

CASE SET FOR ORAL ARGUMENT ON MAY 17, 2001

No. 005457

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOHAMED AL-FAYED, *et al.*,
Appellants,

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,
Appellees.

BRIEF AMICI CURIAE
OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,
THE ELECTRONIC PRIVACY INFORMATION CENTER,
THE AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA,
THE CENTER FOR NATIONAL SECURITY STUDIES
AND THE NATIONAL SECURITY ARCHIVE
IN SUPPORT OF APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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INTEREST OF THE *AMICI CURIAE*

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Electronic Privacy Information Center is a nonprofit public interest research organization that examines the privacy and civil liberties implications of new communications technology. EPIC is a frequent user of the Freedom of Information Act and regularly makes information obtained under the act available to the public through its web site and other publications.

The American Civil Liberties Union of the National Capital Area is the local affiliate of the American Civil Liberties Union, a nationwide, nonprofit membership organization that since 1920 has worked to protect the civil liberties and civil rights of all Americans. The ACLU has often made requests under FOIA in the service of those goals and has often represented clients pursuing FOIA requests. The National ACLU is also the publisher of “Litigation Under the Federal Open Government Laws” (20th ed. 1997-98), a handbook for persons using the FOIA, the Privacy Act, the Government in the Sunshine Act, and the

Federal Advisory Committee Act.

The Center for National Security Studies is a nongovernmental, nonprofit civil liberties organization that works to ensure that government actions undertaken in genuine pursuit of national security interests do not have the effect of violating the rights of individuals or undermining constitutional government. Since 1975, the Center has worked to secure the public's right to know about foreign policy and national defense matters. The Center routinely makes requests under the Freedom of Information Act and relies upon documents released under the Act in carrying out its work.

The National Security Archive is an independent research institute and library located at The George Washington University. The Archive collects and publishes declassified documents obtained through the Freedom of Information Act concerning United States foreign policy and national security matters. It makes hundreds of requests under the Freedom of Information Act every year. Through litigation and public advocacy, it also works to defend and expand public access to government information.

STATEMENT OF THE CASE

For purposes of this brief *amici curiae*, the relevant facts of this case are:

Appellants made requests between the dates of December 1998 and July 2000 to various United States agencies for records relating to events surrounding the deaths of Diana, Princess of Wales and Dodi Al-Fayed. The requests that were made in July of 2000 all contained requests for expedited review.

By September 2000, every agency had either denied Appellants' expedited processing or there had been no response to the expedited processing request. Appellants challenged the denials and delays by filing a motion for a Temporary Restraining Order and/or a Preliminary Injunction on September 6, 2000, in U.S. District Court for the District of Columbia. On September 20, 2000, the district court denied this motion.

Following administrative appeals to the various agencies, which were either denied or not responded to, the Appellants again filed a motion for a Temporary Restraining Order and/or a Preliminary Injunction and a motion to Compel Expedited Processing with the District Court. The District Court denied these motions on December 11, 2000. This appeal was filed on December 20, 2000.

With respect to the underlying facts, amici respectfully refer the court to the briefs of the parties.

STANDARD OF REVIEW

This Court reviews the denial of a preliminary injunction for “abuse of discretion or clear error,” *Ambach v. Bell*, 686 F.2d 974, 979 (D.C. Cir. 1982), but “insofar as [the district court’s decision] rests on a premise as to a pertinent rule of law, that premise is reviewable fully and *de novo* in the appellate court,” *Delaware & Hudson Ry. v. United Transportation Union*, 450 F.2d 603, 620 (D.C. Cir.), *cert. denied*, 403 U.S. 911 (1971), and a district court “necessarily abuse[s] its discretion if it base[s] its ruling on an erroneous view of the law.” *Cooter & Gell v. Hartmzrx Corp.*, 496 U.S. 384, 405 (1990); *accord Jacobs v. Schiffer*, 204 F.3d 259, 264 (D.C. Cir. 2000) (“The district court’s [ruling] was an error of law, which by definition, was an abuse of discretion.”).

