IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,	)	
Plaintiff,	)	
v.	)	Civil Action No. 19-cv-810 (RBW)
UNITED STATES DEPARTMENT OF JUSTICE,	)	
Defendant.	)	

DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

On March 29, 2019, the Attorney General informed Congress and the public that he anticipates that the report issued by Special Counsel Robert S. Mueller, III to the Attorney General pursuant to 28 C.F.R. § 600.8 (the "Mueller Report") will be released "by mid-April, if not sooner." Pl.'s Mot., Ex. 7 at 1, Dkt. 7-4 (letter from the Attorney General to Senator Graham and Representative Nadler (Mar. 29, 2019)). The Attorney General explained that the Department of Justice, with the assistance of the Special Counsel, is "preparing the report for release" by "making the redactions that are required." *Id.* The Attorney General further explained that the Department and the Special Counsel "are well along in the process" of redacting the nearly 400-page report. *Id.* Thus, in less than a few weeks, "[e]veryone will . . . be able to read it on their own." *Id.* at 2.

Only a few hours after the Attorney General's letter was released and widely reported in the media, Plaintiff, the Electronic Privacy Information Center ("EPIC"), filed a motion for a preliminary injunction, seeking an order compelling Defendant, the Department of Justice (the "Department" or "DOJ"), to grant expedited processing of Plaintiff's request for the Mueller Report and related records under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to immediately process Plaintiff's FOIA request, and to issue a determination on Plaintiff's FOIA request on a date certain. *See* Pl.'s Mot., Dkt. 7; Pl.'s Proposed Order, Dkt. 7-2.

Plaintiff's motion should be denied. Although Plaintiff acknowledges the Attorney General's letter, *see* Pl.'s Mem. at 10, Dkt. 7-1, and even attaches it to its motion, *see* Pl.'s Mot. at Ex. 7, Dkt. 7-4, Plaintiff inexplicably ignores the Attorney General's statements that the Department and the Special Counsel "are well along in the process" of preparing the Mueller Report for release, and that he anticipates that the report will be released "by mid-April, if not sooner." Pl.'s Mot. at Ex. 7, at 1. There is simply no reason for this Court to allow Plaintiff to circumvent this orderly process.

Even aside from the Attorney General's representation that he anticipates the Mueller Report will be released by mid-April, a preliminary injunction is not warranted because the Department of Justice has agreed to expedite processing of Plaintiff's FOIA request. *See* Ex. 1 (Declaration of Vanessa R. Brinkmann ¶ 13 (Apr. 5, 2019)). Therefore, Plaintiff's request that the Court order the Department to expedite processing of its FOIA request is moot.

And the remainder of Plaintiff's requested relief—that the Court order the Department to immediately process Plaintiff's exceptionally broad FOIA request and issue a determination on Plaintiff's FOIA request by a date certain—is merely an attempt to leap-frog ahead of other FOIA requesters and should be rejected outright. The Department of Justice has already agreed to expedite processing Plaintiff's FOIA request and will thus process its request "as soon as practicable." 5 U.S.C. § 552(a)(6)(E)(iii). That is all Plaintiff is entitled to under the law. *See id.* Plaintiff should not, by seeking emergency, injunctive relief, be permitted to bypass procedures designed to ensure fair treatment to those requesters who have also been granted expedited processing. Because Plaintiff has already received all the relief to which it is entitled at this stage in the litigation, Plaintiff's motion for a preliminary injunction should be denied.

BACKGROUND

I. Statutory and Regulatory Background

Agencies ordinarily process FOIA requests for agency records on a first-in, first-out basis. *Daily Caller v. U.S. Dep't of State*, 152 F. Supp. 3d 1, 8 (D.D.C. 2015) (citing *Open Am. v. Watergate Special Prosecution Force*, 547 F.2d 605, 616 (D.C. Cir. 1976)). In 1996, Congress amended the FOIA to provide for "expedited processing" of certain categories of requests. *See* Electronic Freedom of Information Amendments of 1996 ("EFOIA"), Pub. L. No. 104-231, § 8 (codified at 5 U.S.C. § 552(a)(6)(E)). Expedition, when granted, entitles requesters to move immediately to the front of the applicable processing queue, ahead of requests filed previously by

other persons, but at the end of the queue of other outstanding requests that have previously been granted expedited processing.

As part of EFOIA, Congress directed agencies to promulgate regulations providing for expedited processing of requests for records in the following circumstances: (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). FOIA defines "compelling need" to mean, as relevant here, "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." *Id.* § 552(a)(6)(E)(v)(II). The "other cases determined by the agency" provision (subsection (E)(i)(II)) gives agencies "'latitude to expand the criteria for expedited access' beyond cases of 'compelling need.'" *Al-Fayed v. CIA*, 254 F.3d 300, 307 n.7 (D.C. Cir. 2001) (quoting EFOIA, H.R. Rep. No. 104-795, at 26 (1996), reprinted in 1996 U.S.C.C.A.N 3448, 3469, 1996 WL 532690 (Sept. 17, 1996)).

The Department of Justice's regulations provide that "[r]equests and appeals" will be taken out of order and "processed on an expedited basis whenever it is determined that they involve," as relevant here:

> (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; . . .
>
> (iv) A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence.

28 C.F.R. § 16.5(e)(1). Standard (ii) implements the statutory "compelling need" standard; standard (iv) defines additional categories for expedition. *See* Revision of FOIA and Privacy Act Regulations and Implementation of EFOIA, 63 Fed. Reg. 29,591, 29,592 (June 1, 1998). 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(e)(4); *see also* 5 U.S.C. § 552(a)(6)(E)(iii).[1]

II. Plaintiff's FOIA Request and Request for Expedited Processing

On November 5, 2018, Plaintiff submitted a FOIA request to the Department of Justice seeking fourteen broad categories of records "concerning the investigation by Special Counsel Robert S. Mueller into Russian interference in the 2016 United States presidential election and related matters." Compl., Ex. 2 at 1, Dkt. 1-1 (EPIC FOIA request (Nov. 5, 2018)). In that request, Plaintiff sought what is now referred to as the Mueller Report—which did not exist at the time—and numerous other types of records related to the Special Counsel's Office, including "[a]ll reports concerning the status of the investigation," "[a]ll records explaining any investigative or prosecutorial step," "[a]ll referrals by the Special Counsel, Attorney General, or Acting Attorney General for administrative remedies, civil sanctions or other governmental action outside the criminal justice system," and "[a]ll drafts" of such records. *Id.* at 1–3 (quotations, ellipses, and brackets omitted).

