

Exhibit 4

VIA MAIL

December 21, 2018

Director, Office of Information Policy
United States Department of Justice, Suite 11050
1425 New York Avenue, NW
Washington, DC 20530-0001

Freedom of Information Act Appeal, DOJ-2018-000676 (OIP)

This letter constitutes an appeal of the U.S. Department of Justice's ("DOJ") Office of Information Policy's ("OIP") denial of expedited processing under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(6)(E)(i), and the DOJ's FOIA regulation, 28 C.F.R. § 16.5(e)(4). The FOIA request was submitted on behalf of the Electronic Privacy Information Center ("EPIC") to the DOJ on November 5, 2018 ("EPIC's FOIA Request").

EPIC's FOIA Request sought records in possession of the DOJ concerning the investigation by Special Counsel Robert S. Mueller into Russian interference in the 2016 United States presidential election and related matters. EPIC's FOIA Request established that there is an "urgency to inform the public" about a matter "concerning actual or alleged Federal government activity" and that EPIC is "primarily engaged in disseminating information." *See* Appendix A.

The DOJ now contends that there is no need to grant expedited processing for the release of records about the ongoing investigation by Special Counsel Mueller into Russian interference in the 2016 presidential election. In an acknowledgement letter from the DOJ, dated November 15, 2018, the DOJ denied EPIC's request for expedited processing of EPIC's FOIA Request under two different standards, both of which EPIC satisfied with specific facts.

First, EPIC established that there is "[a]n urgency to inform the public about an actual or alleged federal government activity" that is "made by a person primarily engaged in disseminating information. 28 C.F.R. § 16.5(d)(ii). But the DOJ concluded that, "based on the information [EPIC] provided," "[t]he Office cannot identify a particular urgency to inform the public about an actual or alleged federal government activity beyond the public's right to know about government activities generally." *See* Appendix B.

Second, EPIC established that there is "[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(a)(1)(iv). Yet the DOJ letter stated that the Director of Public Affairs denied EPIC's request for expedited processing without further justification for this conclusion. *See* Appendix B.

The DOJ's determination should be reversed. According to the relevant DOJ FOIA regulation, a request will be processed on an expedited basis whenever the request involves (1)

“[a]n urgency to inform the public about an actual or alleged Federal government activity, if made by a person who is primarily engaged in disseminating information” or (2) “[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).

EPIC’s FOIA Request made clear that EPIC is “primarily engaged in disseminating information” and that there is an “urgency to inform the public” about a government activity. EPIC’s FOIA Request also made clear that the Special Counsel’s reports and related material are a “matter of widespread and exceptional media interest” and that “there exists possible questions about the government’s integrity that affect public confidence.” EPIC’s FOIA Request presented specific facts demonstrating that—according to major news organizations and President Trump’s own attorneys—the Special Counsel intends to transmit one or more reports detailing his findings.

Based on the voluminous press coverage of, and intense public interest in, the Special Counsel’s investigation, it is clear that the public urgently needs to know the details of the Special Counsel’s findings. The American public is deeply concerned about the scope of Russian interference in the 2016 presidential election. The potential involvement of President Trump in a foreign campaign to influence an election unquestionably bears on the integrity of the government and inevitably affects public confidence. So, too, does the government’s capacity to protect U.S. election systems and democratic institutions against foreign attacks. The Special Counsel’s reports would shed significant light on both of these matters.

EPIC hereby appeals the DOJ’s denial of expediting processing of EPIC’s FOIA Request. EPIC should be granted expedited processing.

Procedural Background

On November 5, 2018, EPIC submitted EPIC’s FOIA Request to the DOJ via facsimile. EPIC specifically requested:

- (1)(a) All “report[s]” and “closing documentation” prepared under 28 C.F.R. § 600.8(c), whether or not such records were actually provided to the Attorney General or Acting Attorney General;
- (b) All drafts, outlines, exhibits, and supporting materials associated with any actual or planned “report” or “closing documentation” under 28 C.F.R. § 600.8(c);
- (2)(a) All “report[s]” concerning “the status of the investigation” prepared under 28 C.F.R. § 600.8(a)(2), whether or not such records were actually provided to the Attorney General or Acting Attorney General
- (b) All drafts, outlines, exhibits, and supporting materials associated with any actual or planned “report” concerning “the status of the investigation” under 28 C.F.R. § 600.8(a)(2);

