

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION)
CENTER)
)
Plaintiff,)
)
v.) Civil Action No. 03-2078 (JR)
)
U.S. DEPARTMENT OF JUSTICE,)
)
Defendant.)
_____)

**MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO PLAINTIFF'S MOTION
FOR PARTIAL SUMMARY JUDGMENT AND
IN SUPPORT OF DEFENDANT'S CROSS-MOTION
FOR SUMMARY JUDGMENT ON EXPEDITED PROCESSING**

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PRELIMINARY STATEMENT

Plaintiff, Electronic Privacy Information Center ("EPIC") filed this lawsuit against the Department of Justice ("DOJ" or "Department") seeking expedited processing of a Freedom of Information Act ("FOIA") request plaintiff submitted to the Executive Office for United States Attorneys ("EOUSA"), a DOJ component. Pursuant to DOJ's FOIA regulations, plaintiff sought expedited processing of its request from EOUSA and from the Department's Office of Public Affairs ("OPA"). Both EOUSA and OPA denied plaintiff's expedition request within the ten-day statutory deadline. Rather than appealing these denials administratively, plaintiff filed a Complaint ("Compl.") and a motion for preliminary injunction seeking to enjoin the Department from "continuing to deny" plaintiff's expedited processing request. See Motion for Preliminary Injunction at 1. The Court denied, sua sponte, plaintiff's preliminary injunction motion for failure to meet the standard for mandamus, see Order dated October 20, 2003, and, shortly thereafter, plaintiff filed the instant motion for "partial" summary judgment and a supporting brief ("Pl. S.J. Br.") on the expedition issue.

Plaintiff's motion should be denied. Long-standing D.C. Circuit case law, as well as the Department's FOIA regulations, require full and timely exhaustion as a prerequisite to filing suit under 5 U.S.C. § 552(a)(4), FOIA's judicial review provision. Because plaintiff failed to exhaust applicable administrative remedies – the Department's administrative appeal process – it cannot maintain its expedition claim. Even if exhaustion were not required, however, plaintiff's motion should be denied because plaintiff failed to demonstrate that its FOIA request deserved expedited treatment at the expense of other, earlier-submitted requests waiting in EOUSA's first-in, first-out processing queue. For these reasons, and those set forth at length below, plaintiff's motion should be denied, and defendant's cross-motion for summary judgment on the expedited

processing issue should be granted.

BACKGROUND

1. Statutory and Regulatory Framework

a. The 1996 FOIA Amendments

Agencies ordinarily process FOIA requests for agency records on a first-in, first-out basis. In 1996, Congress amended the FOIA to provide for "expedited processing" of certain categories of requests. See Electronic Freedom of Information Amendments of 1996, Pub. L. 104-231, § 8 (codified at 5 U.S.C. § 552(a)(6)(E)) ("EFOIA"). Expedition, when granted, entitles requestors to move immediately to the front of an agency processing queue, ahead of requests filed previously by other persons.

As part of EFOIA, Congress directed agencies to promulgate regulations providing for expedited processing of requests for records. Specifically, Congress directed agencies to enact regulations providing for expedited processing (i) "in cases in which the person requesting the records demonstrates a compelling need"; 5 U.S.C. § 552(a)(6)(E)(i)(I); and (ii) "in other cases determined by the agency." Id. § 552(a)(6)(E)(i)(II). Congress also instructed agencies to "ensure" in their regulations (i) that determinations whether to provide expedited processing are made, and notice provided, within 10 days after the date of the request; see id. § 552(a)(6)(E)(ii)(I); and (ii) "expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing." Id. § 552(a)(6)(E)(ii)(II).

Section 552(a)(6)(E)(i)(I), as noted above, requires agencies to expedite processing in cases of a demonstrated "compelling need." The statute defines "compelling need" to mean:

(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)(v)(I), (II).

The EFOIA House Report, upon which the D.C. Circuit has relied in construing the amendments, states the EFOIA expedition categories should be "narrowly applied." Al-Fayed v. Central Intelligence Agency, 254 F.3d 300, 310 (D.C. Cir. 2001) (quoting Electronic Freedom of Information Amendments of 1996, H.R. Rep. No. 104-795, at 26 (1996)). For example, in determining whether a requestor has demonstrated an "urgency to inform" for purposes of Section 552(a)(6)(E)(v)(II), the Report states:

The standard of 'urgency to inform' requires that the information requested should pertain to a matter of a current exigency to the American public and that a reasonable person might conclude that the consequences of delaying a response to a FOIA request would compromise a significant recognized interest. The public's right to know, although a significant and important value, would not by itself be sufficient to satisfy this standard.

H.R. Rep. No. 104-795, at 26; see also Al-Fayed, 254 F.3d at 310 (quoting this portion of the House Report). As the Court of Appeals noted in Al-Fayed: "Congress' rationale for a narrow application is clear: 'Given the finite resources generally available for fulfilling FOIA requests, unduly generous use of the expedited processing procedure would unfairly disadvantage other requestors who do not qualify for its treatment.'" 254 F.3d at 310 (quoting H.R. Rep. No. 104-795, at 26).

The requestor bears the burden of showing that expedition is appropriate. See Al-Fayed, 254 F.3d at 305 n.4 (quoting H.R. Rep. No. 104-795, at 25). Expedition decisions are subject to

judicial review in accordance with Section 552(a)(6)(E)(iii), which states:

Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under [5 U.S.C. § 552(a)(4)], except that the judicial review shall be based on the record before the agency at the time of the determination.

5 U.S.C. § 552(a)(6)(E)(iii). Section 552(a)(4), the cross-referenced provision, is the general FOIA provision authorizing judicial review of agency decisions to withhold records from FOIA requestors. See id. § 552(a)(4)(B). The D.C. Circuit has long held that full and timely exhaustion of administrative remedies is a prerequisite to judicial review under Section 552(a)(4). See, e.g., Oglesby v. United States Dep't of the Army, 920 F.2d 57 (D.C. Cir. 1990).

