No. 04-5063, consolidated with No. 04-5072
ORAL ARGUMENT SCHEDULED JANUARY 13, 2005

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELECTRONIC PRIVACY INFORMATION CENTER,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant-Appellee.

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

BRIEF OF *AMICI CURIAE* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, NATIONAL SECURITY ARCHIVE, AMERICAN CIVIL LIBERTIES UNION, AMERICAN SOCIETY OF NEWSPAPER EDITORS, AND SOCIETY OF PROFESSIONAL JOURNALISTS IN SUPPORT OF APPELLANT FOR REVERSAL IN PART AND AFFIRMANCE IN PART OF THE JUDGMENT OF THE DISTRICT COURT

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and *Amicus*

The following parties and *amici* have appeared before the district court or in this court: Plaintiff-Appellant/Cross-Appellee Electronic Privacy Information Center, Defendant-Appellee/Cross-Appellant United States Department of Justice and *amici curiae* Reporters Committee for Freedom of the Press, National Security Archive, American Civil Liberties Union, American Society of Newspaper Editors, and Society of Professional Journalists.

B. Rulings Under Review

The ruling under review is a December 22, 2003, unpublished Memorandum and Order of Judge James Robertson of the United States District Court for the District of Columbia in *Electronic Privacy Information Center v. United States Department of Justice*, Civil Action No. 03-2078 (JR). There is no official citation of the unpublished Memorandum and Order.

C. Related Cases

Neither the cases on review nor any related cases were previously before this court or are currently pending in any other court of which counsel is aware.

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DISCLOSURE STATEMENT

In accordance with Fed. R. App. P. 26.1 and Cir. R. 26.1, *amicus curiae* the Reporters Committee for Freedom of the Press discloses that it is a voluntary, unincorporated association of reporters and editors. The Reporters Committee has no parent corporation and no stock, thus no publicly held corporation owns 10 percent or more of its stock. The Reporters Committee identifies that its general nature and purpose is to work to defend the First Amendment and freedom of information interests of the news media. The Reporters Committee is a "trade association" because it is a continuing association of individuals operated for the purpose of promoting the general professional, legislative and other interests of the news media.

In accordance with Fed. R. App. P. 26.1 and Cir. R. 26.1, *amicus curiae* the National Security Archive discloses that it is a project of the National Security Archive Fund, Inc. The National Security Archive Fund, Inc. is a not-for-profit corporation established under the laws of the District of Columbia. The National Security Archive Fund, Inc. has no parent corporation and no stock, thus no publicly held corporation owns 10 percent or more of its stock. The Archive identifies that its general nature and purpose is to promote research and public education on U.S. governmental and national security decisionmaking and to promote and encourage openness in government and government accountability. The Archive has no members, thus no member has issued shares or debt securities to the public.

Pursuant to Fed. R. App. P. 26.1 and Circuit Rule 26.1, *amicus curiae* American Civil Liberties Union hereby states that it is a non-profit District of Columbia membership corporation devoted to the defense of constitutional rights and individual liberties, that it has not issued shares or debt securities to the public, and that it has no parent, subsidiary, or affiliated entities that have issued shares or debt securities to the public.

In accordance with Fed. R. App. P. 26.1 and Cir. R. 26.1, *amicus curiae* the American Society of Newspaper Editors discloses that it is a voluntary, incorporated association of newspaper editors. The American Society of Newspaper Editors has no parent corporation and no stock, thus no publicly held corporation owns 10 percent or more of its stock. ASNE identifies that its general nature and purpose is to work to defend the First Amendment and freedom of information interests of the news media. ASNE is a "trade association" because it is a continuing association of numerous individuals operated for the purpose of promoting the general professional, legislative and other interests of the news media.

In accordance with Fed. R. App. P. 26.1 and Cir. R. 26.1, *amicus curiae* the Society of Professional Journalists discloses that it is a voluntary, incorporated association of individuals operated for the purpose of promoting the general professional, legislative and other interests of journalists. The Society of Professional Journalists has no parent corporation and no stock, thus no publicly held corporation owns 10 percent or more of its stock. SPJ identifies that its general nature and purpose is to work to defend the First Amendment and freedom of information interests of the news media. SPJ is a "trade association" because it is a continuing association of numerous individuals operated for the purpose of promoting the general professional, legislative and other interests of the news media.