- (3)(a) All records “expla[ining] . . . any investigative or prosecutorial step” under 28 C.F.R. § 600.7(b), whether or not such records were actually provided to the Attorney General or Acting Attorney General;
- (b) All drafts, outlines, exhibits, and supporting materials associated with any actual or planned “explanation for any investigative or prosecutorial step” under 28 C.F.R. § 600.7(b);
- (4)(a) All records prepared under 28 C.F.R. § 600.9(a) to “notify the Chairman and Ranking Minority Member of the Judiciary Committees of each House of Congress” of a development in the Special Counsel investigation, whether or not such records were actually transmitted to any member of Congress;
- (b) All drafts, outlines, exhibits, and supporting materials associated with any actual or planned notification under 28 C.F.R. § 600.9(a);
- (5)(a) All 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” under 28 C.F.R. § 600.4(c), whether or not such records were actually transmitted to any party outside of the Special Counsel’s Office;
- (b) All drafts, outlines, exhibits, and supporting materials associated with any actual or planned referral for “administrative remedies, civil sanctions or other governmental action outside the criminal justice system” under 28 C.F.R. § 600.4(c);
- (6)(a) All “report[s],” “recommendation[s],” and other “compilation[s] of information” prepared for the eventual consideration of one or more members of Congress, whether or not such records were actually transmitted to any party outside of the Special Counsel’s Office;
- (b) All drafts, outlines, exhibits, and supporting materials associated with any actual or planned report, recommendation, or compilation of the type described in Category (6)(a) of this request;
- (7)(a) All other reports summarizing or describing, for one or more persons outside of the Special Counsel’s Office, (i) any of the Special Counsel’s evidence, findings, decisions, actions, or planned actions, or (ii) any developments in the Special Counsel investigation; and
- (b) All drafts, outlines, exhibits, and supporting materials associated with any actual or planned report of the type described in Category (7)(a) of this request.

EPIC also requested expedited processing and a fee waiver. *See* Appendix A.

On November 15, 2018, the DOJ sent an acknowledgement letter denying EPIC’s request for expedited processing. The letter stated that the processing of EPIC’s FOIA Request has been

initiated and assigned to the complex track because EPIC's request falls within "unusual circumstances." EPIC's request was assigned reference number DOJ-2018-000676 (OIP). See Appendix B.

EPIC's FOIA Request Satisfies The "Compelling Need" Test For Expedited Processing Because It Involves An Urgency To Inform The Public About A Government Activity And Is Made By A Person Primarily Engaged In Disseminating Information

EPIC is entitled to expedited processing of this request because this request involves a "compelling need." 5 U.S.C. § 552(a)(6)(E)(v)(II). The DOJ FOIA regulations list four, independent considerations for demonstrating a "compelling need" for expedited processing, and the requester must satisfy at least one consideration to meet this "compelling need" requirement. EPIC established that its FOIA Request (1) involves "an urgency to inform the public about an actual or alleged federal government activity" and (2) is made by "a person primarily engaged in disseminating information." 16 C.F.R. § 16.5(e)(1)(ii). EPIC presented specific facts to demonstrate a "compelling need." EPIC explained that the activities of the Special Counsel concern matters of current exigency and that a delayed response would compromise the public's ability to understand the investigation into Russian interference in the 2016 presidential election. This determination is incorrect.

(I) There is a Clear "Urgency to Inform the Public" About an Actual Government Activity

First, this request self-evidently involves "an urgency to inform the public about an actual or alleged Federal government activity." 28 C.F.R. § 16.5(e)(1)(ii). The "actual or alleged Federal government activity" is the Special Counsel's investigation of Russian interference in the 2016 presidential election and the U.S. government's response to Russian election interference. There is also a clear "urgency to inform the public" about the details of the Special Counsel's findings, as is apparent from the voluminous press coverage of the Special Counsel's investigation. Courts evaluate three factors when determining whether the requester demonstrates an "urgency to inform," showing a "compelling need": "(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." *Protect Democracy Project, Inc. v. DOD*, 263 F. Supp. 3d 293, 298–99 (D.D.C. 2017) (quoting *Al-Fayed v. C.I.A.*, 254 F.3d 300, 310 (D.C. Cir. 2001)).