The standard for reviewing agency decisions to deny expedition depends on the ground for decision. As noted above, an agency may grant expedition "in cases in which the person requesting the records demonstrates a compelling need," 5 U.S.C. § 552(a)(6)(E)(i)(I), or "in other cases determined by the agency." Id. § 552(a)(6)(E)(i)(II); see also Al-Fayed, 254 F.3d at 307 n.7 (noting this latter provision gives agencies "'latitude to expand the criteria for expedited access' beyond cases of 'compelling need'" (quoting H.R. Rep. No. 104-795, at 26). A decision denying expedited processing for failure to establish "compelling need" under Section 552(a)(6)(E)(i)(I) is reviewed de novo. See Al-Fayed, 254 F.3d at 308. A decision denying expedited processing for failure to meet criteria established by an agency under Section 552(a)(6)(E)(i)(II) is reviewed under a more deferential "reasonableness" standard. See Al-Fayed, 254 F.3d at 307 n.7 (noting that, "to the extent th[e] [agency FOIA] regulations expand the criteria for expedited processing beyond 'compelling need,' the agencies reasonably

determined that plaintiffs' requests did not meet the expanded criteria").¹

b. The Department's Regulations

DOJ implemented EFOIA by final rule effective July 1, 1998. See Revision of Freedom of Information Act and Privacy Act Regulations and Implementation of Electronic Freedom of Information Act Amendments of 1996, 63 Fed. Reg. 29591 (1998). This rule, which governs FOIA requests to components like EOUSA (see 16 C.F.R. § 16.1(b)), states that "[r]equests and appeals" will be "taken out of order and given expedited treatment whenever it is determined that they involve:

- (i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;
- (ii) An urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information;
- (iii) The loss of substantial due process rights; or
- (iv) A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence."

28 C.F.R. § 16.5(d)(1)(i)-(iv). Categories (i) and (ii) implement the statutory "compelling need" standard; categories (iii) and (iv) define additional categories for expedition. See 63 Fed. Reg. at

¹An unpublished opinion cited by plaintiff suggests the "reasonableness" standard should apply only where an agency bases its expedition decision on an "interpretation" – as opposed to an "application" – of its regulations. See Edmonds v. Federal Bureau of Investigation, 2002 U.S. Dist. LEXIS 26578 *9 n.3 (D.D.C. Dec. 3, 2002). In Al-Fayed, however, the D.C. Circuit appeared to use "interpretation" synonymously with "application," see 254 F.3d at 307 n.7, which is consistent with Congress's decision to delegate to agencies the "latitude to expand the criteria for expedited access." See H.R. Rep. 104-795, at 26. Moreover, it is not clear whether there is any meaningful difference between "interpretation" and "application" in this context. See Consarc Corp. v. United States Treasury Dep't, Office of Foreign Assets Control, 71 F.3d 909, 915 (D.C. Cir. 1995).

29592.

As Congress recognized, agency expedition decisions depend on "factual and subjective judgments about the circumstances cited by requestors to qualify them for 'expedited processing.'" H.R. Rep. No. 104-795, at 26. Accordingly, DOJ requires requestors to "explain[] in detail the basis for" their expedition requests. 28 C.F.R. § 16.5(d)(3); see also H.R. Rep. No. 104-795, at 26 ("the requestors will need to explain in detail their basis for seeking such treatment"). For requests based on urgency (category (ii) above), the requestor "must establish a particular urgency to inform the public about the government activity involved in the request, beyond the public's right to know about government activity generally." Id.; see also H.R. Rep. No. 104-795, at 26 (similar). Requests for expedition based on categories (i), (ii), and (iii) must be submitted to the component that maintains the records requested. See 28 C.F.R. § 16.5(d)(2). Requests for expedition based on category (iv) – the Department's "special media-related standard" (see 63 Fed. Reg. at 29592) – must be submitted to the Director of OPA. See 28 C.F.R. § 16.5(d)(2). This enables "the Department's media specialists [to] deal directly with matters of exceptional concern to the media." 63 Fed. Reg. at 29592.

Within ten calendar days of receiving a request for expedited processing, the component must "decide whether to grant it and . . . notify the requestor of the decision." 28 C.F.R. § 16.5(d)(4); see also 5 U.S.C. § 552(a)(6)(E)(ii)(I) (requiring notice of decision within ten days of request). If the request is granted, "the request shall be given priority and shall be processed as soon as practicable." 28 C.F.R. § 16.5(d)(4). If the request is denied, "any appeal of that decision shall be acted on expeditiously." Id.; see also 5 U.S.C. § 552(a)(6)(E)(ii)(II) (requiring "expeditious consideration of administrative appeals of such determinations of whether to

provide expedited processing").

Denials of requests for expedited processing are included among the "adverse determinations" subject to 28 C.F.R. § 16.6(c). Section 16.6(c) requires that such adverse determinations be in writing, see id., include "[a] brief statement of the reason(s) for the denial," id. § 16.6(c)(2), and inform the requestor of his or her appeal rights under 28 C.F.R. § 16.9(a). See id. § 16.6(c)(4). Section 16.9(a), in turn, requires requestors to appeal any "adverse determination" to the Department's Office of Information and Privacy ("OIP") within sixty days of the date of the denial letter. See id. § 16.9(a). If OIP affirms the adverse determination, its decision "shall contain a statement of the reason(s) for the affirmance" and "inform [the requestor] of the FOIA provisions for court review of the decision." Id. § 16.9(b). Section 16.9 expressly notifies requestors that "[i]f you wish to seek review by a court of any adverse determination, you must first appeal it under this section." Id. § 16.9(c).

2. Plaintiff's Requests for Expedited Processing

By letter dated September 10, 2003, plaintiff submitted a FOIA request to EOUSA seeking certain records related to "[t]he August 14, 2003 memorandum from Guy A. Lewis, director [of EOUSA], to federal prosecutors addressing the amendment to H.R. 2799 sponsored by Rep. C.L. 'Butch' Otter" ("August 14 memorandum"). Pl. S.J. Br., Declaration of Marcia Hofmann ("Hofmann Dec."), Ex. 1, at 1.² Specifically, plaintiff requested (i) the August 14

²On July 22, 2003, the House of Representatives passed H.R. 2799, the "Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 2004." H.R. 2799 included an amendment offered by Congressman Otter that, if it were to become law, would prohibit the use of appropriated funds to ask a court to delay notice of a search warrant under 18 U.S.C. § 3103a(b). Section 3103a(b), which was enacted as part of the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001" ("Patriot Act"), allows federal judges, in certain

memorandum; (ii) any attachments thereto; (iii) any "assessments . . . of legal issues that might govern or restrict contacts by U.S. Attorneys with members of Congress"; (iv) all "records submitted by U.S. Attorney's Offices in response to the [August 14] memorandum"; and (v) all "records regarding any contacts that U.S. Attorney's Offices have had with members of Congress as a result of the August 14 memorandum." Id.

