (DOE) Office of Public Information (OPI). The letter responded to Request No. HQ-2023-00176-F, 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. In its FOIA request, the Appellant sought records from the DOE related to fuel prices and shortages and asked for expedited processing of these records. FOIA Request from America First Legal Foundation at 3 (Nov. 10, 2022). DOE denied Appellant’s request for expedited processing of his FOIA request. Interim Response Letter from Alexander C. Morris to Tyler Sanderson at 2-3 (Nov. 22, 2022). Appellant appeals that decision. Appeal Letter Email from America First Legal Foundation to OHA Filings at 1 (Jan. 3, 2023). In this Decision, we deny the appeal.

**I. Background**

On November 10, 2022, Appellant submitted the FOIA request to the DOE. The request was as follows:

A. All communications, from any of the custodians mentioned in Part III, containing the word “diesel” or “fuel” and any of the following terms: “shortage,” “rationing,” “supply chain” or “prices.” The timeframe for this request is April 1, 2022, through the date of processing.

B. All communications with an email address ending in “eop.gov” from any of the custodians mentioned in Part III containing the words “diesel” or “fuel.” The timeframe for this request is April 1, 2022, through the date of processing.

C. All records relating to or regarding the processing of the above items.

**III. Custodians**

- 1) Jennifer M. Granholm, Secretary
- 2) David M. Turk, Deputy Secretary

- 3) Arpita, Bhattacharyya, Chief of Staff, Immediate Office of the Deputy Secretary
- 4) Jeremiah D. Baumann, Deputy Chief of Staff, Immediate Office of the Secretary
- 5) Luke B. Branscum, Special Assistant, Immediate Office of the Assistant Secretary
- 6) Matthew R. Dannenberg, Deputy Chief of Staff, Immediate Office of the Assistant Secretary
- 7) Christopher E. Davis, Senior Advisor to the Secretary
- 8) Robert E. Golden, Special Advisor to the Chief of Staff, Immediate Office of the Secretary
- 9) Vanessa Marie Grisko, Special Assistant to the Chief of Staff, Immediate Office of the Secretary
- 10) David Andres Mayorga, Director of Public Affairs
- 11) Shahrzad Z. Mohtadi, Chief of Staff, Immediate Office of the Assistant Secretary
- 12) Melanie Y. Nakagawa, Senior Advisor, Immediate Office of the Assistant Secretary

FOIA Request at 2-3. The Appellant also requested expedited processing, saying:

AFL requests expedited processing for the above-requested items under 5 U.S.C. § 552(a)(6)(E) and 10 C.F.R. § 1004.5(d)(6).

Our status as a qualified non-commercial public education and news media requester has been recognized by the Department of Defense, Education, Energy, Interior, Health and Human Services, and Homeland Security, and the Office of the Director of National Intelligence. Additionally, as reflected by the widespread and exceptional media interest in and attention to the reported diesel shortage, there is an urgency to inform the public regarding the circumstances surrounding the shortage of diesel fuel, the risks such shortages pose to the U.S. supply chain, particularly the food and heating fuel supply throughout the country, and the Department's efforts to address the shortage.

*Id.* at 3.

DOE issued an interim response letter on November 22, 2022. The letter informed the Appellant that DOE was denying its request for expedited processing because the Appellant had not “provided material that establishes that there is any threat to the life or safety of an individual that would justify expeditious processing of the request” or “identified an actual or alleged activity that poses any particular urgency that requires the dissemination of information in an expedited manner.” Interim Response Letter at 2-3.

The Appellant timely appealed the decision to deny its request for expedited processing on January 3, 2023. Appeal Letter Email at 1. The Appellant argues that it has demonstrated compelling need for the requested information, and therefore, its expedite request should be granted.