Plaintiff also requested expedited processing of its request. *Id.* at 11–12. Plaintiff claimed that expedition was warranted because "there is an 'urgency to inform the public about an actual or alleged federal government activity,'" *id.* at 11 (quoting 28 C.F.R. § 16.5(e)(1)), and "EPIC is an organization 'primarily engaged in disseminating information,'" *id.* at 12 (quoting 28 C.F.R. § 16.5(e)(1)). Plaintiff asserted that "EPIC is also entitled to expedited processing because EPIC's

[1] In addition to expedited processing, Congress also accelerated litigation involving all FOIA claims. *See* 5 U.S.C. § 552(a)(4)(C) (providing that government defendants have 30 days in which to answer a FOIA complaint as opposed to the ordinary 60 days provided by Rule 12 of the Federal Rules of Civil Procedure). FOIA litigation is further accelerated in this District because FOIA cases are exempt from Rule 16 requirements. *See* Local Civ. Rule 16.5(c)(1). Despite these provisions allowing for expedited processing of litigation of FOIA claims, "[a] district court may of course consider FOIA cases in the ordinary course" as "[t]here is no statutory mandate for district courts to prioritize FOIA cases ahead of other civil cases on their dockets." *Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm'n*, 711 F.3d 180, 189 n.7 (D.C. Cir. 2013).

request involves '[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that would affect public confidence.'" *Id.* at 12 (quoting 28 C.F.R. § 16.5(e)(1)(iv)).

On November 15, 2018, the Department of Justice's Office of Information Policy ("OIP") acknowledged receipt of Plaintiff's FOIA request and responded on behalf of the Special Counsel's Office. Compl., Ex. 3 at 1 (letter from the Department of Justice to EPIC (Nov. 15, 2018)). In that letter, OIP stated that it had not yet completed its search to determine whether there were records within the scope of Plaintiff's request. *Id.* The letter further stated that the request fell within "unusual circumstances" because the records that Plaintiff sought required searches in and/or in consultation with other offices. *Id.* (quoting 5 U.S.C. § 552(a)(6)(B)(i)–(iii); *see also* Ex. 1 (Brinkmann Decl. ¶ 8). Accordingly, OIP informed Plaintiff that the request had been placed in the complex processing track and that OIP would not be able to respond within the twenty-working-day time limit, or within the ten additional days provided by the statute. Compl., Ex. 3 at 1–2. Finally, OIP suggested that Plaintiff "may wish to narrow the scope of [its] request to limit the number of potentially responsive records" "in an effort to speed up [OIP's] records search." *Id.* at 2.

In that same letter, OIP also denied Plaintiff's request for expedited processing, stating that "based on the information that [Plaintiff] provided," "[t]his Office cannot identify a particular urgency to inform the public about actual or alleged federal government activity beyond the public's right to know about government activities generally." *Id.* at 1. As Vanessa Brinkmann, Senior Counsel in the Office of Information Policy, explains, "Plaintiff's request for expedited processing focused on the public interest in the Special Counsel's Office's investigation and concern about foreign interference in elections generally, but did not articulate the urgency as

related to the specific records sought in Plaintiff's FOIA request." Ex. 1 (Brinkmann Decl. ¶ 10). Accordingly, although OIP "recogniz[ed] that there was, and continues to be, sustained public interest in the investigation as a whole"—"which is not a factor to be considered in evaluating the merits of a request for expedited processing"—OIP denied Plaintiff's request for expedited processing. *Id.* With regard to Plaintiff's request for expedition on the basis of "widespread and exceptional media interest in which there exist possible questions about the government's integrity that would affect public confidence," that request was directed, pursuant to Department policy, *see* 28 C.F.R. § 16.5(e)(2), to the Director of Public Affairs, who "determined that [Plaintiff's] request for expedited processing should be denied," Compl., Ex. 3 at 1.

In addition, as set forth in Ms. Brinkmann's declaration, OIP "determined that there was no 'urgency to inform the public' in part because, at the time Plaintiff's FOIA request and appeal were submitted, the investigation was still underway and many of the requested records—including the final report—did not yet exist." Ex. 1 (Brinkmann Decl. ¶ 10) (citing 28 C.F.R. § 16.5(e)(1)(ii) (2017)).

On December 21, 2018, Plaintiff administratively appealed the Department's denial of expedited processing. *See* Compl., Ex. 4 (letter from EPIC to the Department of Justice (Dec. 21, 2018)). The Department has since granted Plaintiff's request for expedited processing. *See infra* Part V.

III. The Attorney General's Letters to Congress Concerning Release of the Mueller Report

At the time Plaintiff requested records related to the Special Counsel's investigation and filed its appeal of the Department's denial of its expedition request, the Mueller Report (i.e., the "'confidential report explaining the prosecution or declination decisions'" by the Special Counsel submitted to the Attorney General, pursuant to 28 C.F.R. § 600.8(c), on March 22, 2019) did not

exist. Ex. 1 (Brinkmann Decl. ¶ 10; *see also* Pl.'s Mot., Ex. 5 (letter from the Attorney General (Mar. 22, 2019)). Indeed, it was not until March 22, 2019, that the Attorney General informed Congress that the Special Counsel "has concluded his investigation of Russian interference in the 2016 election and related matters" and had "submitted to me today a 'confidential report explaining the prosecution or declination decisions' he has reached, as required by 28 C.F.R. § 600.8(c)." Pl.'s Mot., Ex. 5 (letter from the Attorney General (Mar. 22, 2019)). In that letter, the Attorney General stated that he "remain[ed] committed to as much transparency as possible" and that he "intend[ed] to determine what other information from the report [(aside from its principal conclusions)] can be released to Congress and to the public consistent with the law, including the Special Counsel regulations, and the Department's long-standing practices and policies." *Id.*

Two days later, on March 24, 2019, the Attorney General submitted another letter to Congress, in which he "advise[d] [Congress] of the principal conclusions reached by Special Counsel Robert S. Mueller III and . . . inform[ed] [Congress] about the status of his initial review of the report [the Special Counsel] has prepared." *See* Pl.'s Mot., Ex. 6 at 1 (letter from the Attorney General (Mar. 24, 2019)). In that letter, the Attorney General reiterated that he is "mindful of the public interest in this matter," and, "[f]or that reason, [his] goal and intent is to release as much of the Special Counsel's report as [he] can consistent with applicable law, regulations, and Departmental policies." *Id.* at 4. The Attorney General determined that certain grand jury information must be redacted before the report could be released:

> Based on my discussions with the Special Counsel and my initial review, it is apparent that the report contains material that is or could be subject to Federal Rule of Criminal Procedure 6(e), which imposes restrictions on the use and disclosure of information relating to "matter[s] occurring before [a] grand jury." Fed. R. Crim. P. 6(e)(2)(B). Rule 6(e) generally limits disclosure of certain grand jury information in a criminal investigation and prosecution. *Id.* Disclosure of 6(e) material beyond the strict limits set forth in the rule is a crime in certain circumstances. *See, e.g.*, 18 U.S.C. § 401(3). This restriction protects the integrity of grand jury proceedings

> and ensures that the unique and invaluable investigative powers of a grand jury are used strictly for their intended criminal justice function.