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STATUTES AND REGULATIONS [2]

18 U.S.C. § 1913 provides:

> No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy or appropriation, whether before or after the introduction of any bill, measure, or resolution proposing such legislation, law, ratification, policy or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to any such Member or official, at his request, or to Congress or such official, through the proper official channels, requests for any legislation, law, ratification, policy or appropriations which they deem necessary for the efficient conduct of the public business, or from making any communication whose prohibition by this section might, in the opinion of the Attorney General, violate the Constitution or interfere with the conduct of foreign policy, counter-intelligence, intelligence, or national security activities. Violations of this section shall constitute violations of section 1352(a) of title 31.

29 C.F.R. § 16.9 provides, in pertinent part:

> (a) Appeals of adverse determinations. If you are dissatisfied with a component's response to your request, you may appeal an adverse determination denying your request, in any respect ...
>
> (c) When appeal is required. If you wish to seek review by a court of any adverse determination, you must first appeal it under this section.

[2]Except for the following, all applicable statutes and regulations are contained in the Brief of Plaintiff-Appellant.

STATEMENT OF INTEREST OF *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 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 litigation since 1970. The Reporters Committee and the reporters it represents use the Freedom of Information Act and expedited processing as tools for providing timely information from government records on matters of public importance. For example, on December 12, 2003, the Reporters Committee requested expedited processing of a FOIA request to the Department of Justice for records showing the number of times it had used 28 C.F.R. § 50.9(d) to close judicial proceedings to the public.

The National Security Archive is a project of the National Security Archive Fund, a not-for-profit corporation established to promote research and publication on U.S. governmental and national security decisionmaking and to promote and encourage openness in government and government accountability. Since its founding in 1987, the Archive has actively sought to defend open government and the Freedom of Information Act through litigation, filing of *amicus* briefs, guidance and research. The Archive has appeared in over 25 lawsuits in the trial and appellate courts of the D.C. Circuit. In 2003, the Archive made 1,209 FOIA requests, none of which requested expedited processing. In 2004, as of July 14, the Archive has made 826 FOIA requests, 8 of which requested expedited processing of the Department of Defense, Department of State and Department of Justice for records concerning interrogation of detainees held by the United States.

The American Civil Liberties Union is a nationwide, non-profit, non-partisan civil rights organization with more than 400,000 members dedicated to the constitutional principles of liberty and equality. Part of the ACLU's mission is to educate the public about government activity that implicates civil rights. The ACLU often uses the FOIA to this end. For example, the ACLU filed a FOIA request in August 2002 for records relating to surveillance conducted under the USA Patriot Act. The ACLU filed a FOIA request in October 2003 for records relating to the treatment of detainees held by the United States outside the continental United States. The ACLU also filed a FOIA request in October 2003 for records relating to surveillance conducted under Section 215 of the USA PATRIOT Act. The ACLU often relies on the statutory right to expedited processing to ensure that records concerning government activity are disseminated to the public while the records are still timely. *See, e.g., ACLU v. Department of Justice*, 265 F.Supp.2d 20, 25 (D.D.C. 2003) (noting that ACLU and other requesters had been granted expedited processing in request for records concerning surveillance conducted under USA Patriot Act). Where an agency denies a request for expedited processing, the ACLU depends on the right immediately to contest the denial in court in order to ensure that the release of important records is not unduly delayed. *See, e.g., ACLU v. Department of Justice*, No. 03-2522, 2004 U.S. Dist. LEXIS 9381 (D.D.C., May 10, 2004) (Huvelle, J.) (holding that, with respect to request for records concerning Section 215 of USA PATRIOT Act, ACLU and other requesters were entitled to expedited processing denied to them by FBI).

The American Society of Newspaper Editors is a nonprofit organization founded in 1922. It has a nationwide membership of approximately 800 persons who hold positions as directing editors of daily newspapers throughout the United States, with members recently being added in

Canada and other countries in the Americas. The purposes of the Society include assisting journalists and providing an unfettered and effective press in the service of the American people.

The Society of Professional Journalists is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press. Members of the Society frequently use the Freedom of Information Act and expedited processing to gain timely information from government records on matters of public concern. For example, last month Ellen Smith, the publisher of *Mine Safety and Health News* and a Society member, sought expedited review for a request to the Mine Safety and Health Administration for important information related to the agency's recording of mining-related fatalities.

