UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5315
(C.A. No. 88-2600)

ASSASSINATION ARCHIVES AND
RESEARCH CENTER, Appellant,

v.

CENTRAL INTELLIGENCE AGENCY, Appellee.

OPPOSITION TO EMERGENCY MOTION FOR EXPEDITED TREATMENT AND SUMMARY REVERSAL

Appellee respectfully suggests that appellant's motion for expedited treatment and summary reversal ("Appellant's Brief") fails to set forth any basis for disturbing the September 29, 1988 Order of the District Court that denied appellant's motion for a preliminary injunction to expedite the processing of its request under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552 (1982 & Supp. IV 1986). See United States v. Allen, 408 F.2d 1287, 1288 (D.C. Cir. 1980) (per curiam) (party seeking summary reversal has "heavy burden of demonstrating both that his remedy is proper and that the merits of his claim so clearly warrant relief as to justify expedited action") (emphasis added). Because the District Court's decision does not reflect an abuse of discretion or clear error--indeed, it is plainly correct--appellant's motion is without merit. See Ambach v. Bell, 686 F.2d 974, 979 (D.C. Cir. 1982) (per curiam) (reviewing court will not disturb order denying preliminary injunction "except for abuse of discretion or clear error"); accord Foltz v. U.S. News & World Report, 760 F.2d 1300, 1306 (D.C. Cir. 1985).

I.

By letter dated August 8, 1988, appellant submitted a FOIA request for access to records that reflect a relationship between the Central Intelligence Agency ("CIA") and Vice President George Bush prior to Mr. Bush's term as Director of the CIA ("Item 1"), and to records pertaining to the assassination of President John F. Kennedy that mention Mr. Bush or that were reviewed by him while he was Director of the CIA ("Item Two"). R. 1, Complaint, exh. 1.[1] Appellant also sought a waiver of FOIA search and copying fees, and expedited processing of its request, on the ground that such records would aid the public "in exercising its right to vote in the election this November . . . particularly since it has been alleged that Mr. Bush suppressed information concerning the Kennedy assassination." Id. By letter dated August 23, 1988, the CIA acknowledged receipt of appellant's request. Id., exh. 2.

Thereafter, by letter dated August 30, 1988, the CIA informed appellant that with respect to Item 1 of its request, a fee waiver had been granted and responsive records would be processed for release. R. 1, Complaint, exh. 3. With respect to Item 2 of its request, however, the CIA advised appellant that the requested records were not "reasonably described" because an unreasonable amount of effort would be required in order to locate any documents pertaining to the Kennedy assassination that might men-

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[1] "R" designates items in the Record on appeal by the number assigned to that item on the District Court docket.

tion Mr. Bush's name. Id.; see also R. 5, Declaration of John H. Wright, Information and Privacy Coordinator, CIA ("Wright Declaration"), paras. 4, 13-16.[2] The CIA further advised appellant that it had provided insufficient grounds for expedited processing of its request. R. 1, Complaint, exh. 3; see also R. 5, Wright Declaration, para. 8. Finally, the CIA informed appellant that due to the heavy volume of FOIA requests received by the agency, it was unable to respond within the ten working days required by the FOIA, and that appellant could treat the letter as a denial and submit an administrative appeal to the CIA Information Review Committee. R. 1, Complaint, exh. 3; see also R. 5, Wright Declaration, paras. 4, 7-8.

Without submitting an administrative appeal, appellant abruptly filed this action--along with a motion for a temporary restraining order, preliminary injunction, and expedited treatment--on September 14, 1988. R. 1, 3. On September 19, 1988, appellee filed its opposition to the motion. R. 5. The Honorable George H. Revercomb, by Order dated September 20, 1988, denied appellant's motion insofar as it sought a temporary restraining order. R. 6.

Following the filing of further briefs, R. 7, 8, and a hearing, Judge Revercomb, by Order dated September 29, 1988, denied

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[2] The CIA explained that it had previously released more than 3,000 pages of records concerning the Kennedy assassination and that appellant could purchase this material at ten cents per page--with the first 100 pages free--but that a fee waiver was unwarranted because such records were already in the public domain. R. 1, Complaint, exh. 3; see also R. 5, Wright Declaration, paras. 4, 17.

the remainder of appellant's motion, concluding that appellant had failed to satisfy the four factors governing issuance of a preliminary injunction. R. 9. As to likelihood of success on the merits, Judge Revercomb expressed "strong misgivings" about whether appellant had exhausted its administrative remedies, and was "unpersuaded" that exceptional circumstances justified expedited processing of its FOIA request. Id. As to irreparable harm, Judge Revercomb ruled that appellant itself would not suffer any injury and that its claims were "speculative and indirect." Id. Judge Revercomb further ruled that expedited processing would injure others who had submitted FOIA requests ahead of appellant, and that the alleged "urgency" of appellant's request did not outweigh the public interest in the orderly processing of other FOIA requests. Id.

