

**EXHIBIT 1**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION  
CENTER,

Plaintiff,

v.

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: Civil Action No. 03-2078 (JR)

U.S. DEPARTMENT OF JUSTICE,

Defendant.

ORDER

Plaintiff moves for a preliminary injunction "enjoining defendant Department of Justice from continuing to deny plaintiff expedited processing of plaintiff's Freedom of Information Act request." An injunction restraining the denial of a request -- once the double negatives are sorted out -- is a writ of mandamus. A preliminary mandatory injunction would effectively grant all the relief plaintiff seeks. The showing offered by plaintiff in support of its motion does not address the quintessential element of mandamus, that the official act demanded by the movant be nondiscretionary. The motion for preliminary injunction [3] is accordingly **denied**, without prejudice to plaintiff's right to seek an expedited form of the de novo judicial review contemplated by FOIA. As it does not appear from the docket that the government has yet been served

with plaintiff's motion, counsel are directed to serve this order upon government counsel by conventional means. It is **SO ORDERED**.

JAMES ROBERTSON  
United States District Judge

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**EXHIBIT 2**

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Al-Fayed v. C.I.A.  
D.D.C., 2000.  
Only the Westlaw citation is currently available.  
United States District Court, District of Columbia.  
Mohamed AL-FAYED, et al., Plaintiffs,  
v.  
CENTRAL INTELLIGENCE AGENCY, et al.,  
Defendants.  
No. Civ.A. 00-2092(CKK).

Sept. 20, 2000.

Mark Steven Zaid, Krieger & Zaid, PLLC,  
Washington, DC, for Plaintiffs.  
Alan Stuart Modlinger, Anne L. Weismann, Diane  
Kelleher, U.S. Department of Justice, Washington,  
DC, for Defendants.

#### MEMORANDUM OPINION

KOLLAR-KOTELLY, J.

\*1 This case comes before the Court on Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction. Plaintiffs, Mohamed Al Fayed and Punch Limited, a British magazine of political satire that Mr. Al Fayed owns and publishes, seek expedited processing of their requests for agency records which they submitted in July and August, 2000, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. These requested records pertain to the tragic deaths of Diana Francis Spencer, Princess of Wales, Emad "Dodi" Al Fayed, and Henri Paul, all of whom were killed in an automobile crash in Paris on August 31, 1997, and subsequent related events. When Plaintiffs filed their Complaint and motion in this Court, certain of the agencies had issued denials of their application for expedited processing, and others had not responded at all to these requests. Since Plaintiffs initiated this lawsuit, though, all of the agencies have responded with denials. Therefore, Plaintiffs now ask this Court to grant emergency relief by compelling some or all of the agencies to engage in expedited processing and release of the desired records. For the reasons elaborated below, the Court finds that such emergency relief is not warranted.

#### I BACKGROUND

The facts surrounding the deaths of Princess Diana,

Dodi, and their driver Henri Paul have received extensive coverage in the international and national media, and require little elaboration here. The three died while driving through a tunnel under the Place d'Alma in Paris, France, leaving bodyguard Trevor Rees-Jones as the sole survivor of the crash. *See* Compl. ¶ 14. Plaintiffs' Complaint describes the ensuing French investigation, which concluded that Mr. Paul's intoxication and excessive speed on a dangerous stretch of road were responsible for the crash, *see id.* ¶ 15, the testimony of a former British foreign intelligence officer and member of MI6 in the course of the investigation, *see id.* ¶ 18, and a subsequent scheme to defraud Mr. Al Fayed out of millions of dollars in exchange for bogus CIA document. *See id.* 24-51.

In particular, Plaintiffs detail the alleged involvement of Oswald LeWinter, who claims connections to United States intelligence operations, in the scheme to sell Mr. Al Fayed fabricated CIA documents suggesting that the crash represented a successful assassination of the Princess and her companion by British intelligence (MI6). *See id.* ¶¶ 21-23. Legal representatives of Mr. Al Fayed alerted the FBI and the CIA to the proposed transaction, whereby putative former CIA agents and others would exchange various documents pointing to MI6 involvement in the crash, and American knowledge of this involvement, for a large sum of money. Subsequently, Mr. Al Fayed's representatives proceeded to arrange the transaction with the knowledge of American law enforcement officials, ultimately designating Vienna, Austria as the site for the exchange, which was to take place on April 22, 1998. *See id.* ¶ 39. Austrian authorities apprehended LeWinter in the course of the transaction, and he has since remained incarcerated there. *See id.* ¶ 45. At the time of his arrest, Mr. LeWinter was in possession of a variety of forged materials purporting to be CIA documents, and he allegedly implicated one or more actual CIA employees in the fraud scheme. *See id.* ¶¶ 46, 48.

\*2 Since these events, Mr. Al-Fayed has sought the prosecution of other participants in the fraud scheme, and has attempted unsuccessfully to procure additional information by subpoena in actions filed in the United States Court for the District of Columbia and the United States District Court for

the District of Maryland. *See id.* ¶¶ 52-58. Mr. Al Fayed engaged former Senator George W. Mitchell to pursue any information in the possession of the CIA or the Department of Defense concerning the crash and related events. *See id.* 59-67. After failing to secure information through all of these venues, Mr. Al Fayed and Punch Limited submitted FOIA requests to twenty one (21) separate branches of ten federal agencies, seeking information pertaining to the crash. Plaintiffs divided their requests into twenty categories of names and events relating to these events. *See Zaid Aff.* ¶ 4. Shortly after submitting these FOIA requests, they filed a Complaint in this Court, asking for judicial review of the various agencies' failure to respond to, or denial of, their application for expedited processing of their FOIA requests. Plaintiffs bring their action under FOIA and under the Administrative Procedure Act, 5 U.S.C. § 702 *et seq.*