Id. Finally, the Attorney General explained the process by which the Department would redact the grand jury information and "any information that could impact other ongoing matters" and release the report:

> Given these restrictions, the schedule for processing the report depends in part on how quickly the Department can identify the 6(e) material that by law cannot be made public. I have requested the assistance of the Special Counsel in identifying all 6(e) information contained in the report as quickly as possible. Separately, I also must identify any information that could impact other ongoing matters, including those that the Special Counsel has referred to other offices. As soon as that process is complete, I will be in a position to move forward expeditiously in determining what can be released in light of applicable law, regulations, and Departmental policies.

Id.

On March 29, 2019, the Attorney General submitted a third letter to Congress, in which he again reiterated his "desire to ensure that Congress and the public have the opportunity to read the Special Counsel's report." Pl.'s Mot., Ex. 7, at 1. The Attorney General updated Congress on the progress the Department had made in processing the Mueller Report for release:

> We are preparing the report for release, making the redactions that are required. The Special Counsel is assisting us in this process. Specifically, we are well along in the process of identifying and redacting the following: (1) material subject to Federal Rule of Criminal Procedure 6(e) that by law cannot be made public; (2) material that the intelligence community identifies as potentially compromising sensitive sources and methods; (3) material that could affect other ongoing matters, including those that the Special Counsel has referred to other Department offices; and (4) information that would unduly infringe on the personal privacy and reputational interests of peripheral third parties.

Id. The Department's "progress is such that [the Attorney General] anticipate[s] that the [Department] will be in a position to release the report by mid-April, if not sooner." *Id.* As the Attorney General emphasized, "[e]veryone will soon be able to read it on their own." *Id.* at 2.

IV. The Instant Litigation

On March 22, 2019—the same day the Attorney General first publicly acknowledged the existence of the Mueller Report—Plaintiff filed the instant lawsuit. *See* Pl.'s Compl.; Pl.'s Mot., Ex. 5 (letter from the Attorney General dated March 22, 2019). Defendants have not yet filed a response to Plaintiff's Complaint, which is not due until April 25, 2019.

On March 29, 2019—only a few hours after the Attorney General stated that he anticipates that the Mueller Report will be released "by mid-April, if not sooner"—Plaintiff filed a motion for a preliminary injunction. *See* Pl.'s Mot.; *see also id.*, Ex. 7, at 1. Plaintiff seeks an order compelling the Department of Justice to grant expedited processing of Plaintiff's FOIA request for the Mueller Report and related records, to immediately process Plaintiff's FOIA request, and to issue a determination on Plaintiff's FOIA request on a date certain. *See* Pl.'s Mot.; Pl.'s Proposed Order.

V. The Department of Justice Granted Plaintiff's Request for Expedited Processing and Will Provide a Response to Plaintiff's FOIA Request "As Soon As Practicable"

In April 2019, given the now-acknowledged existence of the Mueller Report, the Department of Justice reversed its earlier determination and granted Plaintiff's request for expedited processing. Ex. 1 (Brinkmann Decl. ¶ 13).

"Now that Plaintiff's request for expedited processing has been granted, OIP is processing Plaintiff's FOIA request and will provide a response 'as soon as practicable.'" *Id.* ¶ 29 (quoting 5 U.S.C. § 522(a)(6)(E)(iii)); *see also id.* ¶ 34. As the Department's declarant, Ms. Brinkmann, explained, "[t]here are multiple considerations that factor into when a response on an expedited request may be issued." *Id.* ¶ 29. One of the considerations is the number of other expedited FOIA requests that were granted expedition prior to Plaintiff's FOIA request. *Id.* ¶ 30. As of April 5, 2019, OIP is processing 243 requests on an expedited basis. *Id.* ¶ 18. "Plaintiff's FOIA request is

number 206 in the expedited track, which means OIP is currently processing 205 requests which were granted expedited processing ahead of Plaintiff's." *Id.* Ten of the requests pending in the expedited track are FOIA litigation matters, nine of which were granted expedited processing prior to the grant of expedited processing for Plaintiff's FOIA request.[2] *Id.*

Of the 243 FOIA requests that were granted expedition, 106 were filed by public advocacy groups similar to Plaintiff's, and many of the records sought include similarly high-profile topics as Plaintiff's request that are of great interest to the public. *Id.* ¶ 26. Indeed, "[a]s of March 29, 2019, OIP is processing 415 requests related to the Special Counsel's investigation." *Id.* ¶ 17. Of those 415 requests, 198 were received on or after March 22, 2019, *id.*, when the Attorney General informed Congress that the Special Counsel "has concluded his investigation of Russian interference in the 2016 election and related matters" and had "submitted to me today a 'confidential report explaining the prosecution or declination decisions' he has reached, as required by 28 C.F.R. § 600.8(c)," Pl.'s Mot., Ex. 5.

As a practical matter, OIP does not process each request to completion one at a time, but rather, "at each step of the search and review process the requests in a given track are prioritized on a first-in, first-out basis." Ex. 1 (Brinkmann Decl. ¶ 25). "Accordingly, OIP is processing Plaintiff's FOIA request, within each phase of the review process, behind the 205 requests already being processed ahead of Plaintiff's within the expedited track." *Id.* "Plaintiff is not entitled to jump ahead of other expedited requests simply because litigation has been filed, due to the disproportionate and inefficient effect such prioritization has on OIP's ability to process all other non-litigation and expedited requests." *Id.* ¶ 30; *see also id.* ¶ 32.

[2] Additionally, as of March 29, 2019, OIP is currently engaged in 96 ongoing FOIA litigation matters, approximately 53 of which still require records searches or document production schedules to be completed. Ex. 1 (Brinkmann Decl. ¶ 16).

Another consideration concerning processing speed is the breadth of the request. Because "Plaintiff submitted a wide-ranging request for records and it is not entirely clear what, exactly, they are seeking," "OIP will need time to discuss, both internally and with Plaintiff, how to better frame their request to locate [responsive] records." *Id.* ¶ 32. "Depending on what Plaintiff is seeking, OIP may be required to refer portions of Plaintiff's FOIA request to other components within the Department," and, like OIP, those components would "need to balance similar considerations and process Plaintiff's expedited FOIA request while balancing the expedited requests received prior to Plaintiff's." *Id.* Moreover, "[b]ased on the nature of the topic of Plaintiff's FOIA request, any responsive material may contain sensitive information that is properly exempt from release under the FOIA," so "OIP will require sufficient time to conduct a careful review of the materials to ensure that it adequately safeguards any such information from disclosure and consult with other Department components" prior to disclosure. *Id.* ¶ 33.