II.

The District Court's decision does not in any way reflect an abuse of discretion or clear error and, accordingly, summary reversal is plainly unwarranted. It is well-settled law that four factors govern the issuance of a preliminary injunction: (1) the plaintiff must make a strong showing that it is likely to prevail on the merits; (2) the plaintiff must show that without such relief, it will be irreparably injured; (3) the issuance of a stay must not substantially harm the defendant or other parties; and (4) the public interest must favor the stay. See, e.g., Cuomo v. NRC, 772 F.2d 972, 974 (D.C. Cir. 1985) (per curiam); WMATA v. Holiday Tours, Inc., 559 F.2d 841, 842-43 (D.C. Cir. 1977); Vir-

ginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). Applying these four factors to the facts in the instant case, it is abundantly clear that the District Court properly exercised its discretion in denying the preliminary injunction.

To begin with, appellant is not likely to advance this lawsuit to the merits, let alone prevail, because it is not even clear that appellant properly exhausted its administrative remedies. See Stebbins v. Nationwide Mutual Ins. Co., 757 F.2d 364, 366 (D.C. Cir. 1985) ("Exhaustion of such [administrative] remedies is required under [the FOIA] before a party can seek judicial review."). Specifically, appellant has not submitted an administrative appeal of the August 30, 1988 denial of its request for expedited processing (or the denial of a fee waiver as to Item 2 of its request) to the CIA Information Review Committee. R. 5, Wright Declaration, paras. 5-7. See 32 C.F.R. §1900.51 (1987), reissued at 52 Fed. Reg. 46462-63 (1987) (CIA's administrative appeal procedures). To be sure, the FOIA's constructive exhaustion provision permits immediate resort to court where an agency has not made a determination on a request within the initial ten working days specified by the statute. See 5 U.S.C. §552(a)(6)(A)(i). However, this Court has recently suggested that where a FOIA requester waits beyond the ten-day period for the agency's initial response and then, in fact, receives that response before suing the agency (as in the instant case), the requester must exhaust the administrative appeal process be-

fore seeking to litigate the initial response. See Spannaus v. Department of Justice, 824 F.2d 52, 59 (D.C. Cir. 1987) ("Under that view of things, the requester's statutory right to sue might perhaps be either suspended (for the brief period during which an administrative appeal is available plus the 20 working days within which it must be processed) or entirely cut off (if the requester never appeals the denial).") (footnote omitted). See also Tripati v. Department of Justice, Civil No. 87-3301, slip op. at 2 (D.D.C. Apr. 15, 1988) ("plaintiff failed to exhaust his administrative remedies by failing to file a timely appeal of [the agency's] partial denial") (emphasis added) (copy attached as "Attachment A").[3] In light of Spannaus, the District Court appropriately expressed doubt as to its own subject matter jurisdiction. R. 9.

Moreover, even if appellant were to be regarded as having exhausted its administrative remedies, it is unlikely to prevail

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[3] Even apart from its failure to pursue an administrative appeal, appellant may not have exhausted its administrative remedies in other respects as well. See, e.g., Dettman v. Department of Justice, 802 F.2d 1472, 1477 (D.C. Cir. 1986). For example, a portion of Item 2 of appellant's request fails to "reasonably describe" the records sought. R. 1, Complaint, exh. 3; R. 5, Wright Declaration, paras. 4, 15-16. See, e.g., Marks v. Department of Justice, 578 F.2d 261, 263 (9th Cir. 1978). Additionally, a portion of Item 2 does not qualify for a fee waiver because the requested records are already in the public domain. R. 1, Complaint, exh. 3; R. 5, Wright Declaration, para. 17. See, e.g., Blakey v. Department of Justice, 549 F. Supp. 362, 364-65 (D.D.C. 1982), aff'd mem., 720 F.2d 215 (D.C. Cir. 1983). To the extent that appellant seeks access to that public material, it has thus far not complied with FOIA copying fee requirements. See, e.g., Crooker v. CIA, 577 F. Supp. 1225, 1225 (D.D.C. 1984); Lykins v. Department of Justice, 3 Gov't Disclosure Serv. (P-H) ¶83,092, at 83,637 (D.D.C. 1983).

on the merits. Appellant's demand for expedited processing does not demonstrate the kind of "exceptional need or urgency" necessary to justify an exception from appellee's "first-in, first-out" practice of handling FOIA requests. See Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 615-16 (D.C. Cir. 1976).[4] Significantly, appellant has not cited to even a single case where expedited processing was ordered solely because of the asserted "public interest" in the contents of the requested records. Indeed, the relevant case law provides that expedited processing can be appropriate only in truly extraordinary situations--such as when the requester's own life, safety, or substantial due process rights are at stake.[5]

Furthermore, the entire underpinning for appellant's "exceptional need or urgency" claim--i.e., that an unnamed source's unsubstantiated allegations about Mr. Bush's CIA activities justify

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[4] The record clearly demonstrates that appellee's processing of FOIA requests in the order in which they are received is in full compliance with the "good faith" and "due diligence" requirements set forth in Open America. R. 5, Wright Declaration, paras. 8-12.