## II. DISCUSSION

For Plaintiffs to obtain the injunctive relief they seek, FN1 they must establish (1) that they possess a substantial likelihood of success on the merit; (2) that they would suffer irreparable injury if the injunction were not granted; (3) that an injunction would not substantially injure other interested parties; and (4) that the public interest would be furthered by the injunction. *See Serono Lab v. Shalala*, 158 F.3d 1313, 1317-18 (D.C.Cir.1998); *CityFed Fin. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C.Cir.1995); *Sea Containers Ltd. v. Stena AB*, 890 F.2d 1205, 1208 (D.C.Cir.1989); *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C.Cir.1977). No single factor is dispositive; rather the Court "must balance the strengths of the requesting party's arguments in each of the four required areas." *CityFed*, 58 F.3d at 747. This calculus reflects a sliding-scale approach in which an injunction may issue if the arguments for one factor are particularly strong "even if the arguments in other areas are rather weak." *Id.* Thus, this Circuit has held that "[a]n injunction may be justified, for example, where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury." *Id.*

FN1. The same factors apply to a temporary restraining order ("T.R.O.") as to a preliminary injunction. *See Vencor Nursing Ctr. v. Shalala*, 63

F.Supp.2d 1, 7 n. 5.

### A. Ripeness

Defendants argue first that Plaintiffs' claim challenging the denial of expedited processing is not yet ripe for judicial review because Plaintiffs have not exhausted their administrative remedies. *See Defs.' Opp'n to Mot. for T.R.O.* at 5. Specifically, the statute provides for "expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing." *Id.* § 552(a)(6)(E)(ii)(II). In Defendants' view, this provision mandates administrative appeals for all denials of expedited processing before an applicant may seek judicial review. Nothing in the statute or its legislative history, however, points to such a reading. Instead, the statute authorizes judicial review for challenges to "Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph...." *Id.* § 552(a)(6)(E)(iii) (emphasis added). This language of alternatives clearly indicates that judicial review is appropriate at either of two moments: when the agency has denied a request for expedited processing, or when the agency has, upon administrative appeal, affirmed the denial of such a request.

\*3 Moreover, as Plaintiffs aptly argue, the statute further specifies that "judicial review shall be based on the record before the agency at the time of the determination." *Id.*; *see also* Pl.'s Reply to Defs.' Opp'n at 5-6. "[T]he determination," in this provision, signifies the agency's decision to deny expedited processing, whether that decision is based on the applicant's initial request, or on the applicant's supplemental materials submitted in anticipation of an administrative appeal. Accordingly, the Court finds that judicial review of an agency's denial of a request for expedited processing is appropriate, under the statute, either at the point when the agency denies the request, or after the applicant has failed in its administrative appeal.

### B. Substantial likelihood of success on the merits

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, requires agencies to "make available to the public information." *Id.* FOIA provides public access to government documents in order "to ensure

an informed citizenry, vital to the functioning of a democratic society...." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978). Although FOIA does not apply to information that falls within one or more of nine exemptions, *see* § 552(b)(1-9), "these limited exemptions do not obscure the basic policy that disclosure, not secrecy is the dominant objective of the Act." *Department of the Air Force v. Rose*, 425 U.S. 352, 361, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976). Not only does FOIA promote the dissemination of information, but the Electronic Freedom of Information Act Amendments of 1996, Pub.L. 104-231, 110 Stat. 3046, added to FOIA an expedited processing provision which prioritizes expediency where warranted. *See* 5 U.S.C. § 552 ((a)(6)(E). As amended, the statute provides, in relevant part, that:

(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records-

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

....

(v) For purposes of this subparagraph, the term 'compelling need' means-

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

5 U.S.C. § 552(a)(6)(E). Agencies may therefore find compelling need based on the statutorily prescribed conditions, or on conditions enumerated under the agencies' own regulations.

Pursuant to the statutory mandate, the Department of Justice, the Central Intelligence Agency, the Department of Treasury, and the Department of State have promulgated regulations governing when expedited processing of requests for agency documents is warranted. Within the statutory framework and under these regulations, each of the agencies to which Plaintiffs submitted their request for expedited processing determined that Plaintiffs had not demonstrated a "compelling need" or other

basis sufficient to justify such expedited treatment. *See, e.g.,* Exs. to Pls.' Mot. for T.R.O., Nat'l Sec. Agency, Central Sec. Serv. Aug. 11, 2000 letter to Mr. Zaid (denying expedited processing on the grounds that "[t]here is no compelling need to respond to this request in an expeditious manner since there is no threat to life or physical safety and the value of the information would not be lost if not disseminated quickly."); Dep't of Defense Aug. 4, 2000 letter to Mr. Zaid (denying expedited processing under DoD Regulations 5400-7.R because requested information does not involve "breaking news"); Dep't of Justice, Office of Information and Privacy, Aug. 7, 2000 letter to Mr. Zaid (denying expedited processing under DOJ Regulation 28 C.F.R. § 16.5(d)(1)(ii) because there is neither a "particular urgency to inform the public about an actual or alleged federal government activity beyond the public's right to know about government activity generally" nor " 'widespread media interest' regarding the issues raised" by the requests).

