

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

In the Matter of Michael Isikoff)
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Filing Date: September 18, 2015) Case No.: FIA-15-0053
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Issued: October 1, 2015

Decision and Order

On September 18, 2015, Mr. Michael Isikoff filed an Appeal from a Freedom of Information Act (FOIA) interim response issued to him by the Office of Information Resources (OIR) of the Department of Energy (DOE) (FOIA Request No. HQ-2015-01776-F). In that interim response, OIR 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 the Department of Energy (DOE) in 10 C.F.R. Part 1004. This Appeal, if granted, would require OIR to expedite the processing of the Appellant’s FOIA request.

I. Background

On August 27, 2015, the Appellant filed a FOIA request with DOE seeking:

any and all documents, emails, memos, etc. relating to an [Inspector General (IG)] inquiry made into the use of personal emails by Department of Energy employees—including those in the Department of Energy Loan Program Office—for transacting official business.

Request from Appellant to DOE dated August 27, 2015 (Request) at 1. The Appellant in his request described his knowledge of the IG inquiry. He explained that he had obtained a December 3, 2012, letter to Members of Congress from Gregory Friedman, the DOE’s IG. *Id.* That letter, according to the Appellant, indicated that the IG had posed questions to DOE officials about the issue of personal email use for official business starting in September 2012. *Id.* He stated that he believed that follow-up communications had ensued within DOE. *Id.*¹

¹ In his request, the Appellant further specified that he sought: (1) “copies of all correspondence, memos and emails relating to this matter—including all documents relating to the inspector general’s inquiry on this matter and all communications between the IG and the department about this subject” as well as (2) “copies of all correspondence,

The Appellant sought expedited processing of his request. *Id.* at 3. On September 4, 2015, OIR issued an interim response finding that the Appellant's request did not satisfy the requirements for expedited processing. Interim Response from Alexander Morris, OIR, to Appellant, dated September 4, 2015 (Interim Response) at 2. The Appellant challenges OIR's denial. Appeal from Appellant to OHA dated September 18, 2015 (Appeal) at 1.

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 determining 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).

We first note that the Appellant has not claimed that failure to expedite the processing of his request would pose any type of threat to an individual's health or safety. In his request, he asserts that expedited processing is appropriate because there exists an "urgency to inform" the public. Request at 3. Accordingly, the question before us is whether the Appellant's FOIA request meets the requirements of the second situation above.

There is no doubt that the Appellant is engaged in the dissemination of information. He states that he works for Yahoo News, a national media organization, and that he would use the requested information in a Yahoo news story. *Id.* at 1-2. Furthermore, with regard to the three-factor "urgency to inform" test, there is no dispute that the request concerns a federal activity, thereby satisfying the third factor and leaving only the first and second factors at issue. Regarding these factors, the Appellant argues in his request that "[t]his subject is of high interest to the public right now, with various inquiries by congressional committees and inspectors general into other agencies and how they have applied federal rules." *Id.* at 3. OIR concluded in its interim response

emails and other records of communications between the Department of Energy and the National Archives and Records Administration relating to this matter." *Id.*

that this explanation “does not adequately address” the first two factors. Interim Response at 2. In his Appeal, providing further explanation, the Appellant contends that “the use of personal email for official government business is a matter of high public interest at the moment and relates directly to the conduct of a major candidate for president.” Appeal at 1. He adds that the conduct investigated by the IG in 2012 “is one of the few publicly known instances of the use of personal email for government business contemporaneous with the conduct currently at issue in the presidential campaign.” *Id.* He also argues that delaying a response would compromise a significant recognized interest held by the public “in evaluating a matter of major public debate in the presidential election.” *Id.*

It cannot be denied that the use of personal email to conduct government business has become a subject of debate in the current presidential election. Nevertheless, we are not convinced that this means that the request concerns a matter of current exigency. For one, “[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) (*EPIC*). In the instant matter, while a public controversy may arguably exist with regard to the use of personal email by a particular presidential candidate, we are unprepared to find that such controversy reasonably extends to the 2012 IG inquiry. Even if it is assumed that there is a high level of interest in the general issue of the use of personal email accounts for government business, we cannot assume that the same interest level applies to the specific subject of the request. In *EPIC*, the Court indicated that although the connection between a general subject and a specific part of that subject might be readily apparent to a FOIA requester, “it might well prove irresponsible” for agencies to draw such inferences on their own, without evidence. *Id.* at 104. Here, the Appellant informs us that the IG inquiry could be a particularly relevant example in a larger public debate, but he has not provided evidence of public interest in the inquiry itself.

Furthermore, when courts have granted expedited processing requests there often has been “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 an expedited processing request where records sought would enhance debate on pending legislation concerning funding of a DOE research project).² Here, it appears that the Appellant is contending that the time frame of the presidential election creates urgency. We do not agree. Although potential presidential candidates have been announced, the presidential election is not imminent; indeed, primary elections are still several months away. Moreover, even if the presidential election were closer at hand, it is unclear that FOIA requesters may establish urgency by linking a FOIA request to a relevant issue in an upcoming election. As the federal district court for the District of Columbia has observed, “given the breadth of issues at play in a presidential election, such a justification would likely sweep almost any FOIA request into the ambit of ‘urgency.’” *Landmark Legal Found. v. EPA*, 910 F. Supp. 2d 270, 277 (D.D.C. 2012).

² OHA FOIA decisions issued after November 19, 1996, may be accessed at <http://energy.gov/oha/office-hearings-and-appeals>.

For the above reasons, we find that the first two factors do not weigh in the Appellant's favor and that the Appellant has not demonstrated a sufficient "urgency to inform." Accordingly, we have determined that OIR properly denied the Appellant's request for expedited processing.

It Is Therefore Ordered That:

- (1) The Appeal filed on September 18, 2015, by Mr. Michael Isikoff, Case No. FIA-15-0053, 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.

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Poli. A. Marmolejos
Director
Office of Hearings and Appeals
Date: October 1, 2015