[5] 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. Kelly, 427 F. Supp. 80, 81 (D.D.C. 1976) (plaintiff faced multiple criminal charges carrying possible death penalty in state court); cf. Bubar v. Department of Justice, 3 Gov't Disclosure Serv. (P-H) ¶83,227, at 83,955 (need for documents for preparation as witness in criminal trial held insufficient); Rivera v. DEA, 2 Gov't Disclosure Serv. (P-H) ¶81,365, at 81,953 (D.D.C. 1981) (pending civil suit does not justify expedited processing); Gonzalez v. DEA, 2 Gov't Disclosure Serv. (P-H) ¶81,016, at 81,069 (D.D.C. 1980) (use of FOIA as discovery tool to aid standard post-judgment attack on criminal conviction held insufficient).

immediate processing ahead of all other FOIA requesters, see Appellant's Brief at 1, 3-5--is decidedly weak. Notably, the CIA has not received any other FOIA requests for the records sought by appellant, nor has it received any congressional or press inquiries about any such records, other than those press inquiries surrounding the agency's July 1988 identification of a different "George Bush" as the individual mentioned in the Federal Bureau of Investigation document set forth at Attachment 5 to Appellant's Brief. R. 5, Wright Declaration, para. 20.

Beyond that, moreover, even if appellant's request could qualify for expedited processing, appellant is presumptuous to assume that any responsive records will necessarily be located and disclosed. Even if such records were found to exist (and, as to portions of Item 2, if appellant "reasonably describes" them), then one or more of the FOIA's exemptions could conceivably permit withholding. See 5 U.S.C. §552(b)(1)-(9); cf. Strassman v. Department of Justice, 792 F.2d 1267, 1268-69 (4th Cir. 1986) (per curiam) (rejecting argument that "electorate's right to know" about document concerning candidate for public office outweighed claim of privacy where "no evidence of wrongdoing" existed).[6]

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[6] It should also be noted that appellant has made no showing that it is likely to prevail on its separate First Amendment claim. See R. 1, Complaint. Such a right of access to government records simply has not been recognized. See Houchins v. KQED, Inc., 438 U.S. 1, 8-12 (1978); McGehee v. Casey, 718 F.2d 1137, 1147 (D.C. Cir. 1983); American Library Ass'n v. Faurer, 631 F. Supp. 416, 421-23 (D.D.C. 1986), aff'd on other grounds, 818 F.2d 81 (D.C. Cir. 1987).

In sum, given all of these circumstances, the District Court was quite understandably "unpersuaded" that appellant was likely to prevail on the merits. R. 9.[7]

Nor has appellant shown that without expedited processing it will be irreparably injured. The gravaman of appellant's "injury" claim is that it will be unable to disseminate any requested records to the public in time for the November election. Appellant's Brief at 1, 10-11. Surely such an "injury"--to the extent that it can even be regarded as a cognizable harm to appellant rather than to the electorate in a more general sense--is, as the District Court aptly noted, highly "speculative and indirect." R. 9. See Cuomo v. NRC, 772 F.2d at 976 (moving party must "demonstrate that the injury claimed is 'both certain and great'") (quoting Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)).[8]

In pointed contrast to the speculative "injury" to appellant, expedited processing will directly, and quite certainly,

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[7] Appellant's contention that the Federal Courts Improvement Act of 1984, 28 U.S.C. §1657(a) (1985), required the District Court to grant its FOIA request expedited treatment, Appellant's Brief at 2, 8-10, is contrary to the plain language of that statute. That statute merely requires a court to expedite the "consideration" of a FOIA "action" where "good cause therefore is shown." 28 U.S.C. §1657(a). Here, consideration of appellant's "action" has already been expedited insofar as it sought preliminary injunctive relief. Moreover, to the extent that 28 U.S.C. §1657(a) could possibly be construed to require a court to consider expediting a FOIA request (as opposed to an "action"), appellee can only observe that appellant has not shown the requisite "good cause" for such extraordinary treatment.