For these same reasons, "[i]t would be inappropriate at this time for OIP to commit to a fixed processing schedule." *Id.* ¶ 29, *see id.* ¶ 34. Plaintiff recently requested that OIP process and produce the Mueller Report by April 9, and that OIP identify, process, and release records responsive to its request for "[a]ll referrals by the Special Counsel, Attorney General, or Acting Attorney General for administrative remedies, civil sanctions or other governmental action outside the criminal justice system," and "[a]ll drafts" of such records, by April 29. *See id.* at Ex. D; *see also* Compl., Ex. 2 at 2 (quotations, ellipses, and brackets omitted). But, as stated above, the Attorney General "anticipates that we will be in a position to release the [Mueller] report by mid-April, if not sooner." Pl.'s Mot., Ex. 7 at 1. OIP has determined that "it is not practicable for the Department to process the report for release to Plaintiff in response to Plaintiff's FOIA request any earlier than the timeframe the Attorney General has already provided." Ex. 1 (Brinkmann Decl.

¶ 31). As reflected in the Attorney General's March 29, 2019 letter, the Department is identifying and redacting the report as appropriate using the same type of considerations for which FOIA provides exemptions. Pl.'s Mot., Ex. 7 at 1. Once released, there likely will be a need for more processing for FOIA purposes, if at least to align redactions with the proper exemptions. Ex. 1 (Brinkmann Decl. ¶ 31). OIP has further determined that "it would be unduly burdensome and infeasible to complete the processing" of records responsive to Plaintiff's request for "[a]ll referrals by the Special Counsel, Attorney General, or Acting Attorney General for administrative remedies, civil sanctions or other governmental action outside the criminal justice system," and "[a]ll drafts" of such records, by April 29. *Id.* ¶ 34; Compl., Ex. 2 at 2 (quotations, ellipses, and brackets omitted). These records likely contain sensitive information subject to a number of FOIA exemptions, and OIP may have to refer the request other offices within the Department for processing. *Id.* ¶ 33. In sum, "[g]iven OIP's available resources, the estimated time necessary to locate and complete the review of records at issue in Plaintiff's FOIA request, and OIP's other FOIA obligations, it would be inappropriate at this time for OIP to commit to Plaintiff's requested schedule, or a fixed processing schedule." *Id.* ¶ 34.

ARGUMENT

I. Standard of Review

Preliminary injunctive relief "is 'an extraordinary remedy never awarded as of right.'" *Friends of Animals v. U.S. Bureau of Land Mgmt.*, No. 17-0136, 2017 WL 499882, *3 (D.D.C. Feb. 7, 2017) (quoting *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24, (2008)); *see Munaf v. Green*, 553 U.S. 674, 689 (2008) ("A preliminary injunction is an extraordinary and drastic remedy") (citation omitted)). It "should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion." *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004).

A party moving for a preliminary injunction must establish (1) a substantial likelihood of success on the merits; (2) that it would suffer irreparable injury if the injunction is not granted; (3) that an injunction would not substantially injure other interested (nonmoving) parties; and (4) that the public interest would be furthered by the injunction. *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995); *see also, e.g., Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842–43 (D.C. Cir. 1977); *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). The final two "factors merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). Although the D.C. Circuit has not yet definitively decided whether *Winter* abrogates the "sliding scale" approach for assessing these four factors previously applied in this Circuit, "[s]everal judges" on the Circuit have "read *Winter* at least to suggest if not to hold 'that a likelihood of success is an independent, free-standing requirement for a preliminary injunction.'" *See Allied Progress v. Consumer Fin. Prot. Bureau*, No. CV 17-686 (CKK), 2017 WL 1750263, at *2 (D.D.C. May 4, 2017) (quoting *Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011)). This Circuit has also emphasized that a showing of irreparable harm is an "independent prerequisite" for a preliminary injunction. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006).

II. Preliminary Injunctive Relief Is Generally Not Appropriate in FOIA Cases

As an initial matter, preliminary injunctive relief is generally not appropriate in FOIA cases, for a number of reasons.

First, FOIA establishes its own specialized procedural framework controlling the processing of FOIA requests and procedures for FOIA litigation. *See, e.g.*, 5 U.S.C. § 552(a)(3)(A) (providing that a FOIA request must reasonably describe the records sought and must be filed in accordance with published rules and procedures); *id.* § 552(a)(4)(C) (requiring responsive filing

within thirty days of service of a complaint). Courts should not casually sidestep this statutory framework through issuance of preliminary relief.

In addition, the traditional purpose of a preliminary injunction is to "preserve the status quo" so that the court can issue a meaningful decision on the merits. *Cobell v. Kempthorne*, 455 F.3d 301, 314 (D.C. Cir. 2006) (citation omitted). Therefore, when, as here, a movant seeks mandatory injunctive relief, *i.e.*, an injunction that "would alter, rather than preserve, the status quo by commanding some positive act—the moving party must meet a higher standard than in the ordinary case by showing clearly that he or she is entitled to relief or that extreme or very serious damage will result from the denial of the injunction." *Elec. Info. Privacy Ctr. v. U.S. Dep't of Justice*, 15 F. Supp. 3d 32, 39 (D.D.C. 2014) (citations omitted); *see also Nat'l Conf. on Ministry to the Armed Forces v. James*, 278 F. Supp. 2d 37, 43 (D.D.C. 2003) ("A district court should not issue a mandatory preliminary injunction unless the facts and law clearly favor the moving party." (quotation omitted)). An order compelling accelerated processing of a FOIA request would not merely preserve the status quo but would force specific action by Defendant.

Finally, because preliminary injunctive relief is not intended to provide plaintiffs with a means to bypass the litigation process and achieve rapid victory, "a preliminary injunction should not work to give a party essentially the full relief he seeks on the merits." *Dorfmann v. Boozer*, 414 F.2d 1168, 1173 n.13 (D.C. Cir. 1969) (per curiam); *see also Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) ("[I]t is generally inappropriate for a federal court at the preliminary injunction stage to give a final judgment on the merits."). As Plaintiff has indicated, however, that is essentially what it seeks here: an injunction that the Department "immediately process and make a determination on EPIC's FOIA request and produce responsive records as soon as practicable." Pl.'s Mem. 17. That is further indication that Plaintiff's motion is merely a tactic to circumvent

the standard litigation process. *See Daily Caller*, 152 F. Supp. 3d at 6–7 (noting that "in seeking a preliminary order requiring the State Department to process fully the plaintiff's outstanding FOIA requests, and produce all responsive non-exempt documents within twenty business days, the plaintiff essentially requests the full relief it seeks in filing its underlying Complaint").

Indeed, rather than treating a preliminary injunction as an "extraordinary and drastic remedy," *Munaf*, 553 U.S. at 689, Plaintiff seeks an emergency, mandatory injunctions as a means of jumping ahead of other requests (including those already in the expedited processing track) and requests that have been in litigation longer than these newly-filed cases. Not only is this procedure unfair to other FOIA requesters, but it also results in burdensome and unnecessary motion practice for the parties and the Court. That is especially true where, as here, Defendant has agreed to process Plaintiff's request on an already expedited basis. Ex. 1 (Brinkmann Decl. ¶ 13).