SUMMARY OF THE ARGUMENT

Appeals of agency denials for expedited processing of Freedom of Information requests should be reviewed *de novo*. Congress created a provision in the Electronic Freedom of Information Act of 1996, which amended the Freedom of Information Act, that allows FOIA requestors to obtain expedited processing upon a showing of compelling need for a decision that government records will be

granted or denied.¹ The 1996 amendments also provide a requestor a right to challenge an agency's decision to deny expedited processing in court. Congress indicates in the Act that the level of judicial review for appeals court expedited processing should be *de novo* review.

Public policy also dictates a *de novo* judicial review of agency decisions over a request for expedited processing. Congress directed agencies in the Electronic Freedom of Information Act to grant expedited processing when a requestor shows a "compelling need" for quick agency review. Under the statute, one of the definitions for a "compelling need" occurs when a request is made by an information disseminator and there exists an "urgency to inform the public concerning actual or alleged federal government activity." Such a compelling need may exist in many diverse circumstances and Congress would not grant this right to requestors without giving them the ability to enforce it effectively.

¹ Expedited review does not change agency grant or denial decisions, rather it shortens the wait for a decision when the subject matter is of compelling urgency. Agencies have willingly granted expedited review and then denied requested records.

ARGUMENT

I. The Statutory Language, Purpose and Public Policy Require De Novo Review of Denials of Expedited Processing

The major legal issue presented in this appeal -- the appropriate standard for judicial review of an agency's refusal to expedite a FOIA request (or its failure to respond in a timely manner to such a request) -- has broad implications for the proper functioning of the Freedom of Information Act. In adopting the Electronic Freedom of Information Act of 1996, Pub. L. No. 104-231 (codified in various sections of 5 U.S.C. § 552), Congress explicitly recognized that there were circumstances in which requests for government documents merited expedited treatment, and implicitly recognized that federal agencies had not previously done an adequate job of affording such expedition when it was appropriate.

The Electronic Freedom of Information Act ("EFOIA") provides a right to expedited processing "in cases in which the person requesting the records demonstrates a compelling need." 5 U.S.C. § 552(a)(6)(E)(i)(I). The phrase "compelling need" is, in turn, defined to include two situations: those where "a failure to obtain requested records on an expedited basis . . . could reasonably be expected to pose an imminent threat to the life or physical safety of an individual," 5 U.S.C. § 552(a)(6)(E)(v)(I), and those where the requestor is "a person primarily

engaged in disseminating information” and there is “urgency to inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II).

Recognizing the important public interests served by providing priority in such situations, the 1996 Amendments also created a right to immediate judicial review of an agency’s denial of expedited processing. *See* 5 U.S.C. § 552(a)(6)(E)(iii). If the lower court’s decision to apply a deferential, rather than *de novo*, standard of review is not reversed, the value of the immediate judicial review provision will be effectively gutted. *De novo* review is needed to fulfill the remedial purposes of the EFOIA and to comport with the review procedures ordinarily employed under the Freedom of Information Act.

This case presents an issue of first impression. Since the enactment of the 1996 Amendments, no court has interpreted the expedited review provision of the statute.² For the reasons given below, *amici* urge this Court to hold that *de novo*

² In 1994, the United States District Court for the District of Columbia considered whether a Department of Justice standard for expedited processing of FOIA requests, in place prior to the enactment of EFOIA, limited “expedited processing to cases where the information is needed to prevent a threat to ‘life or personal safety, or substantial due process rights would be jeopardized by a failure to expedite.’” *See Electronic Privacy Information Center v. Federal Bureau of Investigation*, 865 F. Supp. 1 (D.D.C. 1994). Additionally, after the enactment of EFOIA, the Electronic Privacy Information Center filed suit in the District Court for the District of Columbia to force the FBI to give expedited review to a FOIA request. Before the issue was adjudicated, the FBI granted EPIC expedited review. *Electronic Privacy Information Center v. Department of Justice*, Civil Action No. 00-1849 (D.D.C.)

review is required.