Plaintiff also sought expedited processing from EOUSA under 28 C.F.R. § 16.5(d)(1)(ii), the "urgency to inform" expedition category. In support, plaintiff stated that "[t]he government activity at issue here – the Justice Department urging prosecutors to influence members of Congress – raises serious questions about the propriety of political appointees and has received considerable media attention in recent days." Hofmann Dec., Ex. 1, at 2. Then, after quoting a newspaper article purporting to describe the August 14 memorandum,³ plaintiff asserted that "a number of news outlets have reported and editorialized on the memorandum," and that a "search in the Lexis-Nexis U.S. newspaper and wire database for articles on this subject between August 14, 2003, when the memorandum was issued, and September 10, 2003 returns 31 results from newspapers throughout the country." Id. at 2-3. Plaintiff attached to its request a fifteen-page print-out of a Lexis-Nexis search containing thirty-one numbered entries (one entry for each

limited circumstances, to authorize investigators to give delayed notice that a search warrant has been executed. See 18 U.S.C. § 3103a(b).

³The article stated in part: "[t]he Justice Department has urged U.S. attorneys to contact congressional representatives who voted against a key anti-terrorism provision of the USA Patriot Act, part of a broad-based publicity campaign on behalf of the law, according to internal documents." Pl. S.J. Br. at 2.

article the search retrieved). See Hofmann Dec., Ex. 1, attachment.⁴ For each entry, the print-out listed information relating to the article (e.g., the article's name, date, and author), followed by a series of sentence fragments from the article purporting to "summarize" it. Less than half of the summaries appeared to refer to the August 14 memorandum or its subject matter. Plaintiff did not attach copies of any of the articles the search retrieved.

Plaintiff also quoted (in part) newspaper editorials from The Washington Post and The New York Times discussing the August 14 memorandum. See Hofmann Dec., Ex. 1, at 3. The Times editorial noted that one member of Congress, Representative Conyers, had "charged that Mr. Ashcroft's lobbying campaign, in which United States Attorneys have been asked to participate, may violate [an anti-lobbying law]." Id. The Post editorial stated that "[t]here's something a little unsettling about this mass deployment," and that "[t]his campaign . . . uncomfortably blurs the line between law and politics." Id. After quoting these editorials, plaintiff concluded: "[i]t is vital, therefore, that the public obtain as much information about the DOJ's efforts to encourage federal prosecutors to contact Congress as possible to promote effective government oversight." Id. at 4.

By letter dated September 10, 2003, plaintiff also sought expedited processing from OPA under 28 C.F.R. § 16.5(d)(1)(iv), the Department's media-related standard. See Hofmann Dec., Ex. 2. Plaintiff's request to OPA, which relied almost exclusively on its September 10 letter to EOUSA, stated: "[a]s detailed more fully in the attached FOIA request, the records we seek relate to a government activity – the Justice Department urging prosecutors to influence members

⁴While plaintiff's search retrieved thirty-one results, two of the articles seem to appear twice: i.e., article number 19 appears identical to article number 21, and article number 20 appears identical to article number 22.

of Congress – that raises serious questions about the propriety of political appointees and has received considerable media attention in recent days." Id., Ex. 2, at 2.

3. DOJ's Response to Plaintiff's Expedition Request

On September 23, 2003, within 10 business days of receiving plaintiff's request for expedition, EOUSA responded on behalf of itself and OPA. See Hofmann Dec., Ex. 5, at 1. Noting that "expedited treatment allows one requestor to receive processing of his or her request ahead of other requestors who have already filed their requests," EOUSA observed that, "[n]ot unsurprisingly, such a displacement of others who have legal rights to a prompt agency response cannot be done except under circumstances that clearly warrant the action, as carefully defined by agency regulation." Id., Ex. 5, at 1.

Turning to the merits of plaintiff's expedition request, EOUSA stated:

In accordance with 28 C.F.R. § 16.5(d)(2), we referred your request for expedited treatment to [OPA]. [OPA] has informed us that they have denied your expedite request. [OPA] determined that the subject of your request is not one of exceptional media interest, nor does it raise any questions about the government's integrity which might affect public confidence. Furthermore, after careful consideration of your letter, I have concluded that you have not otherwise presented a case that would warrant granting expedited processing ahead of others. Your letter does not support a finding that there is an urgency to inform the public about an actual or alleged federal government activity (28 C.F.R. 16.5(d)(1)(ii)). Therefore, in the absence of any such justification, I must deny your request for expedited treatment.

Hofmann Dec., Ex. 5, at 1. EOUSA's letter informed plaintiff that its request would be processed in the normal order (see id.), that it could appeal the decision to deny expedition to OIP within 60 days, see id., and that, "[a]fter the appeal has been decided, you may have judicial review by filing a complaint" in an appropriate United States District Court. See id. at 2.

4. Proceedings to Date

On October 14, 2003, plaintiff filed a complaint seeking "the expedited processing and release of agency records requested by plaintiff from defendant [DOJ]," Compl. ¶ 1, and a motion for preliminary injunction on the expedition issue. Although plaintiff affirmatively alleged it had "exhausted the applicable administrative remedies," Compl. ¶ 19, plaintiff's preliminary injunction papers made clear that, in fact, plaintiff had not appealed EOUSA's and OPA's expedition denials to OIP, and that it did not believe it was required to do so.⁵ See Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction at 8. The Court denied plaintiff's motion by order dated October 20, 2003, because plaintiff had not met the standard for mandamus.

Plaintiff filed the instant motion for "partial" summary judgment on November 4.⁶ As in its preliminary injunction brief, plaintiff does not contend that it appealed the expedition denials in EOUSA's September 22, 2003 letter; instead, plaintiff contends an administrative appeal is not required before seeking judicial review. See Pl. S.J. Br. at 8. On the merits, plaintiff contends EOUSA's and OPA's decisions to deny expedition are unlawful under a de novo standard of

⁵OIP has no record of an appeal by plaintiff or Ms. Hofmann from EOUSA's September 22 denial letter. See Declaration of Priscilla A. Jones at ¶ 2 (attached as Exhibit 1).

