



UNITED STATES DEPARTMENT OF COMMERCE
National Telecommunications and
Information Administration
Washington, D.C. 20230

March 4, 2013

Mr. Michael L. Rispoli
Campaign and Media Strategist
Access Now
PO Box 115
New York, NY 10113

RE: NTIA FOIA 013-37 [Online No. DOC-NTIA-13-0569]

Dear Mr. Rispoli:

On February 22, 2013, the National Telecommunications and Information Administration (NTIA), Office of the Chief Counsel, received your request under the Freedom of Information Act (FOIA), as amended (5 U.S.C. § 552). In this request, you sought the following:

Any and all correspondence; record of meetings (both informal and formal); meeting agendas and summaries; and related documentation between the U.S. Department of Commerce and the European Commission (in particular Vice-President of the Commission Viviane Reding, and her cabinet and staff members) dealing with the European Data Protection Reform Package between September 2011 and February 19, 2013.

You also requested that this FOIA request be processed on an expedited basis. You provided the following to support this request:

This information is directly related to our work on privacy reform in Europe, of which the legislative timeline is quickly approaching its close. It is therefore in the immediate interest of our members to have access to this information as fast as possible.

Department of Commerce regulations require that agencies determine whether to grant a request to process a request on an expedited basis within ten days of receipt.¹ A FOIA request may receive expedited treatment in cases where the requester demonstrates a "compelling need" for such treatment. Department regulations define "compelling need" as: (1) 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; (2) The loss of substantial due process rights; (3) A matter of widespread and exceptional media interest involving questions about the Government's integrity which affect public confidence; or (4) An urgency to inform the public about an actual or alleged Federal Government activity, if made by a person primarily engaged in

¹ Please note expedited treatment means that the request is processed out of order with respect to other requests previously received. Normally, requests are processed on a first in, first out basis. Regardless, the initial response is still due within 20 business days after the request is received. 15 C.F.R. § 4.6(b) and (e).

disseminating information.² The regulations further emphasize that the requester seeking expedited treatment is required to submit a statement explaining in detail the basis for requesting expedited processing under one of these categories.³ In particular, as in this case, when the requester is seeking expedited treatment under the last category (urgency to inform the public), to satisfy this standard the requester's statement must include information regarding: (1) if the requester is not a full-time member of the news media, the requester must establish that he or she is a person whose main professional activity or occupation is information dissemination; and (2) the requester 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 the Government activity generally. Finally, Courts have held that agencies should grant expedited treatment "sparingly" given the "finite resources available for fulfilling FOIA requests. . . ."⁴

NTIA finds that the request for expedited treatment has not met this standard, and therefore, NTIA denies the request. NTIA does not dispute whether the requester and his organization can distribute the information. The requester notes in another portion of his request that Access Now as its mission to distribute information regarding human rights issues in the digital sphere and has 500,000 subscribers. The requester also notes that he intends to publish the information through Access Now's website, blogs, social networks, and other similar means.⁵ Further, a request for correspondence, which includes NTIA as a party, would normally involve an actual or alleged Federal Government activity.

However, NTIA finds that the requester has not demonstrated an "urgency to inform the public" and therefore a compelling need justifying expedited treatment. The Courts note that several factors should be considered in this analysis. First, whether the subject is a matter of current exigency to the American public; and second, whether the consequences of delaying a response would compromise a significant recognized interest.⁶ While the requester has argued that that your "members" have an "immediate interest" noting that a "legislative timeline is quickly approaching," you do not provide that deadline to assist NTIA in determining whether there is an immediate need for the information requested or what the consequence would be of a delay. Further that "interest" is not explained or otherwise demonstrated. Courts have been clear on this point: it is incumbent upon the requester to demonstrate both that the information requested is newsworthy and that there is substantial interest in the particular aspect of the request on the part of the American public or the media.⁷ The requester's short statement does

² See 15 C.F.R. § 4.6(e). The requester has not raised information which would lead NTIA to believe he is seeking expedited treatment under one (1) through three (3) above and therefore NTIA finds that this request only involves number four (4) and has examined the request accordingly.

³ See 15 C.F.R. § 4.6(e)(3).

⁴ See e.g., *Al-Fayed v. CIA*, 254 F.3d 300, 310 (D.C. Cir. 2001) (quoting H.R. Rep. No. 104-795 at 26 (1996)).

⁵ NTIA considers, for purposes of this request, Access Now to be similar to other non-profit organizations, which Courts have consistently held qualifies as an organization that "primarily engaged in disseminating information." See e.g., *Electronic Privacy Information Center v. US Dep't of Justice*, 355 F. Supp. 2d 98, 101 (D. D.C. 2004)(EPIC).

⁶ *Al-Fayed*, 254 F.3d at 310. A third factor is also cited by the courts – whether the request concerns federal government activity. NTIA has previously addressed this factor in the requester's favor.

⁷ *EPIC*, 355 F.Supp.2d at 101-103. In the EPIC case, the requester cited interest, even pointing the media articles, in a general topic or umbrella issue, but did not adequately tie the request to a significant interest of the public in the particular aspect of the FOIA. In this case, the requester only submitted a blanket statement and did not provide media articles or other evidence of a significant and urgent public interest.

not satisfy this standard.⁸ Without further information NTIA cannot find that this is a current exigency to the American public and therefore no demonstrated urgency to inform the American public.


While NTIA has denied this request for expedited treatment, it will make every effort to provide its initial response within the 20 days as required by the statute and regulation. It should also be noted that Department regulations permit you to supplement your request for expedited treatment with additional information at any time. *See* 15 C.F.R. § 4.6(e)(4).

You have the right to appeal an adverse determination of your FOIA request. Your appeal must be received within 30 calendar days of the date of this letter by the Assistant General Counsel for Administration (Office), Room 5898-C, U.S. Department of Commerce, 1401 Constitution Avenue, N.W., Washington, DC 20230. Your appeal may also be sent by email to FOIAAppeals@doc.gov or by facsimile (fax) to (202) 482-2552.

Your appeal must include a copy of your original request, the agency response to the request, and a statement of the reason why you believe the withheld records should be made available and why the agency's denial of your request for the records was in error. The submission (including any email or fax submissions) is not complete without the required attachments. The appeal letter, the envelope, the mail subject line, and the fax cover sheet should be clearly marked "Freedom of Information Act Appeal." The email, fax machine and office mailbox is monitored only on working days during normal business hours (8:30 a.m. to 5:00 p.m. Eastern Time, Monday through Friday).

If you have any questions regarding your request, please contact Stacy Cheney, Attorney Advisor, at 202-482-1864 or via email at scheney@ntia.doc.gov.

Sincerely,



Kathy D. Smith
Chief Counsel

⁸ *American Civil Liberties Union of Northern California, v. US Dep't of Justice, et al*, 2005 U.S. Dist. LEXIS 3763 (N.D. CA 2005) (ACLU submitted several articles that contained only generalized references to the subject matter of the request, but were not sufficient to demonstrate a current exigency to the American public.).