A. The Statute Explicitly Requires De Novo Review

De novo review of agency denials of requests for expedited processing is mandated by the Freedom of Information Act. A major reason for enacting the 1996 EFOIA Amendments was Congress' recognition of the crippling effect of agency delay on FOIA processing. *See* H.R. REP. NO. 104-795 at 13 (1996). The House Report noted a memorandum from Attorney General Janet Reno sent to department heads of all federal government agencies found that "some agencies . . . maintain large FOIA backlogs greatly exceeding the mandated deadlines" and this backlog is "a serious problem -- one of growing concern and frustration to both FOIA requesters and Congress." *Id.*

Along with mandates for affirmative disclosure on the Internet and for release of documents in electronic format, the EFOIA included several new provisions to streamline the processing of FOIA requests and to give priority to requests made with a compelling need for urgency.³ The new law's expedited

³ EFOIA also provided for multitrack processing in order to expedite the processing of small requests, which in the past had been backlogged behind the processing of large requests. *See* 5 U.S.C. § 552(a)(6)(D). Additionally, in EFOIA Congress clarified that the routine backlog of FOIA Act requests did not rise to the level of "exceptional circumstances" needed for a court to extend the statutory time limit for an agency response. *See* 5 U.S.C. § 552(a)(6)(C)(ii).

review provision requires agencies to give priority to requests where there is a compelling need for information, such as requests made by journalists, public interest organizations and others when they perform the vital role of providing information to the public “concerning actual or alleged Federal Government Activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II).⁴

As *amici* know, and as this Court is aware from the many FOIA appeals it has handled, obtaining government documents that Congress intends to be public is often tantamount to pulling teeth. Congress, which is deemed to be aware of what goes on in the federal courts, *see McCarthy v. Bronson*, 500 U.S. 136 (1991), surely knew this too, and acted decisively to ameliorate the problem, at least with respect to situations in which an individual’s life or safety was imminently threatened, and situations in which the public interest in “actual or alleged Federal Government activity” was urgent.

⁴ Congress singled out requests by “person[s] primarily engaged in disseminating information” for expedited treatment because their activities serve the important interests of society. As the Supreme Court has explained:

[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.

Cox Broadcasting v. Cohn, 420 U.S. 469, 491-92 (1975).

Congress was not so naïve as to think that an amendment to the statute would necessarily cause federal agencies to release documents any faster than before the amendment, so it put teeth into the new provisions by making an agency's refusal to expedite subject to immediate judicial review, under the same requestor-friendly standards that apply to other agency denials of FOIA requests. Specifically, the EFOIA Amendments provided that an agency's denial of expedition (or failure to respond promptly to a request for expedition) "shall be subject to judicial review under paragraph (4)." 5 U.S.C. § 552(a)(6)(E)(iii).

"[P]aragraph 4" refers to 5 U.S.C. § 552(a)(4), and the portion of that paragraph dealing with judicial review is 5 U.S.C. § 552(a)(4)(B). It incorporates five specific standards that are intended to make judicial review an effective tool for FOIA requestors. It provides, first, that review may be obtained, at plaintiff's option, either where the plaintiff resides, at its principal place of business, where the records are located or in the District of Columbia. Second, it gives the district court the power directly to order the production of records, making it clear that no remand to the agency is necessary. Third, it provides that "the court shall determine the matter *de novo*." Fourth, it provides that the court may examine the contested records *in camera*. Fifth, it specifies that "the burden is on the agency to sustain its action." *Id.*

It is plain that when Congress specified that denials of expedition were to be “subject to judicial review under paragraph (4),” it incorporated all five of those provisions. There is no basis in the language, the purpose or the legislative history of the EFOIA -- or in common sense -- to conclude that Congress wanted different rules regarding venue to apply to these cases than to other FOIA cases. The provisions of “paragraph 4” are a familiar package in FOIA litigation, and Congress sensibly placed judicial review of denials of expedition into that familiar package.

Despite this clear statutory directive, the court below reasoned that the *de novo* standard did not apply here, because the sentence specifying that standard references cases in which agency records have been “improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B). In the district court's view, this is not a case deserving of *de novo* review because no records have yet been withheld. Mem. Op. of December 11, 2000, at 5-6 (J.A. 392-93).