Amici's interest in this case is in preserving public access to federal government records, particularly those that may be used to expose government activity to the light of public scrutiny. Expedited processing is an essential tool for getting government records on matters of public interest to the public in a timely manner so that those records may be of use in circumstances where action is required before the records would be disclosed under the normal FOIA processing scheme. This appeal concerns important questions of what threshold of proof the news media, or any FOIA requestor, must cross to demonstrate "current exigency" and "substantial interest, either on the part of the American public or the media" in order to qualify for expedited processing of FOIA requests. The issue of exhaustion of administrative remedies is also important because the delays involved in administrative appeal also affect the ability of

requesters to obtain government records on matters of public interest in a timely manner.

Amici are mindful of Congress and this court's warnings about unduly generous granting of expedited processing. Because *amici*, their members and the interests they represent regularly use the FOIA and request expedited processing, they have an interest in the process remaining a practical method of disclosing records quickly where there is a compelling urgency to do so.

SUMMARY OF ARGUMENT

Amici curiae respectfully urge this court to reverse the judgment of the District Court that Plaintiff-Appellant Electronic Privacy Information Center ("EPIC") is not entitled to expedited processing of its Freedom of Information Act ("FOIA") request. In holding that EPIC's request did not concern an "urgency to inform the public concerning actual or alleged Federal Government activity" or "widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence," the District Court erred in focusing narrowly on the number of news articles EPIC cited in its request.

While media interest may be an indicator of an "urgency to inform," it is not a prerequisite. Such an urgency exists when normal processing would produce government records too late for the public to act on them or would result in the continuance of an ongoing wrong whether or not the media exhibited an interest before the release of information. Where media interest is an indicator of an "urgency to inform," that interest need not be "widespread and exceptional," as there may be an urgency to inform the public on matters of an entirely local significance.

It is also insufficient to look narrowly at the number of news articles published in order to

determine "widespread and exceptional media interest," because a small number of articles may be merely an indication of a lack of information to report and not of a lack of interest. In some cases the media interest will be demonstrated in other ways, such as the number of FOIA requests, or will be obvious from the subject of the government records or from the substance of the articles cited.

As a preliminary matter, *amici* also respectfully urge this court to affirm the judgment of the District Court that administrative appeal is not a prerequisite to judicial review of a denial of expedited processing. The Department of Justice has cross-appealed on this issue. Judicial review of expedited processing denials without an administrative appeal is permitted by the plain text of the Freedom of Information Act. Requiring such an appeal would further delay the release of records and is contrary to the purpose of expedited processing.

ARGUMENT

I. Administrative appeal of a denial of expedited processing is not a prerequisite to judicial review and would frustrate the purpose of expedited processing.

The statute authorizing judicial review of an agency's denial of expedited processing does not require an administrative appeal as a prerequisite to filing suit. Requiring an administrative appeal would add another step to the process of seeking to have records released and cause even further delay, contrary to the purpose of expedited processing. An agency rule requiring an administrative appeal, such as the one relied upon by the Department of Justice, is contrary to Congress' intent and the plain language of FOIA, and is therefore void.

FOIA provides that "Agency action *to deny or affirm denial* of a request for expedited processing ... shall be subject to judicial review ... ." 5 U.S.C. § 552(a)(6)(E)(iii)(emphasis

added). Under the plain language of the statute, "judicial review is appropriate at either of two moments: when the agency has denied a request for expedited processing, or when the agency has, upon administrative appeal, affirmed the denial of such a request." *ACLU v. U.S. Dept. of Justice*, No. 03-2522, 2004 U.S. Dist. LEXIS 9381 at 5-6 (D.D.C. May 10, 2004)(*quoting Al-Fayed v. CIA*, No. 00-2092, 2000 U.S. Dist. LEXIS 21476, 7 (D.D.C. Sept. 20, 2000).[3] It is therefore at the discretion of the requester to decide whether to bring suit immediately following a denial, or to first file an appeal in the hope of persuading the agency to change its position.