For these reasons, Courts in this district routinely deny requests for preliminary injunctions in FOIA cases. *See, e.g.*, *Long v. U.S. Dep't of Homeland Sec.*, 436 F. Supp. 2d 38, 44 (D.D.C. 2006) (given the "broad scope of plaintiff's requests," denying motion for preliminary injunction to compel processing within twenty days, and explaining that "[t]he government has not yet had a chance to review its files, prepare and file a dispositive motion, and provide the Court the information necessary to make a decision on any material that might be subject to an exemption"); *Allied Progress*, 2017 WL 1750263, at *1 (denying request for a preliminary injunction mandating expedited processing and production where requester failed to show a likelihood of success on the merits and irreparable harm); *Elec. Privacy Info. Ctr. v. U.S. Dep't of Justice*, No. 03-2078, slip op. at 1 (D.D.C. Oct. 20, 2003), Dkt. 4 (denying, *sua sponte*, a request "'enjoining defendant DOJ from continuing to deny plaintiff expedited processing of plaintiff's Freedom of Information Act request'" because such relief "would effectively grant all the relief plaintiff seeks"), *vacated as*

moot 2004 WL 2713119 (D.C. Cir. 2004).[3] The Court should similarly deny Plaintiff's motion for preliminary injunctive relief here.

III. Even if Preliminary Injunctive Relief Were Appropriate in FOIA Cases, Plaintiff Has Failed to Meet its Heavy Burden to Show Entitlement to a Preliminary Injunction in this Case

A. Plaintiff Has Failed to Establish a Likelihood of Success on the Merits

Before a court may enter a preliminary injunction, "[i]t is particularly important for the movant to demonstrate a substantial likelihood of success on the merits," because "absent a substantial indication of likely success on the merits, there would be no justification for the [C]ourt's intrusion into the ordinary processes of administration and judicial review." *Hubbard v. United States*, 496 F. Supp. 2d 194, 198 (D.D.C. 2007) (internal quotation marks and citation omitted). Here, Plaintiff cannot do so.

Plaintiff argues that it "is likely to succeed on its claim that the DOJ unlawfully refused to process EPIC's FOIA request on an expedited basis." Pl.'s Mem. 21; *see also id.* at 21–24. But the Department has since granted expedited processing of Plaintiff's FOIA request. Ex. 1

[3] *See also, e.g.*, *Wadelton v. Dep't of State*, 941 F. Supp. 2d 120, 124 (D.D.C. 2013) (denying request for a preliminary injunction to expedite processing where requester failed to meet all four elements); *Landmark Legal Found. v. EPA*, 910 F. Supp. 2d 270, 279 (D.D.C. 2012) (denying request for a preliminary injunction to expedite processing where agency stated request is already at the top of the queue and requester failed to meet other elements); *Al-Fayed v. CIA*, No. 00-20292, 2000 WL 34342564, *6 (D.D.C. Sept. 20, 2000) (finding that "upon consideration of the parties' arguments, the statutory and regulatory context, and the applicable case law," emergency relief was not warranted despite the agency's delay in responding to FOIA requests), *aff'd*, 254 F.3d 300 (D.C. Cir. 2001); *Judicial Watch v. U.S. Dep't of Justice*, No. 00-1396, slip op. at 1 (D.D.C., June 27, 2000), Dkt. 4 (denying plaintiff's "emergency motion for expedited treatment" to "compel defendant to respond to plaintiff's Freedom of Information Act request" and noting that the FOIA "was not designed and does not operate as a vehicle to provide immediate and continuing access to government records through litigation"). Courts in other districts do so as well. *See, e.g.*, *Aronson v. U.S. Dep't of Hous. & Urban Dev.*, 869 F.2d 646, 648 (1st Cir. 1989) (Breyer, J.) (denying preliminary injunction); *Pinnacle Armor, Inc. v. United States*, No. 07-1655, 2008 WL 108969, at *9 (E.D. Cal. Jan. 7, 2008) (denying injunctive relief and noting that "[p]laintiff has not provided any authority for the proposition that the claim for the Freedom of Information Act supports a claim for an injunction"); *Carlson v. USPS*, No. 02-5471, 2005 WL 756573, at *8 (N.D. Cal. Mar. 31, 2005) (denying request for injunction sought to compel "timely" response to FOIA request); *Beta Steel Corp. v. NLRB*, No. 2:97 CV 358, 1997 WL 836525, at *2 (N.D. Ind. Oct. 22, 1997) (denying preliminary injunction); *cf. Wiedenhoeft v. United States*, 189 F. Supp. 2d 295, 29697 (D. Md. 2002) (refusing to issue temporary restraining order to force "immediate compliance" with plaintiff's FOIA requests by moving them "to the head of the queue forthwith").

(Brinkmann Decl. ¶ 13). Accordingly, Plaintiff's request for injunctive relief to secure expedited processing of is FOIA request is moot. *See Daily Caller*, 152 F. Supp. 3d at 5 n.2 (declining to enter a preliminary injunction upon finding that the plaintiff's request for expedited processing had been granted by the agency, rendering the requested relief moot). Because Plaintiff's request for expedited processing is moot, Plaintiff cannot show a likelihood of success on the merits of this claim. *See Landmark Legal Found. v. EPA*, 910 F. Supp. 2d 270, 275 (D.D.C. 2012) (stating that "the Court believes that Landmark's request for expedited processing may be moot" and "[i]f it is, this alone would prevent Landmark from showing a likelihood of success").

Plaintiff also argues that it is likely to succeed on its claim that "the DOJ violated the statutory processing deadlines set forth in 5 U.S.C. § 552(a)(6)" by failing to make a determine within 20 working days and by failing to issue a determination on its FOIA appeal concerning expedited processing within 20 working days. Pl.'s Mem. 20–21. But the consequence for a violation of the processing timeline is that Plaintiff is entitled to file suit in district court, and its suit is not barred by a defense that the Plaintiff has not exhausted administrative remedies. *Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm'n*, 711 F.3d 180, 189 (D.C. Cir. 2013) ("If the agency does not adhere to FOIA's explicit timelines, the 'penalty' is that the agency cannot rely on the administrative exhaustion requirement to keep cases from getting into court."); *see also Elec. Info. Privacy Ctr.*, 15 F. Supp. 3d at 40 ("[N]othing in the FOIA statute establishes that an agency's failure to comply with this 20–day deadline automatically results in the agency's having to produce the requested documents without continued processing, as EPIC suggests.").

Moreover, the fact that the Department has now granted expedited processing of Plaintiff's request does not entitle Plaintiff to any relief by the Court. The expedited processing provisions of FOIA do not dictate a specific, compressed schedule for the processing of expedited requests;

rather, the statute directs an agency to "process *as soon as practicable* any request for records to which the agency has granted expedited processing." 5 U.S.C. § 552(a)(6)(E)(iii) (emphasis added). Requests granted expedited treatment are placed ahead of other requests that have not been granted expedited treatment, but a grant of expedited treatment is not an assurance of immediate processing. Multiple requests may be granted expedited treatment at any given time, and there is no direct limit or check on the number of requests or the proportion of total requests granted expedited processing.