⁶It is unclear why plaintiff is seeking only "partial" summary judgment. Plaintiff's complaint, like its motion for a preliminary injunction, is devoted, almost exclusively, to the expedition issue. One sentence of the complaint alleges that DOJ has "wrongfully withheld the requested records," Compl. ¶ 19, but even that allegation appears tied to plaintiff's expedition claim. See, e.g., Compl. at p. 6 (requesting that the Court order expedited processing and that "defendant, upon completion of such expedited processing, . . . disclose the requested records in their entirety and make copies available to plaintiff"). It is true, of course, that plaintiff has "constructively" exhausted with respect to EOUSA's response, on the merits, to plaintiff's FOIA request, see infra n.9 (explaining "constructive" exhaustion), but plaintiff remains free to file a lawsuit challenging any withholdings once EOUSA responds.

review. Id. at 7.

ARGUMENT

Plaintiff's motion for partial summary judgment should be denied and defendant's cross-motion granted because plaintiff failed to exhaust applicable administrative remedies. Even if exhaustion were not required, however, plaintiff's motion should be denied and defendant's cross-motion granted because EOUSA and OPA acted appropriately in denying plaintiff's request for expedited processing.

Before turning to these arguments, it is important to reiterate that, if the Court reaches the merits of OPA's and EOUSA's determinations to deny expedition, review must be limited to "the record before [OPA and EOUSA] at the time of the determination." 5 U.S.C. § 552(a)(6)(E)(iii). Thus, defendant's expedition determinations must be reviewed based on the agency record, which consists of: (i) plaintiff's September 10, 2003, letter to EOUSA seeking expedited processing; (ii) plaintiff's September 10, 2003 letter to OPA seeking expedited processing; and (iii) EOUSA's September 22., 2003 letter to plaintiff denying plaintiff's expedited processing request on behalf of EOUSA and OPA.

Plaintiff's motion contains several attachments – a declaration from an EPIC lawyer and printouts of two newspaper articles – outside the agency record. See Hofmann Dec. & Exs. 3-4

thereto.⁷ These materials, like the other extra-record materials plaintiff cites in its brief,⁸ may not be considered in reviewing defendant's expedition decisions.

I. PLAINTIFF FAILED TO EXHAUST ADMINISTRATIVE REMEDIES

"It is well settled that full and timely exhaustion of administrative remedies is a prerequisite to judicial review under FOIA." Judicial Watch, Inc. v. United States Naval Observatory, 160 F.Supp.2d 111, 112 (D.D.C. 2001); accord Spannaus v. U.S. Dep't of Justice, 824 F.2d 52, 58 (D.C. Cir. 1987) ("[i]t goes without saying that exhaustion of remedies is required in FOIA cases") (internal citation omitted); Oglesby, 920 F.2d at 61-62 ("[c]ourts have consistently confirmed that the FOIA requires exhaustion of [the agency's] appeal process before an individual may seek relief in the courts"); 28 C.F.R. § 16.9 (DOJ regulation implementing FOIA's exhaustion requirement administratively). "Where plaintiff has failed to exhaust its administrative remedies prior to filing with the court, the case is subject to dismissal for lack of subject matter jurisdiction." Judicial Watch v. United States Naval Observatory, 160 F.Supp.2d at 112; accord Judicial Watch v. Federal Bureau of Investigation, 190 F.Supp.2d 29, 33 (D.D.C.

⁷The declaration basically repeats pages 3-7 of plaintiff's brief in declaration form, see Hofmann Dec. at ¶¶ 2-14, and also argues plaintiff will be irreparably injured if its request for expedition is not granted. See id. at ¶¶ 15-17. The printouts are complete copies of two of the thirty-one newspaper articles "summarized" in the Lexis-Nexis search results attached to plaintiff's September 10, 2003 letter to EOUSA. Defendants do not object to the Hofmann Declaration to the limited extent it attaches and authenticates the record correspondence between plaintiff, EOUSA, and OPA. See Hofmann Dec., Exs. 1, 2, & 5.

⁸For example, plaintiff relies in part on a statement Senator Patrick Leahy apparently made on October 1, 2003, twenty days after plaintiff submitted its expedition request. See Pl. S.J. Br. at 2 n.1, 12. Plaintiff also quotes new passages from a newspaper article plaintiff only partially quoted in its request. See id. at 12-13 (quoting Dan Eggen, Prosecutors Are Urged to Press Congress, The Washington Post, Aug. 22, 2003, at A19)).

2002).⁹

FOIA's exhaustion requirement serves many important purposes. See, e.g., Oglesby, 920 F.2d at 61 (exhaustion "allows the top managers of an agency to correct mistakes made at the lower levels and thereby obviates unnecessary judicial review"); Dettmann v. U.S. Dep't of Justice, 802 F.2d 1472, 1476-77 n.8 (D.C. Cir. 1986) ("it would be both contrary to 'orderly procedure and good administration' and unfair 'to those who are engaged in the tasks of administration' to decide an issue which the [agency] never had a fair opportunity to resolve prior to being ushered into litigation") (internal citation omitted). As the D.C. Circuit explained just last month in a case involving a FOIA requestor who failed to appeal administratively a DOJ component's decision to withhold records:

permitting [plaintiff] to pursue judicial review without benefit of prior OIP consideration would undercut "the purposes of exhaustion, namely, 'preventing premature interference with agency processes, . . . afford[ing] the parties and the courts the benefit of [the agency's] experience and expertise, . . . [or] compil[ing] a record which is adequate for judicial review.'"

Hidalgo v. Federal Bureau of Investigation, 344 F.3d 1256, 1259 (D.C. Cir. 2003) (alteration in original) (quoting Ryan v. Bentsen, 12 F.3d 245, 247 (D.C. Cir. 1993)) (in turn quoting Weinberger v. Salfi, 422 U.S. 749, 765 (1975)).¹⁰

⁹There is one exception to this rule. A requestor may "constuctively" exhaust administrative remedies if an agency fails timely to respond to a FOIA requestor and the requestor sues before the agency cures its failure to respond. See, e.g., Oglesby, 920 F.2d at 63-66. Because EOUSA and OPA responded to plaintiff's request for expedited processing within the statutory time-frame (and before plaintiff filed suit), there is no question of constructive exhaustion on the expedition issue in this case.