\*4 Plaintiffs, however, maintain that they have met these criteria. Not only are they "primarily engaged in disseminating information," a status that is not significantly disputed by Defendants, FN2 but Plaintiffs emphasize that they seek information potentially pointing to Federal Government activity (*e.g.,* knowledge of British intelligence involvement in the crash and of the attempted fraud), information relating to an event that has captured enormous media attention, and information that could possibly impact on the French investigation, which shall reach a final conclusion imminently. *See* Pls.' Mot. for T.R.O. at 13-15; Zaid Aff. ¶ 5 (reproducing the portion of Plaintiffs' submission to the agencies which addresses the reasons for expedited processing).

FN2. Defendants do, however, raise "questions" about whether Mr. Al Fayed himself can be said to fall into this category. *See* Defs.' Opp'n at 8 n. 6. The Court sees no need to address this issue at this early stage in the litigation, since Punch Limited clearly and undisputedly is "primarily engaged in disseminating information."

Thus, Plaintiffs challenge the agencies' determinations that the information related to the crash and the subsequent fraud scheme constitutes neither a breaking news story under DoD Regulation

5400-7.R, nor an issue involving "widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence," under DOJ regulations, 28 C.F.R. § 16.5(d)(1)(iv). *See* Pls.' Reply at 8-9; Defs.' Opp'n at 8-9. Plaintiffs quarrel not with the agency regulations under which the agencies rendered these determinations, but with the agencies' application of their regulations to Plaintiffs' requests. In particular, Count Eleven of Plaintiffs' Complaint maintains that Plaintiffs have "met the requisite requirements as set forth in the respective agency regulations to be entitled to expedited processing of their FOIA requests ..., and that they therefore have "a legal right under the respective regulations of the agency defendants to be granted expedited processing, and there is no legal basis for the denial by [the ten agencies] of said right." Compl. ¶ 185.

The Administrative Procedure Act empowers this Court to "hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Although the judiciary bears the responsibility under the APA to set aside agency decisions that meet this description, *see MD Pharmaceutical, Inc. v. Drug Enforcement Admin.*, 133 F.3d 8, 16 (D.C.Cir.1998), "[t]he scope of review under the 'arbitrary and capricious standard' is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). In particular, an agency's application of its own regulations, such as those at issue here, merits considerable deference. *See DSE, Inc. v. United States*, 169 F.3d 21, 27 (D.C.Cir.1999); *Consarc Corp. v. United States Treasury Dep't*, 71 F.3d 909, 914 (D.C.Cir.1995).

On the limited record before the Court on this motion for emergency relief, the Court cannot say that the agencies' denials of Plaintiffs' applications for expedited processing of their requests violate agency regulations or the statute itself. The agencies involved measured Plaintiffs' applications against their regulatory criteria, and found them wanting. In their denial letters, each agency offers legitimate reasons for why it did not deem Plaintiffs' request to meet the regulatory and statutory guidelines for expedited processing. Thus affording the agencies

deference to apply their own regulations interpreting § 552(a)(6)(E), the Court concludes that Plaintiffs have not shown a substantial likelihood of success on the merits of their claims regarding the denial of expedited processing.

#### C. Other factors weighing against preliminary relief

\*5 The Court's conclusion that Plaintiffs are "not likely to succeed on the merits effectively decides the preliminary injunction issue." *Serono Lab., Inc. v. Shalala*, 158 F.3d 1313, 1326 (D.C.Cir.1998). Although the calculus for emergency relief reflects a sliding-scale approach in which a strong argument in favor of one factor may excuse a relatively weaker showing on another factor, *see CityFed. Fin. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C.Cir.1995), absent a "substantial indication of probable success [on the merits], there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review." *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C.Cir.1977); *see also Demjanjuk v. Meese*, 784 F.2d 1114, 1117-18 (D.C.Cir.1986) (per Bork, J.) (denying equitable relief where, despite threat of irreparable harm, petitioner failed to demonstrate likelihood of success on the merits). Without any probability of prevailing on the merits, any purported injury Plaintiffs may allege would not justify such injunctive relief.

In any event, not only have Plaintiffs failed to demonstrate a substantial likelihood of success on the merits, but they have similarly failed to make a showing of irreparable injury, should the Court decline to grant the T.R.O. and preliminary injunction. In his affidavit attached to Plaintiffs' Motion, Plaintiffs' counsel explains that "any further delay in the processing of Al Fayed and Punch's FOIA requests will irreparably harm their ability to engage in informed discussion and debate on the issue of government misconduct or intentional neglect with respect to events and individuals associated with the August 31, 1997 tragedy...." *Zaid Aff.* ¶ 11. Though impassioned, this statement remains conclusory, never explaining why this information will not retain its value if procured through the normal FOIA channels.

In addition, to compel the agencies to provide expedited processing is to place Plaintiffs' requests



in front of a whole queue of others. Such a result would inflict injury on others who, according to the agencies' determinations, have presented more meritorious applications for expedited processing. At best, then, the balance of the harms is in equipoise. For the same reasons, it remains unclear whether or not emergency relief would run contrary to the public interest. Although the expedited processing provision prioritizes expediency, it does so only in very limited circumstances, recognizing that agencies cannot possibly give expedited treatment to each and every FOIA request. Accordingly, the public interest is best furthered by channeling the agencies' resources such that only certain urgent requests receive immediate treatment, while the rest are processed in the usual manner. Of course, disclosure of non-exempt material under the FOIA almost always serves the public interest, but in the world of limited resources contemplated by the EFOIA, such material may not in every case receive immediate processing.