## 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.

Courts have routinely held that journalists and members of the media are people “primarily engaged in disseminating information.” *Landmark Legal Found. v. EPA*, 910 F. Supp. 2d 270, 275 (D.D.C. 2012). Other organizations are considered “primarily engaged in disseminating information” in much more limited circumstances. *Id.* at 275-76. As the legislative history explains: “[t]he standard of ‘primarily engaged’ requires that information dissemination be the main activity of the requestor, although it need not be their sole occupation.” H.R. Rep. No. 104–795, at 26, 1996 U.S.C.C.A.N. 3448, 3469. On at least one occasion the federal courts have found a non-media group was “primarily engaged in disseminating information” because the group’s “mission [was] to serve as the site of record for relevant and up-to-the minute civil rights news and information.” *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005). The courts have also suggested that distributing information online is not enough to establish that sharing information is the organization’s “main activity.” *ACLU of N. Cal. v. Dep’t of Justice*, No. C 04–4447, 2005 U.S. Dist. LEXIS 3763 at \*24-25 (N.D. Cal. Mar. 11, 2005) (finding that the ACLU was not primarily engaged in disseminating information even though it regularly sent out newsletters and maintained a website).

If the Appellant proves it is primarily engaged in disseminating information, it must next demonstrate 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).

Here, the Appellant contends that it is “primarily engaged in disseminating information” because the Appellant has “been widely recognized by other federal government agencies as an organization engaged in disseminating information to the public,” and its “officials routinely appear on national television and use social media platforms to disseminate the information it has obtained about federal government activities.” Appeal at 4. Appellant also argues that the size of its social media following

and that of its president proves that it is primarily engaged in disseminating information. *Id.* at 1. These assertions suggest that Appellant is engaged in disseminating information but do not suggest disseminating information is Appellant's main activity. Further, the Appellant's website explains the organization's mission is to protect "America First" principles from "corrupt special interests, big tech titans, the fake news media, and liberal Washington politicians." *See The Mission*, America First Legal (accessed Jan. 9, 2023), <https://aflegal.org/about/>. The website does not mention sharing or disseminating information at all, let alone that it is the organization's "main activity." Because the Appellant is not primarily engaged in disseminating information, it cannot meet the requirements to prove that it has a compelling need.

Even if Appellant was "primarily engaged in disseminating information," it has not shown that there is urgency to inform the public about the requested information. The Appellant's FOIA request clearly concerns federal government activity, so we consider the remaining two factors. In order to show "urgency to inform the public concerning actual or alleged Federal Government activity," Appellant must first 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. Cal. Nov. 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 media coverage of a diesel shortage on the east coast of the United States is sufficient to demonstrate exigency and has provided news stories from a variety of outlets to support this contention. FOIA Request at 3. We agree that the request concerns a current matter that is of current exigency to the American public and, therefore, find that that the Appellant has satisfied this factor.

The Appellant must also show that a delayed response would "compromise a significant recognized interest." *Al-Fayed*, 254 F.3d at 310. Federal courts have found this factor satisfied where the results of the FOIA request could "enhanc[e] public debate on potential legislative action." *Gerstein*, No. C-06-4643 at \*20 (citing *Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260). Although the concerns about diesel fuel may be newsworthy, Appellant does not identify a significant recognized interest that would be compromised by a delayed response. As such, we do not find that the Appellant has proven a delayed response would compromise a significant recognized interest.

The Appellant is not an organization or person primarily engaged in disseminating information and has not shown that there is an urgency to inform the public about the subject of its FOIA request. Accordingly, we find that the Appellant has not met its burden to show that there is a compelling need in regard to its request, and therefore, we find its request should not be granted expedited processing.

### **III. Order**

It is hereby ordered that the Appeal filed on January 3, 2022, by America First Legal Foundation, FIA-23-0007, 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:

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road-OGIS  
College Park, MD 20740  
Web: [ogis.archives.gov](http://ogis.archives.gov)  
Email: [ogis@nara.gov](mailto:ogis@nara.gov)  
Telephone: 202-741-5770  
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Toll-free: 1-877-684-6448

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