¹⁰The D.C. Circuit has stated that exhaustion under FOIA is a "jurisprudential doctrine," not a "jurisdictional prerequisite." Hidalgo, 344 F.3d at 1258-59 (internal citation omitted). Thus, it has considered "the purposes of exhaustion" and the "particular administrative scheme" in determining whether to require exhaustion in FOIA cases. Id. (internal citation omitted).

EFOIA specifically requires agencies to promulgate regulations ensuring expedited appellate review of decisions whether or not to expedite handling of FOIA requests. See 5 U.S.C. § 552(a)(6)(E)(ii)(II). As we have explained, see supra pp. 5-7, DOJ has enacted regulations specifically governing appeals to OIP of expedition denials. Under the regulations, denials of expedited processing treatment are "adverse determinations" subject to the Department's administrative appeal process, see 28 C.F.R. § 16.6(c); see also id. § 16.9, and OIP must resolve such appeals "expeditiously." Id. § 16.5(d)(4). The regulations specifically inform requestors that "[i]f you wish to seek review by a court of any adverse determination, you must first appeal it under this section." 28 C.F.R. § 16.9(c).¹¹

Plaintiff does not claim that it appealed EOUSA's and OPA's expedition denials administratively to OIP (and OIP has no record of plaintiff having done so). See Declaration of Priscilla A. Jones at ¶ 2. Plaintiff argues, instead, that there is no exhaustion requirement with respect to agency expedition decisions (plaintiff does not dispute that exhaustion is required for all other FOIA claims). See Pl. S.J. Br. at 8. In support, plaintiff cites only Judge Kollar-Kotelly's unpublished decision in Al-Fayed v. Central Intelligence Agency, 2000 U.S. Dist. LEXIS 21476 (D.D.C. Sept. 20, 2000). We acknowledge the decision in Al-Fayed, but respectfully submit that case was wrongly decided.

Plaintiffs in Al-Fayed had submitted FOIA requests to numerous federal agencies (including DOJ) seeking information related to the deaths of Dodi Al Fayed and Princess Diana. See 2000 U.S. Dist. LEXIS 21476, at *2-5. "Shortly after submitting these FOIA requests,"

¹¹EPIC generally relies on the Department's EFOIA regulations throughout its brief, see, e.g., Pl. S.J. Br. at 4 n.2, 9, 12, 14, and nowhere suggests the regulations are in any way unlawful.

plaintiffs sought judicial review of "the various federal agencies' failure to respond to, or denial of, their application for expedited processing." *Id.* at *5. Rejecting the government's argument that exhaustion was required with respect to agencies that had denied plaintiffs' expedition requests as of the time of suit,¹² the court stated: "[n]othing in the statute or its legislative history . . . points to such a reading." *Id.* at * 7. According to the court, because EFOIA "authorizes judicial review for challenges to '[a]gency action *to deny or affirm denial of a request for expedited processing,*" *id.* (emphasis in original) (quoting 5 U.S.C. § 552(a)(6)(E)(iii), "[t]his 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." *Id.*¹³ The court did not discuss long-standing D.C. Circuit case law requiring exhaustion under FOIA, or agency regulations, such as DOJ's, specifically requiring exhaustion in the expedition context.

We believe this decision is wrong for several reasons.¹⁴ Contrary to the court's

¹²At the time of the court's decision, all of the agencies had responded with denials of plaintiffs' requests for expedition. *See* 2000 U.S. Dist. LEXIS 21476 at *2. With respect to agencies that had not responded as of the time of suit, plaintiffs appeared to have constructively exhausted under 5 U.S.C. § 552(a)(6)(E)(iii).

¹³The court also noted EFOIA's requirement that judicial review of expedition decisions "be based on the record before the agency at the time of the determination," *see* 5 U.S.C. § 552(a)(6)(E)(iiii), and stated: "[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." 2000 U.S. Dist. LEXIS 21476 at *8. We submit the court's interpretation is wrong for the reasons discussed below in the text; that is, there can be no agency "determination" for judicial review until a requestor constructively or actually exhausts.

¹⁴The course of litigation ultimately mooted out any potential appeal from the court's ruling. Although Judge Kollar-Kotelly rejected the government's expedition argument, she denied plaintiff's request for a temporary restraining order requiring expedited processing,

conclusion, EFOIA *does* support requiring exhaustion of expedition denials. For example, Section 552(a)(6)(E)(ii)(II) expressly requires agencies to enact regulations "ensur[ing] . . . expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing." 5 U.S.C. § 552(a)(6)(E)(ii)(II). It is hard to see why Congress would have required agencies to engage in rulemaking and establish expedited appeal procedures if requestors could simply bypass those procedures and head straight to court.

EFOIA also expressly "directs that [Section 552(a)(4)] shall govern review of denials of expedition with only one exception." Al-Fayed, 254 F.3d at 305 (citing 5 U.S.C. § 552(a)(6)(E)(iii)).¹⁵ As explained above, the D.C. Circuit has long held that FOIA plaintiffs must exhaust administrative remedies before filing suit under Section 552(a)(4). See, e.g.,

holding, among other things, that plaintiffs had not demonstrated a probability of success on the merits. See 2000 U.S. Dist. LEXIS 21476 at *14-15. After this decision, plaintiffs "returned to the agencies to supplement the administrative record and to seek expedition through administrative appeals," Al-Fayed, 254 F.3d at 302, effectively mooting the exhaustion issue. Plaintiffs then filed a second motion seeking expedited processing, which Judge Kollar-Kotelly also denied, and from which plaintiffs appealed to the D.C. Circuit. See id. at 302-03. On appeal, the Circuit Court addressed only the merits of Judge Kollar-Kotelly's decision that plaintiffs' FOIA requests did not qualify for expedited treatment and the relevant standard of review. See id. at 303.

Other than Judge Kollar-Kotelly's decision, we are not aware of any other case permitting a FOIA requestor to sue for expedited processing without first exhausting – either constructively or actually – applicable administrative remedies. Two cases, Judicial Watch, Inc. v. United States Naval Observatory and Edmonds v. Federal Bureau of Investigation, appear, at least implicitly, to accept the notion of exhaustion in the expedited processing context. See Judicial Watch, Inc., 160 F.Supp.2d at 112 (discussing long-standing rule requiring exhaustion of administrative remedies in expedition context); Edmonds, 2002 U.S. Dist. LEXIS 26578 *2-3 (where agency failed timely to respond to expedition request, court stating: "[h]aving exhausted her administrative remedies . . .").