\*6 Nonetheless, the Court recognizes that many of the agencies to which Plaintiffs submitted their requests did not even meet their statutory and regulatory obligation to respond to Plaintiffs within ten days by either granting or denying their application for expedited processing.FN3 See 5 U.S.C. § 552(a)(6)(E)(ii)(I) ("regulations under this subparagraph must ensure ... that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request ..."). When enacting the EFOIA, Congress identified as one of the purposes of the Act to "ensure agency compliance with statutory time limits...." 142 Cong. Rec. S10713-03, S10714. Neither the FOIA, nor its amendments in the EFOIA, has managed to accomplish this goal. As Senator Patrick Leahy, one of the sponsors of the amendments, remarked, "[t]he current time limits in the FOIA are a joke. Few agencies actually respond to FOIA requests within the 10-day limit required in the law. Such routine failure to comply with the statutory time limits is bad for morale in the agencies and breeds contempt by citizens who expect government officials to abide by, not routinely break, the law." 142 Cong. Rec. at S10715. The Court notes that the agencies' delay in responding to Plaintiffs has done little to boost this morale. Still, upon consideration of the parties' arguments, the statutory and regulatory context, and

the applicable case law, the Court determines that it cannot grant the relief Plaintiffs seek.

FN3. Those agencies which still had not responded to these requests at the time Plaintiffs filed their Complaint eventually produced responses, seemingly under pressure from this litigation.

### III. CONCLUSION

For the foregoing reasons, the Court shall deny Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction. An order accompanies this memorandum opinion.

D.D.C., 2000.

Al-Fayed v. C.I.A.

Not Reported in F.Supp.2d, 2000 WL 34342564  
(D.D.C.)

END OF DOCUMENT

**EXHIBIT 3**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,

Plaintiff,

v.

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Civil Action No. 00-1396 (JR)

UNITED STATES DEPARTMENT OF  
JUSTICE, et al.,

Defendant.

**FILED**

JUN 27 2000

ORDER

BRUCE MAYER, CLERK  
U.S. DISTRICT COURT

Upon consideration of plaintiff's "emergency motion for expedited treatment to, in part, compel defendant to respond to plaintiff's Freedom of Information Act request,"<sup>1</sup> it is this 27th day of June, 2000,

**ORDERED** that the motion is **denied**. The Freedom of Information Act was not designed and does not operate as a vehicle to provide immediate and continuing access to government records through litigation.

"Congress wished to reserve the role of the courts for two occasions, (1) when the agency was not showing due diligence in processing plaintiff's individual request or was lax overall in meeting its obligations under the Act with all available resources, and (2) when plaintiff can show a genuine need and reason for urgency in gaining access to Government records ahead of prior applicants for information." Open America, Inc. v.

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<sup>1</sup> This case was reassigned to the undersigned judge on June 26, 2000, as related to No. 2000cv0723. See LCvR 40.5(c).

(N)

X

Watergate Special Prosecution Force, 547 F.2d 606, 615-16 (D.C. Cir. 1976). The cases finding "emergency" conditions in a FOIA context have been few, and the claims to "emergency" status in those cases were different from and more focused than the claim presented by this plaintiff.<sup>2</sup> See Exner v. FBI, 443 F. Supp.

1349, 1353 (S.D. Cal. 1978) (allegation of exposure to harm from organized crime figures); Cleaver v. Kelley, 427 F. Supp. 80, 81 (D.D.C. 1976) (plaintiff facing criminal charges carrying possible death penalty in state court).

The Department of Justice is required to act upon a request for expedited access within ten calendar days of receipt by the FOIA office if a "person primarily engaged in disseminating information" can demonstrate that there is an "urgency to inform the public concerning actual or alleged Federal Government activity," 28 C.F.R. § 16.5(d). This plaintiff did not make such a request.



JAMES ROBERTSON  
United States District Judge

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<sup>2</sup> The motion reveals some confusion about the identity, or the role, of the actual plaintiff. The stated "emergency" is that a motion is to be filed tomorrow in the Eleventh Circuit (by Judicial Watch? by Larry Klayman, Esq?) on behalf of Lazaro Gonzales.

Copies to:

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Counsel for Plaintiff

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U.S. Department of Justice  
Civil Division  
901 E Street, N.W., Room 905  
Washington, D.C. 20044

Counsel for Defendant

**EXHIBIT 4**

LEXSEE 1988 U.S. DIST. LEXIS 18606

**ASSASSINATION ARCHIVES AND RESEARCH CENTER, INC., Plaintiff v.  
CENTRAL INTELLIGENCE AGENCY, Defendant.**

Civil Action No. 88-2600

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

*1988 U.S. Dist. LEXIS 18606*

September 29, 1988, Decided  
September 29, 1988, Filed

**DISPOSITION:** [\*1] ORDERED that plaintiff's petition for preliminary injunction and for expedited treatment is denied.

**COUNSEL:** NATHAN DODELL, Assistant United States Attorney, 555 4th Street, N.W. Fourth Floor, Washington, D.C. 20001.

JAMES H. LESAR, 918 F. Street N.W., Suite 509, Washington, D.C. 20004.

DANIEL S. ALCORN, Fensterwald, Alcorn & Vangellow, 1000 Wilson Boulevard, Suite 900, Arlington, VA 22209.

**JUDGES:** REVERCOMB

**OPINION BY:** GEORGE H. REVERCOMB

**OPINION:**

ORDER

Plaintiff seeks a preliminary injunction to expedite the processing of a FOIA request. In order to grant a preliminary injunction, plaintiff must 1) make a strong showing that it is likely to prevail on the merits; 2) show that it will be irreparably harmed in the absence of the relief sought; 3) show that issuance of the stay would not substantially harm others; and 4) show that the public interest would not be harmed by the injunctive relief. *Virginia Petroleum Jobbers Association v. Federal Power Comm'n*, 104 U.S. App. D.C. 106, 259 F.2d 921, 925 (D.C. cir. 1958); *American Federation of Government Employees v. O.P.M.*, 618 F. Supp. 1254,

1258 (1985). The Court concludes that plaintiff has not met this burden.