A Senate Judiciary Committee report explained the expedited processing provisions as follows:

> Once . . . the request for expedited access is granted, the agency must then proceed to process that request "as soon as practicable." No specific number of days for compliance is imposed by the bill since, depending upon the complexity of the request, the time needed for compliance may vary. The goal is not to get the request for expedited access processed within a specific time frame, but to give the request priority for processing more quickly than otherwise would occur.

Electronic Freedom of Information Improvement Act of 1995, S. Rep. No. 104-272 at 18 (1996), *available at* 1996 WL 262861. Accordingly, this Court has recognized that when expedited treatment is warranted, the statute requires that "requests must be 'process[ed] as soon as practicable.'" *Protect Democracy Project, Inc. v. U.S. Dep't of Def.*, 263 F. Supp. 3d 293, 296 (D.D.C. 2017) (quoting 5 U.S.C. § 552(a)(6)(E)(iii)).

Finally, Plaintiff argues that it is "likely to succeed on its claim that the DOJ has unlawfully withheld records responsive to EPIC's FOIA Request." Pl.'s Mem. 24. But at the time Plaintiff submitted its FOIA request in November 2018, the Mueller Report did not exist. *See* Ex. 1 (Brinkmann Decl. ¶ 10); *see also* Pl.'s Mot. Ex. 5. And many of the records Plaintiff seeks are exempt from disclosure. As the Attorney General explained in his letters to Congress, the Mueller Report itself contains several categories of information that are plainly exempt from disclosure

under FOIA. *See* Pl.'s Mot., Ex. 7, at 1. Those include (1) "material subject to Federal Rule of Criminal Procedure 6(e) that by law cannot be made public" (i.e., certain grand jury information); (2) "material the intelligence community identifies as potentially compromising sensitive sources and methods;" (3) "information that could affect other ongoing matters, including those that the Special Counsel has referred to other Department offices;" and (4) "information that would unduly infringe on the personal privacy and reputational interests of peripheral third parties." *See id.*; *see also id.*, Ex. 6 at 4. Each of these categories coincides with well-established FOIA exemptions. *See* 5 U.S.C. § 552(b)(1), (b)(3), (b)(6), (b)(7); *see also, e.g.*, *Toensing v. U.S. Dep't of Justice*, 999 F. Supp. 2d 50, 60 (D.D.C. 2013) (finding that grand jury material subject to Federal Rule of Criminal Procedure 6(e) is "exempt from disclosure under FOIA Exemption 3"); *Larson v. U.S. Dep't of State*, 565 F.3d 857, 863, 865, 868–69 (D.C. Cir. 2009) (finding that agencies properly protected "information relating to 'intelligence sources and methods'" under Exemption 1 and Exemption 3); *Manning v. U.S. Dep't of Justice*, 234 F. Supp. 3d 26, 35 (D.D.C. 2017) (finding that the agency properly withheld information concerning an ongoing investigation under Exemption 7).

Aside from Plaintiff's request for the Mueller Report itself, many, if not all, of Plaintiff's other requests are, on their face, overbroad and/or subject to exemptions. Plaintiff requested fourteen categories of records touching on numerous aspects of the Special Counsel's "investigation into Russian interference with the presidential election" and "related matters." Compl., Ex. 2 at 1. For example, Plaintiff seeks "[a]ll reports concerning the status of the investigation," "[a]ll records explaining any investigative or prosecutorial step," and "[a]ll referrals by the Special Counsel, Attorney General, or Acting Attorney General for administrative remedies, civil sanctions or other governmental action outside the criminal justice system." *Id.* at 1–3

(quotations, ellipses, and brackets omitted). Such records likely would be subject to several exemptions. *See, e.g.*, *Heggestad v. U.S. Dep't of Justice*, 182 F. Supp. 2d 1, 8–12 (D.D.C. 2000) (finding that prosecution memoranda were exempt from disclosure under Exemption 5 because they constituted attorney work product and were covered by the deliberative process privilege); *Worldnetdaily.com, Inc. v. U.S. Dep't of Justice*, 215 F. Supp. 3d 81, 85 (D.D.C. 2016) (finding that a memorandum from memo from DOJ prosecutors to superiors recommending against prosecution was protected from disclosure under the deliberative process privilege). As another example, Plaintiff seeks "drafts" of each category of records. Compl., Ex. 2 at 1–3. Courts have routinely found that drafts are exempt from disclosure under Exemption 5. *See, e.g.*, *Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (withholding draft manuscript because release could lead to "confusion of the public"); *Nat'l Sec. Archive v. CIA*, 859 F. Supp. 2d 65, 70–72 (D.D.C. 2012), *aff'd* 752 F.3d 460 (D.C. Cir. 2014) (allowing agency to withhold entire volume of multivolume agency history because volume in question was a draft and was not included in final published version).

Accordingly, because Plaintiff cannot show a likelihood of success on the merits—indeed, to the contrary—its motion for a preliminary injunction should be denied.

B. Plaintiff Has Failed To Establish that it Will Suffer Irreparable Harm or that a Mandatory Injunction Would Cure Any Alleged Harm

"[T]he basis of injunctive relief in the federal courts has always been irreparable harm." *CityFed Fin. Corp.*, 58 F.3d at 747 (quoting *Sampson v. Murray*, 415 U.S. 61, 88 (1974), internal quotation marks omitted). The D.C. Circuit "has set a high standard for irreparable injury." *In re Navy Chaplaincy*, 534 F.3d 756, 766 (D.C. Cir. 2008) (internal quotation marks and citation omitted). The party seeking injunctive relief must show that its injury is "both certain and great," and that it is "actual and not theoretical." *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir.

1985) (per curiam). It is a "well known and indisputable principle[]" that a "unsubstantiated and speculative" harm cannot constitute "irreparable harm" sufficient to justify injunctive relief. *Id.* In short, "[t]he key word in this consideration is *irreparable*. . . . The possibility that adequate . . . corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm." *Id.* (quoting *Va. Petroleum Jobbers Ass'n*, 259 F.2d at 925). Thus, in the rare instances where courts have granted preliminary injunctions in FOIA cases, the courts have done so upon finding that the plaintiff would be irreparably harmed by an actual, impending deadline. *See, e.g.*, Minute Order, *Nat'l Immigration Law Ctr. v. U.S. Dep't of Homeland Sec.*, No. 19-cv-866 (D.D.C. Apr. 1, 2019) (finding that the plaintiff established "irreparable harm" because "if Plaintiff is unable to obtain the information sought in its FOIA request, the individuals Plaintiff represents in Tennessee may lose their ability to pursue *Bivens* claims due to the imminent lapsing of the relevant statute of limitations"); *Wash. Post v. Dep't of Homeland Sec.*, 459 F. Supp. 2d 61, 75 (D.D.C. 2006) ("Because the urgency with which the plaintiff makes its FOIA request is predicated on a matter of current national debate, due to the impending election [(which was only three weeks away)], a likelihood for irreparable harm exists if the plaintiff's FOIA request does not receive expedited treatment."); *Aguilera v. Federal Bureau of Investigation*, 941 F. Supp. 144, 151–52 (D.D.C. 1996) (finding, in a case where the agency refused expedition, because the documents at issue were key evidence in an evidentiary hearing that a trial court had scheduled for the near future regarding the requester's conviction for murder, a preliminary injunction requiring the FBI to expedite the processing of plaintiff's FOIA request was warranted); *Cleaver v. Kelley*, 427 F. Supp. 80, 81–82 (D.D.C. 1976) (granting a preliminary

injunction and ordering expedited processing of plaintiff's FOIA request where plaintiff had been indicted for attempted murder and assault, and trial was scheduled to begin in a month).