¹⁵The exception is that judicial review of an expedition decision is on the agency record. See 5 U.S.C. § 552(a)(6)(E)(iii); Al-Fayed, 254 F.3d at 305.

Oglesby, 920 F.2d at 61-62. Indeed, the Court of Appeals requires exhaustion in part because "[t]he statutory scheme in the FOIA specifically provides for an administrative appeal process following an agency's denial of a FOIA request." Id. at 61 (citing 5 U.S.C. § 552(a)(6)(A)(i), (ii)). So, too, EFOIA specifically requires agencies to enact regulations ensuring (i) that determinations of whether to provide expedited processing are made and notice provided within ten days after the date of the request and (ii) "expeditious consideration" of administrative appeals of such determinations. See 5 U.S.C. § 552(a)(6)(E)(ii)(I), (II).

It is true, as Judge Kollar-Kotelly suggests, see Al-Fayed, 2000 U.S. Dist. LEXIS 21476, at *7, that EFOIA's legislative history does not refer to exhaustion, but that cuts in favor of, not against, an exhaustion requirement. Congress, in 1996, was legislating against a long and consistent history of courts requiring exhaustion under FOIA. See, e.g., Stebbins v. Nationwide Mut. Ins. Co., 757 F.2d 364, 366 (D.C. Cir. 1985); Crooker v. United States Secret Serv., 577 F. Supp. 1218, 1219 (D.D.C. 1983). Congress would not likely have departed from this highly developed case law without some acknowledgment it was doing so; if anything, therefore, the absence of any reference in the legislative history to exhaustion suggests Congress intended that established practice prevail.¹⁶ Cf. White v. Mercury Marine, 129 F.3d 1428, 1434 (11th Cir. 1997) ("Congress is assumed to act with the knowledge of existing case law and interpretations

¹⁶The case law does not limit exhaustion to agency withholding decisions. For example, a requestor must appeal administratively an agency refusal to waive fees in order to challenge the fee decision in court. See Oglesby, 920 F.2d at 66; Judicial Watch, Inc. v. Federal Bureau of Investigation, 190 F.Supp.2d at 33; see also 28 C.F.R. 16.6(c) (defining fee waiver denial as an "adverse determination" subject to DOJ administrative appeal process). Courts require exhaustion in the fee waiver context even though the statute says only: "In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: *Provided*, That the court's review of the matter shall be limited to the record before the agency." 5 U.S.C. § 552(a)(4)(A)(vii).

when it passes new legislation").

Against this backdrop, Al-Fayed simply misread Section 552(a)(6)(E)(iii), which, as noted above, authorizes judicial review of "[a]gency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request." 5 U.S.C. § 552(a)(6)(E)(iii). This Section, we submit, contemplates judicial review in three circumstances: (i) where the agency denies expedited processing, the requestor appeals, and the agency does not timely respond to the appeal ("agency action to deny"); (ii) where the agency denies expedited processing, the requestor appeals, and the agency affirms the denial on appeal ("agency action to . . . affirm denial"); and (iii) where the agency does not timely respond to a request for expedited processing and plaintiff files suit before receiving a response ("failure by an agency to respond in a timely manner").¹⁷ This is the only reading consistent with Section 552(a)(6)(E)(ii)(II) (which commands agencies to create an administrative appeal process for resolving expedition appeals "expeditious[ly]"), the DOJ regulations implementing Section 552(a)(6)(E)(ii)(II), and the long line of cases requiring exhaustion as a condition precedent to invoking FOIA's judicial review provision.

Requiring appeals of expedition decisions when an agency responds before suit is filed also serves the important policies underlying FOIA's exhaustion requirement. See Hidalgo, 344 F.3d at 1258-59 (failure to exhaust precludes review if the "'purposes of exhaustion' and the

¹⁷These three scenarios are consistent with the D.C. Circuit's description of exhaustion in Oglesby. See 920 F.2d at 65-66 ("Where, as discussed below, appellant has not constructively exhausted his claims, he must appeal to the agencies within 60 days from the date of the district court's order on remand from this court. Following his administrative appeals, or if the agencies do not respond within twenty days of the appeal, the appellant will be deemed to have fully exhausted his administrative remedies and may bring suit.") (footnote omitted).

'particular administrative scheme' support such a bar") (internal citation omitted). For example, requiring exhaustion would "prevent[] premature interference with agency processes," Hidalgo, 344 F.3d at 1259 (internal citations and quotations omitted), "compil[e] a record which is adequate for judicial review," id. (internal citations and quotations omitted), and preserve the "agency's power to correct or rethink initial misjudgments or errors." Id. at 1260 (internal citation and quotation omitted); see also Dettmann, 802 F.2d at 1476-77 n.8 (discussing other policies underlying exhaustion requirement). Requiring exhaustion also is particularly appropriate here, given that EOUSA and OPA invested time and resources into responding within the ten-day statutory time frame.¹⁸ Cf. Oglesby, 920 F.2d at 64.

For all of these reasons, plaintiff's motion for partial summary judgment should be denied because plaintiff failed to exhaust administrative remedies, and defendant's cross-motion should be granted.

II. PLAINTIFF FAILED TO SATISFY THE STANDARDS FOR EXPEDITED PROCESSING

Even if plaintiff's claim for expedited processing is properly before the Court, plaintiff's motion for partial summary judgment should be denied on the merits. As explained above, see supra pp. 7-10, plaintiff sought expedition from EOUSA under 28 C.F.R. § 16.5(d)(1)(ii), the "urgency to inform" standard. See 5 U.S.C. § 552(a)(6)(E)(v)(II). EOUSA's decision denying expedition is reviewed de novo. See Al-Fayed, 254 F.3d at 308. Plaintiff also sought expedition

¹⁸Requiring exhaustion also is appropriate given plaintiff's reliance on extra-record materials. If plaintiff had exhausted its administrative remedies, it could have presented to OIP the very extra-record materials it is precluded from presenting to the Court. See supra nn.7, 8. Instead, plaintiff is attempting to obtain the equivalent of an administrative appeal through this lawsuit.

from OPA under 28 C.F.R. § 16.5(d)(1)(iv), the Department's "media-related" standard. OPA's decision denying expedition is reviewed for reasonableness. See Al-Fayed, 254 F.3d at 307 n.7. As we now show, whether viewed under Section 16.5(d)(1)(ii) or Section 16.5(d)(1)(iv), plaintiff failed to satisfy the requirements for expedited processing.