As to likelihood of [\*2] success on the merits, the Court entertains strong misgivings about whether plaintiff has exhausted its administrative remedies. See *Spannaus v. Dept. of Justice*, 262 U.S. App. D.C. 325, 824 F.2d 52, 59 (D.C. Cir. 1987). Furthermore, the Court is unpersuaded that plaintiff has shown that circumstances exist which are so exceptional as to justify expediting its FOIA application.

As to irreparable harm, plaintiff has not shown that it would suffer injury. "The movant must show that the alleged harm will directly result from the actions which the movant seeks to enjoin." *Wisconsin Gas Co. v. Federal Energy Regulatory Comm'n*, 244 U.S. App. D.C. 349, 758 F.2d 669, 673-74 (D.C. Cir. 1985). The injury which plaintiff claims will occur is speculative and indirect.

Clearly, granting plaintiff expedited treatment would injure others who have filed FOIA requests ahead of plaintiff.

As to the public interest, the Court finds that the public interest in an orderly processing of FOIA requests is not outweighed by the "urgency" of the request plaintiff has made. Therefore, it is by the Court, this 29th day of September, 1988,

ORDERED that plaintiff's petition for a preliminary injunction [\*3] and for expedited treatment is denied.

GEORGE H. REVERCOMB

United States District Judge



**EXHIBIT 5**

LEXSEE 2005 U.S. DIST. LEXIS 40318

**ELECTRONIC PRIVACY INFORMATION CENTER, Plaintiff, v.  
DEPARTMENT OF JUSTICE, Defendant.**

**Civil Action No. 05-845 (GK)**

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

*2005 U.S. Dist. LEXIS 40318*

**November 16, 2005, Decided  
November 16, 2005, Filed**

**COUNSEL:** [\*1] For ELECTRONIC PRIVACY INFORMATION CENTER, Plaintiff: Marcia Clare Hofmann, David L. Sobel, ELECTRONIC PRIVACY INFORMATION CENTER, Washington, DC.

For DEPARTMENT OF JUSTICE, Defendant: Marcia Kay Sowles, U.S. DEPARTMENT OF JUSTICE, Washington, DC; Benton Gregory Peterson, ASSISTANT UNITED STATES ATTORNEY, Civil Division, Washington, DC.

**JUDGES:** Gladys Kessler, United States District Judge.

**OPINION BY:** Gladys Kessler

**OPINION:**

**MEMORANDUM ORDER**

Plaintiff is a public interest research organization which, among other things, reviews federal law enforcement activities and policies to determine their potential impact on privacy interests and civil liberties. On March 29, 2005, Plaintiff filed a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for the release of various information related to the "USA PATRIOT ACT of 2001," Pub. L. No. 107-56, 115 Stat. 272 (2001). Compl. P 8. Plaintiff sought expedited processing of its FOIA request. Id. P 9.

By letter dated April 12, 2005, the Federal Bureau of Investigation ("FBI"), a component of Defendant, granted Plaintiff's request for expedited processing. Pl's Mot. to Compel, Ex. 3. Thereafter, Plaintiff [\*2] filed this lawsuit claiming Defendant failed to process Plaintiff's

FOIA request in a timely manner. On June 14, 2005, Plaintiff filed a Motion to Compel Expedited Processing of Plaintiff's FOIA Request ("Plaintiff's Motion").

On November 8, 2005, a Status Conference was held, during which the parties reiterated their positions with respect to the processing of Plaintiff's FOIA request. That same day, the Court granted Plaintiff's Motion, and ordered the parties to submit a Joint Praecipe with a proposed timeline for processing the remaining pages, or notify the Court that they were unable to come to an agreement. The parties were informed that if they were unable to come to an agreement, the Court would enter an order based on the record before it. On November 14, 2005, the parties informed the Court that they were unable to reach an agreement regarding the remaining pages.

The Court is unable to determine, based on the Government's representations at the Status Conference and various written submissions made during this litigation, how many pages it can actually process within a given time frame. At the Status Conference, the Government represented that the universe of potentially [\*3] responsive pages had been narrowed from approximately 130,000 to 18,000. As early as June 29, 2005, the Government had already determined that 5,000 pages of the 18,000 were potentially responsive. Def.'s Opp'n to Pl.'s Mot. to Compel, Att. A P 20. Yet the Government has not stated that any of those 5,000 pages have been completely processed, n1 nor that any of those pages have been turned over to Plaintiff.

n1 The Government represents that "because

of the nature of plaintiff's request, identification of responsive records has proven much more difficult than initially anticipated." Def.'s Resp. to Pl.'s Notice of Filing at 1.

To provide another example of the inadequacy of the Government's responses to Plaintiff's Motion, it filed, in support of its Opposition to Plaintiff's Motion, the Declaration of David M. Hardy, Section Chief of the Record/Information Dissemination Section, Records Management Division, FBI Headquarters. Hardy attested that the FBI should be able to process 1,000 pages per month for responsiveness. [\*4] Opp'n, Att. A P 26. However, at the Status Conference, almost seven months after the FBI agreed to process Plaintiff's FOIA request on an expedited basis, the Government was still unable to give even an estimate as to how far along in the review process it was. Nor could the Government provide an estimate as to when processing would be completed.