[8] Appellant's contention that the District Court "erred in requiring it to show irreparable harm" because appellee was in violation of the FOIA, Appellant's Brief at 10, is mistaken. Appellee is not in violation of the FOIA, because its "first-in, first-out" processing practice fully comports with the requirements of Open America. See R. 5, Wright Declaration, paras. 8-12.

disadvantage approximately 1,391 other persons or organizations who have submitted FOIA requests ahead of appellant. R. 5, Wright Declaration, para. 12. See Open America, 547 F.2d at 614 (noting that "real parties at interest may [be] the 5,137 other persons or organizations who made requests prior to plaintiff"); Mitsubishi Elec. Corp. v. Department of Justice, 39 Ad.L.Rep.2d (P&F) 1133, 1142 (D.D.C. 1976) (recognizing that expedited processing "will adversely impact upon the conflicting interests of numerous individuals whose requests . . . were filed [earlier]"). Surely the District Court cannot be faulted for protecting the legitimate interests of these other FOIA requesters. See R. 9.

Finally, as the District Court correctly recognized, R. 9, expedited treatment for appellant would necessarily harm the public interest in fair and orderly FOIA processing. See Open America, 547 F.2d at 614-16. It would be an ill-advised precedent indeed if all FOIA requesters seeking records to substantiate bald, hearsay allegations concerning candidates for public office were routinely to qualify for expedited processing simply because an election is close at hand.[9] Predictably, such a precedent would only encourage such requesters routinely to commence premature litigation, seek preliminary injunctions and, if denied, seek "emergency" relief from this Court. Given that such a tac-

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[9] In this regard, it is difficult to understand how appellant can seriously characterize the kind of sensational, pre-election allegations and innuendo about a candidate for public office--as set forth in the magazine article it cites--as giving rise to "unique circumstances." Appellant's Brief at 8. It is practically worthy of judicial notice that in these times such allegations, especially prior to elections, are anything but uncommon.

tic results in a clear inequity to other FOIA requesters, and burdens the limited resources of agencies and courts, there is simply no compelling public interest in indulging appellant's demand for a veritable "pre-election exception" from the time-tested and sensible agency practice of chronologically processing FOIA requests.

In sum, appellant has not even come close to meeting its distinctively heavy legal burden to support summary reversal.

WHEREFORE, appellee respectfully submits that appellant's emergency motion for expedited treatment and summary reversal should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

APR 15 1988

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ANANT KUMAR TRIPATI,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE, et al.,

Defendants.

Civil Action No. 87-3301-LFO

MEMORANDUM ORDER

Plaintiff Anant Kumar Tripati is a citizen of Fiji and is currently incarcerated at the Federal Correctional Institution in Tucson, Arizona. He filed a FOIA and Privacy Act request on May 31, 1984 seeking documents in the possession of the Federal Deposit Insurance Corporation ("FDIC") containing his name or the names of companies with which he had been associated. After administratively processing plaintiff's request, the FDIC partially granted and partially denied his request by letters dated July 6, 1984, September 19, 1984, and November 23, 1984. The July 1984 letter advised plaintiff of his right to bring an administrative appeal of the partial denial within 30 days. The letter of September 1984 reiterated plaintiff's right to appeal and sought payment for the search and duplication costs of $250.50 incurred in processing plaintiff's FOIA request.

On July 4, 1987, more than two and one-half years later, plaintiff filed a FOIA suit in federal district court against the

FDIC and several other defendants. Defendant FDIC moves to dismiss plaintiff's complaint for failure to exhaust administrative remedies. See Crooker v. United States Marshals Service, 577 F.Supp. 1217, 1218 (D.D.C. 1983); Crooker v. United States Secret Service, 577 F.Supp. 1218, 1219 (D.D.C. 1983). Defendant FDIC's motion will be granted because plaintiff failed to exhaust his administrative remedies by failing to file a timely appeal of FDIC's partial denial of his FOIA and Privacy Act request. There is no credible evidence that plaintiff filed a timely appeal within the 30 period allowed for administrative appeals. The facts indicate that plaintiff did not file an appeal with the FDIC until May 6, 1987, approximately 1045 days after the FDIC's first partial denial of his request and 902 days after the FDIC's final letter of November 23, 1984. Accordingly, it is this 15th day of April, 1988, hereby

ORDERED: that defendant FDIC's motion to dismiss should be, and is hereby, GRANTED; and it is further

ORDERED: that plaintiff's complaint with respect to defendant FDIC should be, and is hereby, DISMISSED with prejudice.

Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Opposition To Emergency Motion For Expedited Treatment And Summary Reversal was served upon appellant by hand-delivery of a copy thereof to the offices of:

James H. Lesar, Esq.
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on this 12th day of October, 1988.

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