A. Plaintiff Failed to Satisfy the "Urgency to Inform" Standard

In evaluating a request for expedited processing based on urgency to inform, "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. These factors must be "narrowly applied." Al-Fayed, 254 F.3d at 310 (quoting H.R. Rep. No. 104-795, at 26). Plaintiff's request failed to satisfy factors (1) and (2).¹⁹

Plaintiff contends it satisfied the first factor – current exigency to the American public – because it "provided defendant DOJ with search results from the Lexis-Nexis news database that contained 31 articles from across the country regarding the August 14 memorandum, published in a twenty-seven-day period preceding the FOIA request." Pl. S.J. Br. at 10. But this argument fails on its own terms. While plaintiff did submit with its FOIA request an attachment with "summaries" of thirty-one newspaper articles, less than half of the summaries mentioned the

¹⁹Defendants do not dispute that plaintiff's FOIA request "concerns a federal government activity." Nor do defendants dispute, for purposes of this motion, that plaintiff is an entity "primarily engaged in disseminating information" for purposes of 5 U.S.C. § 552(a)(6)(E)(v)(II).

August 14 memorandum or its subject matter. See supra p. 8.²⁰ In fact, the bulk of the articles – even those whose summaries do mention the August 14 memorandum – appear to relate primarily to a *different* subject matter, namely, a series of speeches the Attorney General gave in various cities over the summer to educate Americans about the Patriot Act.²¹ See Al-Fayed, 254 F.3d at 311 (plaintiff must establish exigency with respect to "particular aspect" of its allegations).

Defendants do not deny that the August 14 memorandum was the subject of some press coverage, including in the pieces quoted in plaintiff's September 10, 2003 request. But whatever the precise number of articles (ten, fifteen, twenty), plaintiff did not establish that the August 14 memorandum was a matter of "current exigency" to the American public. The memorandum surely was "newsworthy," but that, standing alone, is not sufficient to merit expedited processing; otherwise, the exception would swallow the rule. See Al-Fayed, 254 F.3d at 310 (subject, while "newsworthy," not a matter of "current exigency"). To merit expedited treatment (and a trip to the head of the processing queue), a FOIA requestor must show the agency that its request

²⁰It is somewhat difficult to evaluate the article "summaries" because the summaries themselves are disjointed, and simply a collection of sentence fragments from the articles. That said, only eleven of the article summaries – i.e., the summaries for articles 2, 10, 18, 19, 20, 23, 24, 26, 29, 30 & 31 of the attachment – appear to mention the August 14 memorandum or its subject matter. Articles 21 and 22 also mention the memorandum or its subject matter, but as noted supra n.4, these articles appear to be identical to articles 19 and 20.

²¹Indeed, throughout its brief, plaintiff improperly equates press coverage of various issues relating to the Patriot Act with coverage of the August 14 memorandum. See, e.g., Pl. S.J. Br. at 10-11 ("the Attorney General's public campaign in support of the Patriot Act 'produced a barrage of headlines and evening news appearances in the dozen cities he has visited in the last three weeks . . . [a]nd the 2001 Patriot Act, with his help, is perhaps among the most identifiable and hotly debated pieces of legislation in the country") (quoting a newspaper article cited in plaintiff's Lexis-Nexis search results, but never provided to EOUSA or OPA).

involves a matter of *urgency*; e.g., a "currently *unfolding* story"; id. (emphasis added); a matter of "*substantial* interest, either on the part of the American public or the media"; id. at 311 (emphasis added); or information the value of which will be lost if not disseminated quickly. Cf. id. at 311 n.12. Again, the touchstone – mandated by statute – is urgency.²² 5 U.S.C. § 552(a)(6)(E)(v)(II). Plaintiff did not make such a showing; indeed, plaintiff's request said little at all beyond quoting two newspaper editorials and a newspaper article. Compare 28 C.F.R. § 16.5(d)(3) (requestor must "explain[] *in detail* the basis for requesting expedited processing") (emphasis added). And, after quoting the editorials, plaintiff merely said: "[i]t is vital, therefore, that the public obtain as much information about the DOJ's efforts to encourage federal prosecutors to contact Congress as possible to promote effective government oversight." Hoffman Dec., Ex. 1, at 4. Plaintiff can accomplish that goal – obtaining "as much information . . . as possible" – proceeding through the processing queue in the ordinary course.

Nor did plaintiff demonstrate the second factor – that "the consequences of delaying a response would compromise a significant recognized interest." Al-Fayed, 254 F.3d at 310. Plaintiff argues that delaying response to its FOIA request would "hamper" our "democracy's interest in 'the uninhibited, robust, and wide-open debate about matters of public importance that secures an informed citizenry.'" Pl. S.J. Br. at 11 (quoting Cornelius v. NAACP Legal Def. and

²²See also Webster's Ninth New Collegiate Dictionary (1991) at 435 (defining "exigent" as "**1** : requiring immediate aid or action," and "exigency" as "**1 a** : the quality or state of being exigent"). A stringent standard for "urgency" is consistent not only with the statute's legislative history, see Al-Fayed, 254 F.3d at 310 ("compelling need" factors must be "narrowly applied") (quoting H.R. Rep. No. 104-795, at 26), but also with Congress's alternative definition of "compelling need" as "[a circumstance where] a 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).

Educ. Fund, Inc., 473 U.S. 788, 815 (1985) (other internal citations and quotations omitted)); see also Pl. S.J. Br. at 11 (noting "[t]he current and ongoing debate on the Patriot Act will be hampered by further delay in DOJ's response to plaintiff's request"). But as the D.C. Circuit observed in Al-Fayed, "[t]he public's right to know" – the *only* interest plaintiff asserts here – "although a significant and important value, would not by itself be sufficient to satisfy" the statutory standard. 254 F.3d at 310 (quoting H.R. Rep. 104-795, at 26); see also 28 C.F.R. § 16.5(d)(3) (requestor must "establish a particular urgency to inform the public about the government activity involved in the request, beyond the public's right to know about government activity generally"). This disposes of plaintiff's argument.