The district court's reasoning is not persuasive. First, it is illogical to assume that Congress intended the phrase “improperly withheld from the complainant” to prevail over its specific mandate to apply the “paragraph 4” standards in these cases. If Congress had intended to say that these cases “. . . shall be subject to judicial review under the venue and remedy provisions of

paragraph 4 but not the *de novo, in camera* and burden of persuasion provisions thereof,” it surely knew how to do so. Indeed, Congress focused its attention very directly on “paragraph 4,” amending it (in section 6 of the EFOIA) to provide that “a court shall accord substantial weight to an affidavit of an agency concerning the agency’s determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).” 5 U.S.C. § 552(a)(4)(B). Thus, Congress in fact modified the standard of review for certain technical issues, without modifying the *de novo* standard in the immediately preceding sentence.⁵ It is therefore impossible to believe that Congress paid no attention to the details of the judicial review it was providing for these cases involving expedited review.

Second, it is incorrect to say that an agency’s denial of expedited processing (or its refusal to respond promptly to a request for expedition) is not a situation where agency records have been “improperly withheld.” The records most certainly have been withheld *thus far*, and while that may or may not represent the agency’s final position, Congress has determined that it is final enough to justify

⁵ The legislative history of EFOIA specifically cautions that this modification of the standard of review with respect to certain purely technical issues should not “affect the extent of judicial deference that a court may or may not extend to an agency on any other matter.” H.R. REP. NO. 104-795 at 22 (1996).

judicial review *now*. That is hardly a novel proposition under the FOIA; this Court has long recognized that an agency's failure to comply with the FOIA time limits amounts to the improper withholding of requested documents. *See, e.g., Spannaus v. Dep't of Justice*, 824 F.2d 52, 58 (D.C. Cir. 1987). The court should not subvert Congress' intent to provide immediate and effective judicial review in cases where a requestor asserts a statutory right to expedition and is rebuffed by the agency.

The court below also concluded that a deferential standard of review is appropriate here because an agency is "better equipped" than a court to deal with "the operation of normal processing systems and [the] allocation of finite resources." Mem. Op. of December 11, 2000, at 8 (J.A. 395). But that reasoning simply conflicts with the purpose of the 1996 Amendments, which in specified circumstances gave FOIA requestors a statutory right to depart from the normal processing systems and the usual allocation of resources as determined by an agency, and an additional statutory right to immediate judicial enforcement of that departure when denied by the agency. To defer to an agency's "normal processing systems" and its own determinations about the "allocation of [its] resources" when reviewing a denial of expedition effectively reads the 1996 Amendments out of the Act.

Contrary to the district court’s analysis, it is not an agency’s “normal processing systems” or its “allocation of resources” that are before the court upon judicial review of a denial of expedition. What is before the court, rather, is the question of whether the request at issue presents a “compelling need” as defined by the statute. If it does, the agency has no discretion to deny expedited processing in order to follow its “normal processing systems” or because it has other ideas about how to allocate its resources.

B. Public Policy Considerations Behind the Enactment of the Expedited Review Provision Require De Novo Review

Even if the statutory language and the congressional intent were not so clear, the Court should conclude that *de novo* review is the correct standard because it best serves the purpose of the Freedom of Information Act and the expedited review provision of the EFOIA.

In enacting the EFOIA, Congress recognized that information disseminators can get urgent information on matters of public concern to many people quickly, a compelling interest that could be served by an expedited review process. In situations where the public has a need to know about an issue involving government information, journalists and other information disseminators are vital

to getting the word out.