This is a common sense approach taken by Congress to further the goal of providing expedited processing. Congress provided that when a FOIA requester demonstrates a "compelling need" to get government records quickly he or she could do so. 5 U.S.C. § 552(a)(6)(E)(i)(I). As discussed in Section II, below, these are instances where Congress has recognized that expedited processing is necessary in order to deliver government information to the public in time for the information to be of use. Requiring requesters who have asserted a "compelling need" for government records on an expedited basis to navigate an additional level of time-consuming bureaucracy is contrary to the goal of producing the needed records quickly.

In some instances, a requestor may believe that his or her interest in getting records quickly is best served by an administrative appeal. Such an appeal is certainly less expensive than filing a lawsuit and may be resolved more quickly than a suit. Where a requester has reason to believe that an appeal is the most expeditious method of obtaining the requested records, that option remains open. However, where a requester believes that further appeal to an agency that

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[3]This language was also the basis of the District Court's holding in this case. Appendix, at 71-72 (*quoting Al-Fayed v. CIA*, No. 00-2092, 2000 U.S. Dist. LEXIS 21476, 7 (D.D.C. Sept. 20, 2000).

has already once denied his or her request for expedited processing will not be successful, such an appeal may serve only to further delay the decision on the release of records the requester needs quickly.

"[A]bsent a statutory provision to the contrary, failure to exhaust is by no means an automatic bar to judicial review." *Oglesby v. U.S. Dept. of Army*, 920 F.2d 57, 61 (D.C. Cir. 1990)(citing *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418, 426 (1968)). "Of 'paramount importance' to any exhaustion inquiry is congressional intent. Where Congress specifically mandates, exhaustion is required. But where Congress has not clearly required exhaustion, sound judicial discretion governs." *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992)(rev'd by statute on other grounds)(internal citations omitted). Here, Congress specifically mandated that exhaustion is not required. It follows that there is no judicial or agency discretion to require it.

"No particular deference" is owed to an agency's interpretation of FOIA. *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1313 (D.C. Cir. 2003). The Department of Justice regulation implementing appeals of FOIA actions requires that "If you wish to seek review by a court of any adverse determination, you must first appeal it under this section." 28 C.F.R. § 16.9(c). But because this regulation is contrary to the statute it interprets and implements, it is void. Where Congress has provided for judicial review of expedited processing decisions without administrative appeal, an agency may not then require such an appeal by regulation.
Rulings in other FOIA cases that have found administrative appeal to be a prerequisite to judicial review have not addressed the section providing for expedited processing at issue in this case and are inapplicable here. *See Hidalgo v. F.B.I.*, 334 F.3d 1256 (D.C. Cir. 2003)(denial of records

under Exemption (b)(6) and Exemption(b)(7)(c)); *Oglesby*, 920 F.2d 57 (constructive denial by failure of agency to respond); *Dettmann v. U.S. Dept. of Justice*, 802 F.2d 1472 (1986)(adequacy of agency search and segregation of exempt records).

Because a requirement for administrative exhaustion would cause added delay where government records are needed quickly, because the plain language of the statute authorizes judicial review without exhaustion, and because there are no cases requiring administrative exhaustion in expedited processing cases, this court should affirm the judgment of the district court that administrative exhaustion is not a jurisdictional prerequisite to judicial review of denial of expedited processing.

II. A "compelling need" for expedited processing exists when normal processing would produce government records too late for the public to act on them.

Expedited processing is an essential mechanism for making government records publicly available in circumstances where timeliness is important. In some cases, disclosure of government records through the normal agency processing schedule will result in information being delivered to the public too late for it to be of use, other than for historical purposes. In these cases there is a "compelling need" to process FOIA requests on an expedited basis.

To that end, Congress amended FOIA in 1996 to provide for expedited processing when a requester demonstrates such a "compelling need." Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C. § 552(a)(6)(E)(i)(I). FOIA defines "compelling need" in two ways: (1) 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" or, (2) when the requester is primarily engaged in disseminating information to the public, there is an

"urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. § 552(a)(6)(E)(v). Expedited processing is also available in other cases as determined by individual government agencies. 5 U.S.C. § 552(a)(6)(E)(i)(II).

In *Al-Fayed v. C.I.A.*, the only federal appeals court decision addressing expedited processing of FOIA requests, this court articulated a 3-part test for the "urgency to inform" standard based on the legislative history of the E-FOIA Amendments that created expedited processing. 245 F.3d 300, 310 (D.C. Cir. 2001). In determining if expedited processing is required by FOIA, a court must consider: (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. *Id*. Additional factors may also be considered, including the "credibility" of a requester. *Id*.