What is clear is that Plaintiff's FOIA request, which should have been processed on an expedited basis, has been pending for nearly eight months. An incredibly small amount of pages has been released to Plaintiff. n2 While the Court recognizes the difficulty the Government has had in processing Plaintiff's request, the record shows that Defendant's efforts have been unnecessarily slow and inefficient.

n2 The Government represented at the Status Conference that only about 250 pages had been released to Plaintiff.

Upon consideration of the Motion, Opposition, and Reply, the representations made during the Status

Conference, the parties' submissions in response to the [\*5] Court's November 8, 2005 Order, and the entire record herein, it is hereby

**ORDERED** that Defendant shall complete the processing of 1500 pages every 15 calendar days, and provide to Plaintiff all responsive non-exempt pages contained therein, until processing is complete; n3 it is further

n3 The Court recognizes that there are several layers of review, each of which take time. However, the Government has represented that it is processing Plaintiff's FOIA request on a rolling basis, i.e., after a group of documents are reviewed for responsiveness, they are immediately moved to the next stage of review. Therefore, at this point, there should be a number of documents at various stages of the review process, and Defendant should be able to comply with this Order without the need for an initial grace period.

**ORDERED** that Defendant shall notify Plaintiff of the total number of pages responsive to Plaintiff's FOIA request within 60 calendar days; and it is further

**ORDERED** that Defendant is not [\*6] required to categorize responsive documents according to Plaintiff's different FOIA requests.

Gladys Kessler

United States District Judge

November 16, 2005

**EXHIBIT 6**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

**ELECTRONIC PRIVACY  
INFORMATION CENTER,**

**Plaintiff,  
v.**

**DEPARTMENT OF JUSTICE,**

**Defendant.**

**Civil Action 06-00096 (HHK)**

**AMERICAN CIVIL LIBERTIES  
UNION, et al.,**

**Plaintiffs,  
v.**

**DEPARTMENT OF JUSTICE,**

**Defendant.**

**Civil Action 06-00214 (HHK)**

**ORDER**

It is this 24<sup>th</sup> day of March, 2006, hereby

**ORDERED** that the expedited motion, filed by the Department of Justice (“DOJ”), seeking relief from the court’s February 16, 2006 order [#13] is granted in part and denied in part; and it is further

**ORDERED** that DOJ’s Office of Intelligence and Policy Review shall have an additional 60 days to complete the processing of the plaintiff Electronic Privacy Information Center’s (“EPIC’s”) December 16, 2005 FOIA request, as measured from March 8, 2006—the original deadline imposed by the court’s February 16, 2006 order; and it is further

**ORDERED** that DOJ's Office of Legal Counsel shall have an additional 120 days to complete the processing of EPIC's December 16, 2005 FOIA request, as measured from March 8, 2006—the original deadline imposed by the court's February 16, 2006 order; and it is further

**ORDERED** that no *Vaughn* index of any responsive classified documents or declaration supporting the withholding of either responsive classified or unclassified documents shall be required before the point at which a dispositive motion is filed; and it is further

**ORDERED** that the clerk of the court shall schedule a status hearing sixty days from the date of this order, or as soon thereafter as the business of the court permits.

Henry H. Kennedy, Jr.  
United States District Judge

**EXHIBIT 7**

H

Edmonds v. F.B.I.  
D.D.C., 2002.  
Only the Westlaw citation is currently available.  
United States District Court, District of Columbia.  
Sibel D. EDMONDS, Plaintiff,  
v.  
FEDERAL BUREAU OF INVESTIGATION,  
Defendant.  
No. Civ.A. 02-1294(ESH).

Dec. 3, 2002.

David K. Colapinto, Stephen Martin Kohn, Kohn,  
Kohn & Colapinto, P.C., Washington, DC, for  
Plaintiff.  
Pamela D. Huff, U.S. Attorney's Office, Vesper  
Mei, U.S. Department of Justice Civil, Washington,  
DC, for Defendant.

#### ORDER

HUVELLE, J.

\*1 Before the Court are plaintiff's Motion for Partial Summary Judgment [11-1] and defendant's opposition and Cross Motion for Stay of Proceedings [18-1] pursuant to *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C.Cir.1976). At issue before the Court is the speed with which defendant must comply with plaintiff's Freedom of Information Act ("FOIA") request. See 5 U.S.C. § 552 *et seq.*

Plaintiff asserts that she is entitled to expedited processing of her FOIA request under 28 C.F.R. § 16.5(d)(1)(iv), which provides for expedited processing where a request involves "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." Defendant disputes plaintiff's entitlement to expedited processing and moves for an *Open America* stay on the grounds that the FBI is exercising due diligence in responding to plaintiff's requests but that exceptional circumstances have prevented it from processing the requests within the statutory time limit.

#### BACKGROUND

Plaintiff is a whistleblower who worked as a contract linguist for the FBI in counter-terrorism

and counter-intelligence investigations at the FBI Washington Field Office after September 11, 2001. By letter dated April 19, 2002, Ms. Edmonds has requested documents relating to herself, her allegations of wrongdoing at the FBI, and investigations of persons related to her. Plaintiff made a second FOIA request on April 29, 2002, seeking information pertaining to her security clearance and the purported investigation and/or adjudication thereof. In both requests, plaintiff asked for expedited processing. However, in response to these requests, defendant has failed to make any determination regarding whether her requests are entitled to expedited processing. See 28 C.F.R. § 16.5(d)(4); see also 5 U.S.C. § 552(a)(6)(E)(i)-(ii). Having exhausted her administrative remedies, plaintiff now moves for partial summary judgment, requesting that this Court order the FBI to expedite the processing of her requests.

