

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

In the Matter of National Review)	
)	
Filing Date: April 29, 2015)	Case Nos.: FIA-15-0023
)	FIA-15-0024
_____)	

Issued: May 20, 2015

Decision and Order

On April 29, 2015, National Review (Appellant) filed two appeals challenging two Freedom of Information Act (FOIA) determinations issued by the Office of Information Resources (OIR) of the Department of Energy (DOE) (Request Nos. HQ-2015-01099-F, HQ-2015-01100-F). In its determinations, the OIR denied the Appellant’s request for expedited processing of its request for information filed under the FOIA, 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeals, if granted, would require the OIR to expedite the processing of the Appellant’s FOIA request.

I. Background

On March 31, 2015, the Appellant filed a request seeking “copies of all e-mail . . . or other messages sent to or from staff of the Office of the Secretary” referencing a conditional loan to Alcoa through the DOE’s Advanced Technology Vehicles Manufacturing program. FOIA Request Letter from Jillian Melchior, National Review, to the OIR (March 31, 2015) (Request Letter). The request limited the scope of responsive records to messages dated between May 1, 2014 and March 26, 2015 and containing one or more specified keywords. *Id.* The Appellant also requested expedited processing. *Id.*

On April 6, 2015, the OIR sent the Appellant an interim response letter explaining that it had asked the DOE Loan Programs Office to conduct a search for responsive documents. Interim Response Letter from Alexander Morris, OIR, to Jillian Melchior, National Review (April 6, 2015) (Response Letter #1). In a separate interim response letter on the same date, the OIR stated that it had asked the Office of the Executive Secretariat to conduct a search of its files. Interim Response Letter from Alexander Morris, OIR, to Jillian Melchior, National Review (April 6,

2015) (Response Letter #2).¹ In both determinations, the OIR denied the request for expedited processing. Response Letters #1 and #2.

On April 29, 2015, the Office of Hearings and Appeals (OHA) received two appeals from the Appellant challenging the expedited processing denials. Appeal Letter from Jillian Melchior, National Review, to the OHA (April 20, 2015) (Appeal Letter #1); Appeal Letter from Jillian Melchior, National Review, to the OHA (April 21, 2015) (Appeal Letter #2). Given that both OIR determinations and both appeals relate to the same request, we will address the appeals in a single decision.

II. Analysis

Agencies generally 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).

A “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 a 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); *Wadelton v. Dep’t of State*, 941 F. Supp. 2d 120, 122 (D.D.C. 2013).

The Appellant makes no claim that failure to grant expedited processing status to its request would pose a threat to any individual’s life or physical safety. Appeal Letters #1 and #2. Rather, the Appellant argues that its request meets the three-factor “urgency to inform” test outlined above. *Id.* There is no doubt here that the Appellant, a national media organization, is engaged in the dissemination of information. Moreover, given that the request concerns a federal activity, the third factor is satisfied here and only the first and second factors are at issue.

Regarding the first factor, the Appellant argues that the request concerns a matter of current exigency because it involves the use of taxpayer money and because the public deserves timely information about the use of federal funds. *Id.* Further, the Appellant states that there has been extensive Congressional and media attention on DOE’s loan programs promoting renewable energy and energy efficiency. *Id.* The Appellant adds that the Alcoa loan is a matter of public

¹ As noted above, the OIR assigned two case numbers to the Appellant’s request. Those case numbers represent the two locations that the OIR asked to conduct a search.

significance because it represents the first automotive loan granted by DOE since 2011 and because the loan could represent an example of “the DOE issuing government loans to politically connected companies.” *Id.* As to the second factor, the Appellant states that the DOE announced the granting of the loan on March 26, 2015. *Id.* A delay, the Appellant argues, would compromise a “breaking news story” relating to a “controversial loan program.” *Id.*

Although we agree that the loan is a matter of public importance, we find that the Appellant has not shown that the first two factors of the test weigh in its favor. On the first factor, the Appellant’s arguments are too general and lacking in evidentiary support. The federal district court for the District of Columbia has found, for instance, that “only public interest in the specific subject of a FOIA request is sufficient to weigh in favor of expedited treatment.” *EPIC v. Dep’t of Def.*, 355 F. Supp. 2d 98, 102 (D.D.C. 2004). In *EPIC*, the Court denied a request for expedited FOIA processing because the plaintiff had demonstrated only public concern about the “umbrella issue” of government data mining, not the data mining software program that was the subject of the request. *Id.* at 102-03; *see also ACLU v. U.S. Dep’t of Justice*, 321 F. Supp. 2d 24, 30-34 (D.D.C. 2004) (granting a request for expedited processing where the plaintiffs had demonstrated media interest in the specific section of the Patriot Act that was the subject of the request). In the instant matter, the Appellant needed to show public or media interest in the subject of the request, the DOE loan to Alcoa, not just in the broader subject of DOE loans. The Appellant, however, has said nothing about media coverage of the Alcoa loan and in fact has provided little description of any relevant media coverage.² *See Wadelton*, 941 F. Supp. 2d at 123-24 (stating that plaintiffs in expedited processing cases often demonstrate media interest by quantifying and describing media coverage). In addition, the Appellant’s suggestion that something about the loan could become controversial in the future is speculative and not relevant. The issue under the first factor in the test is “current exigency.”

The Appellant’s argument is no stronger when it comes to the second factor in the test, which regards the consequences of a delayed response. Although the Appellant clearly preferred to receive the requested records immediately after the loan’s announcement, the Appellant has not sufficiently explained why any information it might obtain could not be equally newsworthy if the request is not expedited. We further note that the federal district court for the District of Columbia generally has granted expedited processing only in cases where “there was an ongoing public controversy associated with a specific time frame” such as a pending decision on legislation. *Long v. Dep’t of Homeland Security*, 436 F. Supp. 2d 38, 43 (D.D.C. 2006). The Appellant has identified no time frame to guide us in determining that expedited processing is necessary, aside from a brief mention in the request of *National Review*’s own recurring print deadlines. *See Request Letter*. Based on the foregoing, we have determined that the OIR properly denied the Appellant’s request for expedited processing.

III. Conclusion

After considering the Appellant’s arguments, we conclude that the request for expedited processing was appropriately denied.

² The Appellant identifies only one news article loosely related to the broader subject of DOE loans, a *Politico* article from April 1, 2015. *See Appeal Letters #1 and #2.*

It Is Therefore Ordered That:

- (1) The Appeals filed on April 29, 2015, by National Review, Case Nos. FIA-15-0023 and FIA-15-0024, are 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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Poli. A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 20, 2015