(1) EPIC's FOIA Request concerns a matter of current exigency to the American public

For matters of current exigency, district courts require there be a "'substantial interest' in the 'particular aspect' of [the] FOIA request." *EPIC v. DOD*, 355 F. Supp. 2d 98, 102 (D.D.C. 2004). When determining whether an interest is substantial, courts will consider the number of publications, the variety of sources, and the content of the articles present in the request. See *Amer. Civil Liberties Union v. DOJ*, 321 F. Supp. 2d 24, 31–32 (D.D.C. 2004). According to the district court, "case law makes it clear that only public interest in the specific subject of a FOIA request is sufficient to weigh in favor of expedited treatment." *EPIC v. DOD*, 355 F. Supp. 2d at 102.

The subject of EPIC’s FOIA Request, the Special Counsel’s investigation into Russian interference in the 2016 presidential election, is clearly of “substantial interest” to the public because it involves a national election and an attack on U.S. democratic institutions by a foreign adversary. At the time of EPIC’s request, EPIC identified 941,000 news articles related to Special Counsel Mueller and “Russia.” EPIC described with significant factual detail the criminal and intelligence community investigations showing that the Russian government carried a multi-pronged attack on the U.S. presidential election. EPIC also cited to major news organizations and President Trump’s own attorneys stating that Special Counsel Mueller intends to create one or more reports detailing the Special Counsel’s findings.

Moreover, the D.C. Circuit has held that facts within an agency's knowledge are part of the record before the agency at the time it reviews a FOIA request, whether or not the requester specifically referenced such facts. *Nat'l Treasury Employees Union v. Griffin*, 811 F.2d 644, 648 (D.C.Cir. 1987). For example, in *EPIC v. DOD*, the district court recognized that a Government Accountability Report (“GAO”) that was subsequently released after the FOIA request was made but before the denial of expedited processing was available to the agency during the time it would have considered the requester’s expedition request. 355 F. Supp. 2d at 104 n.7. According to the court, “there can be little doubt that the agency was aware of the GAO report and the information it contained when considering Plaintiff's request for expedition.” *Id.*

Like in *EPIC v. DOD*, the agency should have been aware of additional news coverage following the submission of EPIC’s FOIA Request that underscored the urgency of the request. For example, former Attorney General Jeff Sessions submitted his resignation at the request of President Trump, and Matthew G. Whitaker was appointed acting Attorney General in his place.¹ Acting Attorney General Whitaker has been a public critic of the Mueller investigation.²

(2) The consequences of delaying a response would compromise a significant recognized interest

Delaying a response to EPIC’s request would compromise a significant recognized interest in understanding the specific details of the Special Counsel’s investigation into Russian interference in the 2016 presidential election. Courts require that for a public interest to become an interest recognized by the FOIA, the requester must show that the requested information is “vital to [a] current and ongoing debate.” *Sai v. Transportation Sec. Admin.*, 54 F. Supp. 3d 5, 11 (D.D.C. 2014). The D.C. Circuit has acknowledged that “stale information is of little value . . .” *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988). For instance, in *EPIC v. DOJ*, the court found that EPIC had demonstrated a risk of irreparable injury when seeking expedited processing for information vital to an ongoing debate surrounding the legality of the government’s warrantless surveillance program. 416 F. Supp. 2d 30, 41 (D.D.C. 2006).

¹ Devlin Barrett, Matt Zapotosky, & Josh Dawsey, *Jeff Sessions Forced Out As Attorney General*, Wash. Post (Nov. 7, 2018), https://www.washingtonpost.com/world/national-security/attorney-general-jeff-sessions-resigns-at-trumps-request/2018/11/07/d1b7a214-e144-11e8-ab2c-b31dcd53ca6b_story.html.

² See e.g., Max de Haldevang & Adam Pasick, *All the Times Robert Mueller’s New Boss Railed Against the Russia Probe*, Quartz (Nov. 7, 2018), <https://qz.com/1454952/all-matthew-whitakers-criticisms-of-robert-muellers-russia-investigation/>.

The release of the requested information is vital to an ongoing debate surrounding the scope of Russian interference in the 2016 presidential election and the involvement of particular individuals in that interference, such as the potential involvement of President Trump. In *Protect Democracy Project v. DOD*, the requesters sought information related to the President’s legal authority to launch missile strikes against a Syrian-government airbase the day after the President launched missile strikes against Syria. The district court stated, “[b]eing closed off from such a debate is itself a harm in an open democracy” if there is an undue delay in processing. *Protect Democracy*, 263 F. Supp. 3d at 300.