In response, defendant argues that plaintiff does not qualify for expedited processing because her requests are "personal to her, and the documents that she seeks have nothing to do with any wider concerns of the American public." (Def.'s Opp. at 8.) According to defendant, her requests are being made in order to obtain information for her civil suit, *Edmonds v. Department of Justice*, Civil Action No. 02-1448(JR). Further, defendant seeks an *Open America* stay until April 1, 2003, on the grounds that although the FBI is exercising due diligence in responding to plaintiff's requests, there are exceptional circumstances, especially in light of September 11, 2001, that have prevented defendant from processing plaintiff's requests in a timely manner.

#### LEGAL ANALYSIS

##### I. *Open America* Stay

Defendant FBI moves for an *Open America* stay until April 1, 2003.FN1 Under FOIA, a court may retain jurisdiction and give an agency additional time to respond to a FOIA request "[i]f the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request...." 5 U.S.C.A. § 552(a)(6)(C)(i). Exceptional circumstances exist



when an agency "is deluged with a volume of requests for information vastly in excess of that anticipated by Congress, when the existing resources are inadequate to deal with the volume of such requests within the time limits of ... [5 U.S.C. § 552(a)(6)(A) ], and when the agency can show that it 'is exercising due diligence' in processing the requests." *Open America*, 547 F.2d at 616. Such exceptional circumstances do not include "a delay that results from a predictable agency workload of requests ... unless the agency demonstrates reasonable progress in reducing its backlog of pending requests." 5 U.S.C.A. § 552(a)(6)(C)(ii).

FN1. Plaintiff incorrectly argues that defendant has waived its right to an *Open America* stay by not raising it before now. See Pl.'s Opp. at 12. A request for a temporary stay does not constitute an affirmative defense, since it is unrelated to defendant's defenses to the merits of plaintiff's FOIA claims, and thus, there is no basis for plaintiff's waiver argument.

\*2 The FBI has demonstrated that exceptional circumstances do exist, the agency is exercising due diligence in processing requests, and it is making reasonable progress in reducing its backlog. According to the declaration of Christine Kiefer, Acting Chief of the Litigation Unit, Freedom of Information Privacy Acts Section, Records Management Division at FBI Headquarters in Washington, D.C., the FBI is still confronted by over 1,300 requests each month even though it has drastically reduced its backlog. The FOIA personnel also spend time on administrative appeals, litigation, and large projects. For instance, as of September 30, 2002, the FBI was involved in 142 pending requests in various federal courts throughout the United States involving 650 FOIA requests. Finally, in response to the events of September 11, 2001, the FBI has had to divert personnel to assist in ongoing investigations of terrorist attacks. For these reasons, the FBI faces exceptional circumstances warranting an *Open America* stay.FN2

FN2. As indicated by the many cases cited by the defendant in its Opposition at 15-16 and 18-19, *Open America* stays of far greater time periods than requested here have been ordered by this Court on numerous occasions, and these stays have been granted subsequent to the passage of the Electronic FOIA Amendments of 1996. See, e.g., *Emerson v.*

*CIA*, 1999 U.S. Dist. Lexis 19511, at \*4 (D.D.C. Dec. 16, 1999) (Hogan, J.).

In addition to demonstrating "exceptional circumstances," defendant has also shown that it is exercising due diligence in responding to plaintiff's FOIA requests and has made reasonable progress in reducing its backlog despite the burdens on its resources. As attested to by Kiefer, the FBI's backlog has decreased significantly since 1996 (declining approximately 26%). Further, as evidenced by her declaration, the FBI has identified approximately 774 pages of responsive documents and it is in the process of reviewing these documents at this time. Based on the efforts to date, the Court is satisfied that the FBI is exercising due diligence in responding to plaintiff's requests.

Having found that defendant has satisfied the exceptional circumstances-due diligence test, however, this Court's inquiry is not complete, for *Open America* also recognized that where a requester shows exceptional need or urgency, that requester may be given priority over other requesters. *Open America*, 547 F.2d at 615-16. In particular, defendant itself has recognized several specific grounds for expediting requests, only one of which is relevant here, and it is this ground for expedition to which the Court must turn its attention.

## II. Expedited Processing

As noted, plaintiff moves for partial summary judgment, arguing that her requests involve "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence" and therefore are entitled to expedited processing under the Department of Justice's ("DOJ") regulations. 28 C.F.R. § 16.5(d)(1)(iv). Defendant responds that plaintiff has not satisfied this standard because she has failed to show that her requests concern a matter of current exigency to the American public, and she has not shown that " 'a delay in obtaining information can reasonably be foreseen to cause a significant adverse consequence to a recognized interest.' " (Def.'s Opp. at 9, quoting *Al-Fayed v. CIA*, 254 F.3d 300, 311 (D.C.Cir.2001).)

\*3 The problem with defendant's position is that it

is attempting to graft onto the DOJ's regulation FOIA's definition of "compelling need." See 5 U.S.C. § 552(a)(6)(E)(v)(I) and (II). However, the regulation at issue here was not issued pursuant to this "compelling need" standard. As the D.C. Circuit recognized in *Al-Fayed*, FOIA directs agencies to provide "for expedited processing, not only 'in cases in which the person requesting the records demonstrates a compelling need,' but also 'in other cases determined by the agency.'" *Al-Fayed*, 254 F.3d at 307 n. 7, quoting 5 U.S.C. § 552(a)(6)(E)(i) (emphasis in original). Citing the statute's legislative history, the Court explained that this "latter provision gives an agency 'latitude to expand the criteria for expedited access' beyond cases of 'compelling need.'" H.R.Rep. No. 104-795, at 26." *Id.*; see also *Aguilera v. FBI*, 941 F.Supp. 144, 149 (D.D.C.1996); *Electronic Privacy Information Center v. FBI*, 865 F.Supp. 1, 2 (D.D.C.1984); *Whitehurst v. FBI*, Civil Action No. 96-572 (Feb. 5, 1997) (Kessler, J.).