For all of these reasons, EOUSA properly denied plaintiff's request for expedition under 28 C.F.R. § 16.5(d)(1)(ii) because plaintiff's request did "not support a finding that there is an urgency to inform the public about an actual or alleged federal government activity." Hofmann Dec., Ex. 5.

B. Plaintiff Failed to Satisfy the Department's Media-Related Standard

Plaintiff also sought expedition under Section 16.5(d)(1)(iv), through which the Department, by regulation, expedites treatment whenever it determines that a request involves (1) "[a] matter of widespread and exceptional media interest" (2) in which there exist "possible questions about the government's integrity which affect public confidence." 28 C.F.R. § 16.5(d)(1)(iv). Requests for expedition under Section 16.5(d)(1)(iv) must be submitted to OPA, the Department's "media specialists," 63 Fed. Reg. at 29592, whose decisions are reviewed for reasonableness. See Al-Fayed, 254 F.3d at 307 n.7; see also H.R. Rep. No. 104-795, at 26

(cautioning agencies against "unduly generous use of the expedited processing procedure").

OPA appropriately denied plaintiff's request because plaintiff failed to satisfy both prongs of the DOJ standard.

Plaintiff's argument that it established "widespread and exceptional" media interest essentially repeats its argument on "current exigency," and should be rejected for the same reasons. Thus, plaintiff contends it cited "more than 30 relevant news articles in its FOIA request," Pl. S.J. Br. at 12, but as we have explained, see supra pp. 21-22 & n.20, the summaries plaintiff submitted do not support that claim. Nor, in any event, did plaintiff establish that the media had an "exceptional" interest in the August 14 memorandum. See Hofmann Dec., Ex. 5, at 1 ("the subject of your request is not one of exceptional media interest"). The bulk of the articles summarized in the attachment to plaintiff's request appeared to relate mostly – and, in many cases, solely – to the Attorney General's own efforts to educate citizens about the Patriot Act, see supra p. 22 & n.21, a separate "matter" for purposes of Section 16.5(d)(1)(iv). Compare Edmonds, 2002 U.S. Dist. LEXIS 26578 at *10 (in granting expedition, noting the "flurry of articles and television coverage" related to plaintiff's whistleblower allegations, a subject of her underlying FOIA request) (cited at page 12 of plaintiff's summary judgment brief)

Plaintiff also failed to establish that its request raised "possible questions about the government's integrity which affect public confidence." 28 C.F.R. § 16.5(d)(1)(iv). To be sure, plaintiff did quote a New York Times editorial stating that "[o]ne member of Congress, Representative John Conyers Jr., a Michigan Democrat, has charged that Mr. Ashcroft's lobbying campaign, in which United States attorneys have been asked to participate, may violate the law prohibiting members of the executive branch from engaging in grassroots lobbying"; Hofmann

Dec., Ex. 1, at 3; and a Washington Post editorial stating that "[t]his campaign . . . uncomfortably blurs the line between law and politics." Id.; see also Pl. S.J. Br. at 13 (quoting these passages).

But other than repeating one congressman's allegation, neither editorial charged, as plaintiff suggests (see Pl. S.J. Br. at 12), that the August 14 memorandum violated any anti-lobbying law. The New York Times said only that the Department was "spin-doctoring the problem." See Hofmann Dec., Ex. 1, at 3. And, while the Washington Post surely was critical of the Department's efforts to educate the public about the Patriot Act, it did not opine that the August 14 memorandum was unlawful. In fact, in a portion of the editorial not quoted by plaintiff, the Post stated: "U.S. attorneys are political appointees, and there's nothing wrong with having them explain a complicated – and controversial – new law to members of Congress who are getting questions about the Patriot Act from a jittery public." See Editorial, The Washington Post, Mr. Ashcroft's Footsoldiers, Aug. 23, 2003, A22; see also id. (noting that, "although it's rather unusual, there have been other occasions in which U.S. attorneys have been asked to educate lawmakers"); cf. Al-Fayed, 254 F.3d at 308 (in discussing statutory expedition factors, noting that decision whether to grant expedition may depend in part on "the credibility of a claimant's allegations regarding governmental activity"). Editorials often question or criticize government activities and policies; but they ordinarily do not rise to the level of creating questions about government integrity "which affect public confidence."²³

²³In addition to these editorials, plaintiff's brief also quotes passages from two articles plaintiff neglected to quote (or provide copies of) in its submission to OPA. See Pl. S.J. Br. at 12-13 (quoting Dan Eggen, Prosecutors Are Urged to Press Congress, Washington Post, Aug. 22, 2003, at A19); id. at 13 (quoting Ashcroft's Roadshow, Bangor Daily News, Aug. 28, 2003, at A10); see also supra nn.7, 8. While these quotations add nothing to plaintiff's expedition claim, by submitting such extra-record materials, plaintiff only highlights the degree to which it failed to meet its burden when requesting expedition at the agency level.

Congress has cautioned agencies not to be "unduly generous" in their use of "the expedited processing procedure." See H.R. Rep. No. 104-795, at 26 (noting such use "would unfairly disadvantage" other requestors not qualifying for expedited treatment); Al-Fayed, 254 F.3d at 310. Consistent with Congress's instruction, OPA reasonably applied the Department's regulatory criteria in determining that plaintiff's request did not meet the standard for expedited processing under Section 16.5(d)(1)(iv). For all of the reasons we have explained, this determination should be upheld.²⁴

²⁴For these reasons as well, OPA's determination should be upheld even if this Court were to apply a "de novo" review standard.

CONCLUSION

For all of the foregoing reasons, plaintiff's motion for partial summary judgment should be denied and defendant's cross-motion should be granted.

Respectfully submitted,

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Date: November 18, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION)
CENTER)
)
Plaintiff,)
)
v.) Civil Action No. 03-2078 (JR)
)
U.S. DEPARTMENT OF JUSTICE,)
)
Defendant.)
_____)

[PROPOSED] ORDER

Upon consideration of the parties' cross-motions for summary judgment on the issue of expedited processing, and of the entire record herein, it is by the Court, this _____ day of November, 2003, ORDERED that:

1. plaintiff's motion for partial summary judgment on the expedited processing issue is DENIED;
2. defendant's cross-motion for summary judgment on the expedited processing issue is GRANTED;

JAMES ROBERTSON
United States District Judge

cc: David L. Sobel
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