Moreover, the movant "'must demonstrate a causal connection between the alleged harm and the actions to be enjoined; a preliminary injunction will not issue unless it will remedy the alleged injuries.'" *Navistar, Inc. v. EPA*, No. 11-cv-449(RLW), 2011 WL 3743732, at *2 (D.D.C. 2011) (quoting *Hunter Group, Inc. v. Smith*, 164 F.3d 624 (4th Cir. 1998) (per curiam)). Because Plaintiff has not made the requisite showing of an actual, nonspeculative injury that could be remedied by preliminary injunctive relief, its motion should be denied on this basis alone. *Cf. Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep't of Hous. & Urban Dev.*, 639 F.3d 1078, 1088 (D.C. Cir. 2011) (noting that if one requirement is not met then "there is no need to consider the remaining factors").

Plaintiff argues that it will suffer harm because, "absent the requested preliminary injunction, EPIC will be precluded from obtaining in a timely fashion information vital to the current and ongoing debate concerning Russian election interference and the Special Counsel investigation." Pl.'s Mem. at 27 (quotation and ellipsis omitted). Plaintiff further argues that a delay in the production of the Mueller Report will result in it becoming "stale information . . . of little value." *Id.* at 25. But the Department has granted Plaintiff's request for expedition and will process its request "as soon as practicable." 5 U.S.C. § 552(a)(6)(E)(iii); Ex. 1 (Brinkmann Decl. ¶¶ 29, 34). Plaintiff plainly suffers no harm by receiving all it is entitled to under the law.

Moreover, as Plaintiff acknowledges, "the public and the news media have focused extraordinary attention on Russian election interference; the Special Counsel investigation into such interference; the potential involvement of the President in a foreign campaign to influence the 2016 election; and possible obstruction of justice by the President while in office," Pl.'s Mem.

at 26—to the tune of "941,000 news articles containing the terms 'Robert Mueller' and 'Russia,'" *id.* at 23–24. The argument that the public and the media will lose interest in the Mueller Report or that the information contained therein will be of little value to them if Plaintiffs' requests are processed according to the normal expedited procedures—strains credulity.

Plaintiff next argues that the records it seeks "are also highly relevant to specific events and proceedings that are ongoing or imminent." Pl.'s Mem. 27. As one example, Plaintiff asserts that "the Mueller Report and related Special Counsel records would provide EPIC with essential context concerning the still-active criminal cases brought by the Special Counsel's Office." *Id.* But, as set forth above, the very fact that there are ongoing investigative matters and cases makes it likely that many of the requested records would be exempt from disclosure. *See supra* Part III.A. In the absence of a showing that EPIC would likely be entitled to a significant release of documents, Plaintiff cannot meet its burden to establish that it will be irreparably harmed if it fails to receive a determination on an expedited timeframe. *See Elec. Privacy Info. Ctr.*, 15 F. Supp. 3d at 46 (finding that a requestor "cannot claim to be injured—much less 'irreparably' so—if the [defendant] withholds documents that that [plaintiff] is not entitled to access in the first instance"); *Landmark*, 910 F. Supp. 2d at 278 (finding no irreparable injury where, among other things, "there is no guarantee, even if the Court were to issue a preliminary injunction that the records Landmark seeks would be disclosed"); *Nation Magazine v. Dep't of State*, 805 F. Supp. 68, 74 (D.D.C. 1992) (denying preliminary injunction on ground that plaintiff had failed to demonstrate irreparable harm because "[e]ven if this Court were to direct the speed up of processing of their requests, [plaintiffs] have not shown at this time that they are entitled to the release of the documents that they seek" as "it is undisputed that at least some of the documents are probably exempt from production under FOIA").

Plaintiff also asserts that because "Congress is moving forward with its own investigation and oversight activities concerning Russian interference and the Special Counsel probe," Pl.'s Mem. 27, "[p]ublic access to the Mueller Report and related records is necessary to ensure that EPIC can follow, evaluate, and provide expert input concerning these congressional proceedings," *id.* at 28. But as the Attorney General has stated in his March 29 letter to Chairmen Graham and Nadler, "I share your desire to ensure that Congress and the public have the opportunity to read the Special Counsel's report. We are preparing the report for release, making the redactions that are required." *Id.* at Ex. 7, at 1. And the Attorney General has stated his willingness to testify before Congress in early May. *Id.* at Ex. 7, at 2. If Plaintiff wishes to "follow, evaluate, and provide expert input concerning these congressional proceedings," Pl.'s Mem. 28, Plaintiff likely will have ample opportunity to review the Mueller Report and provide input prior to the Attorney General's testimony. Plaintiff does not explain how it will be harmed, much less irreparably so, by receiving the redacted report in approximately mid-April.

In addition, Plaintiff cites to a statement by the President and argues that, "[a]ccess to the Mueller Report is vital to accessing the validity of the President's demand for an investigation" of "the persons responsible for the 'illegal' Special Counsel probe" "before any such investigation begins." Pl.'s Mem. 28. But the President did not state that an investigation had begun or was imminent; instead, the President merely expressed that "hopefully, somebody is going to look at the other side." Remarks by President Trump Before Air Force One Departure, The White House (Mar. 24, 2019), *available at* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-air-force-one-departure-7/. Thus, any injury Plaintiff faces is merely speculative and insufficient to establish irreparable harm. *See Wisc. Gas Co.*, 758 F.2d at 674. In any event,

Plaintiff again does not explain how it will be harmed if Plaintiffs' requests are processed according to the normal expedited procedures.

Plaintiff cites to "the first scheduled presidential primary debate" in June and argues that "the Mueller Report and related records are critical to the public's understanding of the election interference techniques used by Russia, techniques that may be deployed again in the 2020 presidential election." Pl.'s Mem. 28. Again, however, the Attorney General anticipates releasing the redacted Mueller Report by approximately mid-April, before the June presidential primary debate, and well before the 2020 primaries or general election. Plaintiff does not explain how it is prejudiced by the report's release at that time or how it will be harmed if Plaintiffs' requests are processed according to the normal expedited procedures.[4]

Finally, Plaintiff argues that "the DOJ's unlawful refusal to expeditiously process EPIC's FOIA Request prevents EPIC from sharing information with the public at a critical moment in the national discourse, thereby causing EPIC irreparable harm." Pl.'s Mem. 30. But the Department has granted Plaintiff's request for expedition. Ex. 1 (Brinkmann Decl. ¶ 13). Thus, Plaintiff suffers no harm.