The public may need an immediate opportunity to discuss an issue to participate meaningfully in the democratic process. If a journalist or a public interest organization seeks information on plans to construct a government building, that information is useful to the public when it can still affect the construction. The building cannot be unbuilt if the public finds out later that it was too expensive or was built in the wrong place. Similarly, information about a planned government program may be of urgent importance to the public while the program is still in the planning stage. For example, *amicus* Electronic Privacy Information Center recently obtained expedited review of FBI records concerning the controversial “Carnivore” Internet surveillance system. *See* footnote 2, *supra*. The resulting disclosures have been reported prominently in the media, have been referred to in congressional proceedings, and have had an impact on the manner in which the government is now proceeding in the matter.⁶

Likewise, expedited processing is also warranted where requested information relates to investigations or allegations of misconduct about a sitting

⁶ *See* Drew Clark, *Hill's Carnivore Concerns Could Stymie New Administration*, NATIONAL JOURNAL'S TECHNOLOGY DAILY, November 28, 2000 (Senators Hatch and Leahy, in a letter to FBI Director Louis J. Freeh, raised new concerns about Carnivore "based on documents released under a Freedom of Information Act (FOIA) lawsuit").

public official. If such information is not released expeditiously, citizens could be deprived of information needed for informed decision-making in the voting booth.

Another example of a situation in which expedited processing is appropriate is when the public needs to know whether government practices, left unchecked, may lead to serious harm. For example, if a journalist seeks inspection of Marine Corps Osprey aircraft because of allegations that they were falsified to make the Osprey appear safer than it is, the public has a strong interest in reviewing that information before more serious accidents occur.

Expedited processing may also be warranted to put current events in context. Although the contextual information may be historical, it may nonetheless be needed urgently to fully understand pressing current events. For example, if a hazard caused by the federal government comes to light, information about precautionary measures that are in place or about related past events may be needed urgently to assess the continued threat to the public or proper measures for preventing recurrences.

Expedited processing is also important to confirm or refute the existence of ongoing or recent government wrongdoing. Where there is a reasonable basis to believe such wrongdoing is occurring or has occurred, the facts need to be disclosed so that actual wrongdoing can be swiftly addressed and false allegations

put to rest. The latter may be as important as the former: mistaken allegations of wrongdoing, left to fester, damage the public's confidence in government. The public needs this information when it is familiar with the context surrounding events to which it pertains.⁷

When a federal agency refuses to grant expedition in cases such as these, there is no relevant agency expertise to which a court should defer. The question whether there is an "urgency to inform the public concerning actual or alleged Federal Government activity" is one that the federal courts are far better equipped to address -- and in a manner that properly takes into account the public interest -- than the Freedom of Information officers of the various agencies.

The same is true with regard to FOIA requestors who claim an entitlement to expedition under 5 U.S.C. § 552(a)(6)(E)(v)(I) on the ground that the "failure to obtain requested records on an expedited basis . . . could reasonably be expected to pose an imminent threat to the life or physical safety of an individual." Such cases are also urgent and compelling. There is certainly no reason to believe that an agency official is better equipped to decide whether a person's life or limb is in

⁷ For instance, Special Counsel John Danforth, charged with examining allegations of governmental wrongdoing in the 1993 Branch Davidian raid, found that the government committed no "evil acts" but that its failure to be candid with the public caused untold damage to the public's confidence in government. Interim Report to the Deputy Attorney General Concerning the 1993 Standoff at the Mt. Carmel Complex, Waco, Texas, July 2000.

danger than a United States District Judge, and no reason why a court should defer to an agency's "normal processing systems" or resource allocations when such an allegation is brought before it.

In the instant case, the public has read news stories about an alleged plot by a con artist to sell Dodi Al-Fayed's father fraudulent CIA documents concerning those deaths. The Appellants' requests for expedition were entitled to timely consideration by the various agencies to which they were addressed, and to consideration on the merits, *de novo*, by the district court.

CONCLUSION

For the reasons stated above, the decision of the district court should be reversed, and this Court should hold that judicial review of an agency's denial of a request for expedited processing (or an agency's failure to respond in a timely manner to such a request) under 5 U.S.C. § 552(a)(6)(E)(i) is *de novo*.

This Court may then proceed to make that determination itself on the

administrative record, or it may remand the case to the district court to conduct the proper *de novo* review.

Dated: March 16, 2001

Respectfully submitted,

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