Like the public debates surrounding the legality of military strikes against the Syrian government, there is great public debate surrounding the government’s capacity to defend U.S. election systems and democratic institutions against foreign attacks. The loss in the value of the timely release of information results in cognizable harm because the public cannot participate in meaningful public debate about the Special Counsel’s substantive findings, the Trump campaign’s involvement in Russian interference, the government’s response to that interference, and possible obstruction of justice by President Trump.

(3) The request concerns a federal government activity

As previously stated, the actual government activity at issue in EPIC’s FOIA Request is the Special Counsel’s investigation of Russian interference of the 2016 presidential election and the U.S. government’s response to Russian election interference. EPIC’s FOIA Request included facts—supported by both official government documents and federal regulations—to demonstrate that the activities of the Special Counsel, including the creation of investigatory reports, constitute a federal government activity. Moreover, the U.S. government’s response to Russian election interference is self-evidently an actual government activity.

(II) EPIC is an Organization “Primarily Engaged in Disseminating Information”

EPIC is an organization “primarily engaged in disseminating information” under 28 C.F.R. § 16.5(e)(1)(ii) because, as the D.C. District Court explained in *EPIC v. DOD*, “EPIC satisfies the definition of ‘representative of the news media.’” 241 F. Supp. 2d 5, 15 (D.D.C. 2003). Like the District Court’s determination in 2003, EPIC still actively gathers information that is of interest to a segment of the public, turns the raw materials into distinct work, and publishes that work to the public through its website, bi-weekly newsletter, and various news outlets. In EPIC’s FOIA Request, EPIC stated that it is a registered non-profit organization committed to open government, privacy, and civil liberties. EPIC’s request emphasized that the requested information would reach a large audience because EPIC routinely publishes information obtained through the FOIA on its widely read website, <https://epic.org>.

EPIC’s FOIA Request Also Satisfies The “Compelling Need” For Expedited Processing Because It Involves A Matter Of Widespread Interest In Which There Exists Possible Questions About The Government’s Integrity The Affect Public Confidence

EPIC’s FOIA Request also established that EPIC is entitled to expedited processing because the activities of the Special Counsel involves “[a] matter of widespread and exceptional

media interest in which there exists possible questions about the government’s integrity that affect public confidence.” 28 C.F.R. § 16.5(e)(1)(iv). The “primary” method for determining whether there are questions about the government’s integrity that affect public confidence “is [to] examin[e] the state of public coverage of the matter at issue, and whether that coverage surfaces possible ethics issues so potentially significant as to reduce public confidence in governmental institutions.” *Oversight v. DOJ*, 292 F. Supp. 3d 501, 508 (D.D.C. 2018).

EPIC’s FOIA Request cited the extraordinary media attention given to the work of the Special Counsel, including 941,000 news articles containing the terms “Robert Mueller” and “Russia.” Many of the top news articles discuss the potential involvement of President Trump in Russia’s campaign to influence an election that he won. Other articles examine President Trump’s possible obstruction of justice and the discharge of a high-profile Special Counsel investigation. This coverage pertains to ethics and conflict-of-interest issues that are “so significant” as to affect the public’s confidence in democratic institutions and the government’s ability to conduct a fair investigation. For example, a June 2018 Pew Research poll found that most Americans lacked confidence in President Trump in his ability to handle matters related to the Special Counsel investigation.³

I certify that this explanation is true and correct to the best of my knowledge and belief. 5 U.S.C. § 552(a)(6)(E)(vi). For the foregoing reasons, EPIC is entitled to expedited processing of EPIC’s FOIA Request. § 552(a)(6)(E)(iii).

Conclusion

Thank you for your consideration of this appeal. We anticipate your determination on our appeal within twenty working days. 5 U.S.C. § 552(a)(6)(A)(ii). For question regarding this appeal, please contact John Davisson at 202-483-1140 x120 or davisson@epic.org, cc: FOIA@epic.org.

Respectfully submitted,

/s John Davisson
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³ Alec Tyson, *Most Americans Lack Confidence in Trump to Deal Appropriately with Mueller Probe*, Pew Research Center (June 20, 2018), <http://www.pewresearch.org/fact-tank/2018/06/20/trump-mueller-probe/>.