

OIP Guidance

When to Expedite FOIA Requests

An issue bound to be confronted sooner or later by all federal agencies is whether to give certain requesters expedited treatment under the Freedom of Information Act. Because the granting of a request for expedition necessarily works to the direct disadvantage of other FOIA requesters, the merits of such requests should be assessed carefully.

The FOIA requires that federal agencies determine whether to release requested records within 10 working days, but that period may be extended for an additional 10 working days whenever any of three statutorily defined "unusual circumstances" exist. 5 U.S.C. §552(a)(6)(B). Many agencies are often unable to meet these deadlines due to such factors as the number of requests received, the volume of records sought, decentralized recordkeeping procedures, and limitations on resources—often coupled with the need for a line-by-line review of sensitive documents. The U.S. Court of Appeals for the D.C. Circuit has recognized this problem and has specifically approved the equitable practice of handling requests on a "first-in, first-out" basis. See *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 614-16 (D.C. Cir. 1976), citing 5 U.S.C. §552(a)(6)(C).

At the same time, however, the D.C. Circuit in *Open America* recognized that some FOIA requests necessarily involve a far greater degree of urgency than others and that when a requester can show "exceptional need or urgency," his request should be processed out of turn. 547 F.2d at 616. The *Open America* decision did not specify any particular circumstance which might constitute "exceptional need or urgency," so decisions on whether to grant expedition have been left for agency FOIA officers to make on a case-by-case basis. Several years of administrative practice in this area, though, together with at least some specific judicial precedents, have served to develop the following guidelines and considerations.

Threat to Life or Safety

First, FOIA processing should be expedited whenever it is demonstrated that an individual's life or personal safety would be jeopardized by the failure to process a request immediately. Of the handful of court decisions to have ordered expedited processing, almost all have fallen into this category. See, e.g., *Exner v. FBI*, 443 F. Supp. 1349, 1353 (S.D. Cal. 1978) (plaintiff obtained expedited treatment after leak of information exposed her to harm by organized crime figures), *aff'd*, 612 F.2d 1202 (9th Cir. 1980); *Cleaver v. Kelley*, 427 F. Supp. 80, 81 (D.D.C. 1976) (plaintiff faced multiple criminal charges carrying possible death penalty in state court). At the administrative level, the Department of Justice has expedited a request to facilitate disclosure of medical information about a child's father vital to the child's emergency medical treatment. Another agency agreed to process immediately a request from the parents of a young woman believed to be facing a serious threat to her life in the custody of a cult. To be sure, FOIA requests involving substantiated "life-or-death" matters are rare, but no more

compelling justification can exist for special FOIA treatment.

Loss of Substantial Due Process Rights

As a general rule, a request also should be expedited if it is shown that substantial due process rights of the requester would be impaired by the failure to process immediately and that the information sought is not otherwise available. Indeed, the practices of many federal agencies reflect such concern for the due process rights of requesters. At the Justice Department's Drug Enforcement Administration, for example, the portion of a drug offender's file that is relevant to an upcoming parole hearing is routinely processed for release out of turn under the FOIA. Similarly, other agencies regularly expedite FOIA requests for information needed in contract award protests so that filing deadlines can be met.

It is not sufficient, however, for a requester merely to allege that requested records are "needed" in connection with some judicial or administrative proceeding; rather, the immediate use of the FOIA must be shown to be critical to the preservation of a substantial right. See *Rivera v. DEA*, 2 GDS ¶181,365 at 81,953 (D.D.C. 1981) ("A pending civil suit does not generally qualify a FOIA demand for expedited processing."). Indeed, in *Mitsubishi Electric Corp. v. Department of Justice*, 39 Ad.L. Rep.2d (P&F) 1133, 1140-42 (D.D.C. 1976), the court pointedly refused to order expedited processing where a requester had not availed itself of existing civil discovery mechanisms for obtaining the records sought. In connection with criminal proceedings, weak "due process" claims have likewise been found inadequate. See, e.g., *Gonzalez v. DEA*, 2 GDS ¶181,016 at 81,069 (D.D.C. 1980) (use of FOIA as discovery tool to aid standard post-judgment attack on criminal conviction held insufficient); *Bubar v. United States Department of Justice*, 3 GDS ¶183,227 (D.D.C. 1981) (need for documents for preparation as witness in criminal trial held insufficient).

Other Considerations

Beyond these two narrow categories, it is unclear to what extent agencies have the discretion to grant requests for expedition under any other circumstances. Only one judicial decision has ventured beyond these categories—*Schacter v. IRS*, 3 GDS ¶182,515 at 83,302-03 (D.D.C. 1982), where a court somewhat perfunctorily ordered immediate disclosure of a record related to imminent action by Congress. Moreover, agencies should not forget the interests of all requesters in having their requests treated equitably, as well as the public interest in the integrity of FOIA processing. See *Mitsubishi Electric Corp. v. Department of Justice*, *supra*, 39 Ad.L. Rep.2d (P&F) at 1142 (Expedited processing, "if granted, will adversely impact upon the conflicting interests of numerous individuals whose requests and appeals were filed [earlier]."). Because a decision to take a FOIA request out of turn necessarily entails further delay for other requesters waiting patiently in line, simple fairness demands that it be made only upon careful scrutiny of truly exceptional circumstances.