DOJ promulgated the standard pertinent to this case pursuant to this discretionary authority. Because that standard falls outside and goes beyond FOIA's definition of "compelling need," the Court has no basis to demand that the requester satisfy the compelling need test in order to satisfy the regulation.FN3 Under DOJ's regulation, plaintiff need not show prejudice or a matter of current exigency to the American public; she need only demonstrate that the subject matter of her request involves "[a] matter of widespread and exceptional media interest in which there exist possible questions about the integrity of the government that affect public confidence." Plaintiff easily meets this standard and is thus entitled to expedited processing.

FN3. It is, of course, axiomatic that an "agency is required to follow its own regulations." *Cherokee National of Okla. v. Babbitt*, 117 F.3d 1489, 1499 (D.C.Cir.1997). In addition, the Court has no basis to accord deference to the agency's reasonable interpretation of its own regulations, see *Al-Fayed*, 254 F.3d at 307 n. 7, since defendant has not cited any interpretation of its regulations but only argues that plaintiff does not meet the standard because the "requests are personal to her, and the documents that she seeks have nothing to do with any wider concerns of the American public." (Def.'s Opp. at 8.)

First, as even defendant concedes (Def.'s Op. at 7-8) and is as amply demonstrated by the record before the Court, plaintiff's allegations have received extensive media coverage, including numerous newspaper articles in the printed press-*Associated Press, The Washington Post, Chicago Tribune*-and on TV. (See, e.g., Pl.'s Mot. Exs. 5, 8, 9, 12, 13, 17-19.) Plaintiff's allegations regarding security lapses in the FBI's translator program have also fueled the interest of Senators Leahy and Grassley, both of whom have written to the Attorney General and spoken on the floor of the Senate about their concerns regarding the significant security issues raised by plaintiff's allegations and the integrity of the FBI. (*Id.* Ex. 10.) FN4 This flurry of articles and television coverage, which has continued at least until last month, cannot be cast aside by a sleight-of-hand as defendant attempts to do by categorizing plaintiff's requests as being merely "personal to her" and of no "wider public concern." (Def.'s Opp. at 8.)

FN4. As is clear from Pl.'s Reply Mem., her allegations continue to receive coverage in the press, including on *60 Minutes* (Pl.'s Reply Mem. Ex. 23), and attention from Senator Grassley. (*Id.* Ex. 24.)

While it is true-as defendant argues (Def.'s Opp. at 8)-that plaintiff's pending lawsuit against the DOJ may be the motivating force for her requests and that the documents that she seeks undoubtedly relate to that suit, these requests also relate to matters of wider public concern that directly implicate "possible questions about the government's integrity which affect public confidence." 28 C.F.R. § 16.5(d)(1)(iv). Nothing in the DOJ's regulation disqualifies a plaintiff from obtaining expedited processing where the documents may assist her in another lawsuit, nor is there any basis to conclude that a whistleblower who has brought suit against a government agency as a result of her firing cannot also satisfy the DOJ's regulations for expedited processing. Indeed, it would be illogical to conclude that where a whistleblower's allegations trigger "widespread and exceptional media interest" because of the questions raised regarding the "government's integrity," that person's requests can be rejected for expedited handling because they are also personal to her and her lawsuit against the defendant. *Cf. Halloran v. Veterans Admin.*, 874 F.2d 315, 323 (5th Cir.1989) ("[T]he specific motives of the party

making the FOIA request are irrelevant. If the general public has a legitimate, albeit abstract, interest in the requested information and that disclosure is warranted, disclosure must be made despite the fact that the party actually requesting and receiving the information may use it for less-than-lofty purposes.")

\*4 In sum, plaintiff has satisfied the criteria established by the DOJ for expediting FOIA requests. Plaintiff has offered ample evidence that her allegations have been (1) the subject of "widespread and exceptional media interest," and (2) call into question "the integrity of the ... [FBI] which affect[s] public confidence" in that institution. While defendant could justifiably argue that the Court's application of the relevant regulation will result in an even greater burden on its already strained resources and will disadvantage other FOIA requesters, FN5 the Court is constrained to enforce the regulation as written.

FN5. In this regard, the Court is mindful of the admonition in *Al-Fayed* that an " 'unduly generous use of the expedited processing procedure would unfairly disadvantage other requesters" ' whether they qualify for expedited treatment or not. 254 F.3d at 310 (citation omitted). Unlike *Al-Fayed*, the statutory requirement of "compelling need" is not applicable here, since the DOJ has " 'expand[ed] the criteria for expedited access' beyond cases of 'compelling need." ' *Id.* at 307 n. 7 (citation omitted).

#### CONCLUSION

Accordingly, plaintiff's motion for partial summary judgment is GRANTED, defendant's Motion for *Open America* Stay is DENIED, and a status hearing is set for December 13, 2002, at 11:00 a.m., at which time defendant must inform the Court of the date when the request will be processed consistent with 5 U.S.C. § 552(a)(6)(E)(iii) and 28 C.F.R. § 16.5(d)(4) ("as soon as practicable").

D.D.C., 2002.  
Edmonds v. F.B.I.  
Not Reported in F.Supp.2d, 2002 WL 32539613  
(D.D.C.)

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