For all of these reasons, Plaintiff has failed to meet is heavy burden of showing of irreparable harm and has accordingly demonstrated no reason for the Court to invoke its emergency powers at this early stage in the litigation.

C. The Balance of Equities and the Public Interest Weigh Against a Preliminary Injunction

Along with alleged harm to Plaintiff, the Court must consider whether a preliminary injunction of the sort demanded by Plaintiff would be in the public interest or harm nonlitigants.

[4] Plaintiff appears to be describing a harm that is suffered primarily by the public, not by Plaintiff itself. That harm is more properly considered when weighing the public interest factor in the injunction analysis—and, as explained below, in this case the public interest counsels against the award of the preliminary injunction Plaintiff seeks.

See Al-Fayed, 254 F.3d at 303. The relief Plaintiff seeks is not in the public interest and would harm nonlitigants, and for this reason as well, Plaintiff's motion should be denied. *See Wadelton v. Dep't of State*, 941 F. Supp. 2d 120, 124 (D.D.C. 2013) ("Plaintiffs argue that a preliminary injunction will be in the public interest, based on little more than the core purpose of FOIA being to 'allow the public to be informed about "what their government is up to". . . . This explanation does nothing to distinguish plaintiffs' FOIA request from any other FOIA request. Therefore, the Court finds that plaintiffs fail to satisfy the public interest prong." (citations omitted)).

Plaintiff's request for the proposed preliminary injunction threatens to compromise the delicate balancing of interests that Congress undertook in enacting FOIA. Importantly, granting accelerated processing of Plaintiff's request would disadvantage other, similarly situated members of the press (or the public) who themselves have FOIA requests pending before the Department of Justice (some of which also may be viewed as urgent by the requestors) that have been granted expedited processing. *See* Ex. 1 (Brinkmann Decl. ¶¶ 26, 30, 32); *see also Baker v. Consumer Fin. Prot. Bureau*, No. CV 18-2403(CKK), 2018 WL 5723146, at *5 (D.D.C. Nov. 1, 2018) (finding that a "preliminary injunction ordering the immediate processing and release of the requested records" "would harm the approximately 100 other requesters . . . in line ahead of Plaintiff and would erode the proper functioning of the FOIA system"). Because the Department has granted expedited processing of Plaintiff's FOIA request, Ex. 1 (Brinkmann Decl. ¶ 13), the Department will process the request before FOIA requests filed previously by other persons, but after other outstanding requests that have previously been granted expedited processing, *see id.* ¶ 25. Although Plaintiff argues that an injunction would not affect other FOIA requesters, Pl.'s Mem. 31, ordering the Department to complete Plaintiff's request on an artificial timeline would require that resources be diverted from those other requests that have already been granted

expedited processing and thus, would undermine their interests as well as the overall public interest in proper operation of the FOIA, including its provision for expedition. *See Nation Magazine*, 805 F. Supp. at 74 (entry of a preliminary injunction expediting a FOIA request over other pending requests "would severely jeopardize the public's interest in an orderly, fair, and efficient administration of [ ] FOIA"); *Elec. Privacy Info. Ctr.*, 15 F. Supp. 3d at 47 (D.D.C. 2014) ("[A]llowing [a plaintiff] to jump to the head of the line would upset the agency's processes and be detrimental to the other expedited requesters, some of whom may have even more pressing needs."); *Protect Democracy Project*, 263 F. Supp. 3d at 303 ("[R]equiring production by a date certain, without any factual basis for doing so, might actually disrupt FOIA's expedited processing regime rather than implement it."); *see also* Ex. 1 (Brinkmann Decl. ¶¶ 26, 30).

In addition, granting Plaintiff's request for an infeasible and extraordinary processing schedule would compromise the public interest in ensuring that certain types of documents, the disclosure of which would cause harm, are carefully redacted consistent with the FOIA exemptions. *See* Ex. 1 (Brinkmann Decl. ¶ 33). The exemptions listed in § 552(b) embody a judgment by Congress that the public interest would best be served by allowing agencies to withhold certain records—for example, classified information and those records whose disclosure would interfere with effective law enforcement, 5 U.S.C. § 552(b)(7). Indeed, Congress specifically recognized that, in certain cases, depending on the subject matter of the request, additional time would be required to ensure that the public's interest in preventing the public disclosure of these exempted documents was not compromised. *See* H.R. Rep. No. 104-795, 1996 U.S.C.C.A.N. at 3466 ("In underscoring the requirement that agencies respond to requests in a timely manner, the Committee does not intend to weaken the interests protected by the FOIA exemptions. Agencies processing some requests may need additional time to adequately review

requested material to protect these exemption interests."). Ordering the Department to disclose documents, not "as soon as practicable" as dictated by FOIA, 5 U.S.C. § 552(a)(6)(E)(iii), but rather on any artificial, accelerated timetable, threatens to risk disclosure of statutorily exempt material. *See Daily Caller*, 152 F. Supp. 3d at 14 ("Requiring the agency to process and produce [requested] materials under an abbreviated deadline raises a significant risk of inadvertent disclosure of records properly subject to exemption under FOIA."); *Protect Democracy Project*, 263 F. Supp. 3d at 302 ("Imposing on Defendants an arbitrary deadline for processing would run the risk of overburdening them, and could even lead to the mistaken release of protected information."); *Baker*, 2018 WL 5723146, at *5 ("Ordering Defendant to process and release documents according to Plaintiff's timeline risks that, in its haste, Defendant will inadvertently release records which fall under a FOIA exception and Congress has decided should not be released."); *see also* Ex. 1 (Brinkmann Decl. ¶ 33). For this reason as well, the public interest weighs in favor of applying the normal, statutorily provided processing schedule to Plaintiff's request.

Moreover, the Executive Branch is currently in discussions with Congress over the anticipated release of the Mueller Report, and a court order setting a premature deadline could disrupt that ongoing process. The confidential report is a sensitive Executive Branch document, and the Executive has stated its willingness to accommodate Congress's desire to see much of the report. Given these negotiations and the ongoing accommodation process, a court order in this case could preempt or disrupt those ongoing negotiations between the two branches. Such a disruption is contrary to the public interest.

Finally, the Attorney General has already stated that he anticipates public release of the Mueller Report with the appropriate redactions within a short time frame. *See* Pl.'s Mot., Ex. 7 at

1. The public interest is best served by permitting the expeditious processing and release of that report, without diverting resources with unnecessary and unjustified litigation.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's Motion for a Preliminary Injunction.

Dated: April 5, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2019, I electronically transmitted the foregoing to the parties and the clerk of court for the United States District Court for the District of Columbia using the CM/ECF filing system.

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