"Exigency" is defined as "A state of urgency; a situation requiring immediate action." Black's Law Dictionary (8th ed. 2004). A current exigency to the American public, as required by Part 1 of the *Al-Fayed* test, exists, for example, when there is an ongoing wrong that could be exposed by the release of government records or where government records are relevant to action that must be taken before a deadline that could not be met if the records were disclosed through the normal FOIA process. The ongoing wrong or the existence of the deadline requires immediate action. Otherwise the wrong impermissibly continues or the deadline passes without the public being able to fully participate. Exigency is not limited to situations where there is an imminent threat to life or physical safety, because such an interpretation would be redundant with the first definition of "compelling need." 5 U.S.C. § 552(a)(6)(E)(v).

For example, an exigency requiring expedited processing might exist when government records show that an agency is failing to properly regulate a private company, resulting in harm to the environment or economy. A similar example would occur where records show that a government official is engaged in significant action or inaction in violation of the law, especially where the alleged wrongdoing is ongoing. In such cases the expedited disclosure of the records could trigger an immediate stop to ongoing wrongdoing. As discussed in Section IV, below, had expedited processing been granted to the ACLU's requests for information regarding the treatment of individuals detained abroad by the United States after the September 11, 2001 terror attacks, the abuse of detainees at Abu Ghraib prison could have been brought to light and acted on months earlier.

An exigency also exists when the public needs records or information on a matter that is subject to a deadline. Such an exigency would exist, for example, where records are relevant to legislation that is up for a vote, or show that a previously unknown harm will occur if a public works project is completed. If the records are disclosed after the close of a public comment period, after a deadline has passed or after action is taken, the records are no longer useful as a tool for public participation in government.

In this case, exigency existed for two separate, although related reasons. First, the records requested by EPIC were necessary to determine whether the Executive Office of U.S. Attorneys had violated the Anti-Lobbying Act, 18 U.S.C. § 1913, by requesting that federal prosecutors lobby on behalf of the USA PATRIOT Act. If records would reveal that illegal lobbying was occurring, disclosure of the records could trigger a demand that it end. Second, the records were relevant to the debate on a piece of pending legislation: The "Otter Amendment," which would

have denied funding for certain uses of the USA PATRIOT Act. Disclosure on an expedited basis was necessary to inform public comment and input on the legislation. If resistance to the amendment and support of the USA PATRIOT Act by federal prosecutors was the result of improper influence from the Executive Office of U.S. Attorneys, this would be relevant to the public debate and influence on the amendment.

The failure of the Department of Justice to disclose these records before the final legislative decision on the amendment robbed the public of the chance to make fully informed comment on the legislation and the ability to call for a stop to any illegal lobbying. Had the records been disclosed on an expedited basis and had they shown that illegal lobbying occurred, public support for the amendment might well have resulted in its passage. The ability to make informed comment on pending legislation and the ability to require government officials to act in accordance with the law are significant recognized interests, as required by part 2 of the *Al-Fayed* test, that were compromised by the Department of Justice's refusal to expedite EPIC's FOIA request.[4]

Amici are mindful of Congress' warning that "unduly generous use of the expedited processing procedure would unfairly disadvantage other requestors who do not qualify for its treatment," H.R. Rep. No. 104-795, at 26 (1996), and this court's warning that "an unduly generous approach would also disadvantage those requestors who do qualify for expedition, because prioritizing all requests would effectively prioritize none." *Al-Fayed*, 254 F.3d at 310. Because *amici*, their members and the interests they represent regularly use the FOIA and request

[4]Part 3 of the *Al-Fayed* test, that the request concern federal government activity, is not disputed in this case.

expedited processing, they have an interest in the process remaining a practical method of disclosing records quickly where there is a compelling urgency to do so. However, *amici*'s interpretation of when expedited processing is required does not implicate these concerns.

Congress' concerns about "unduly generous" use of expedited processing were based on "the finite resources generally available for fulfilling FOIA requests." H.R. Rep. No. 104-795, at 26. In fiscal year 2003, out of 53,904 total FOIA requests, the Department of Justice granted expedited processing in only 123, or 0.2% of requests.[5] In fiscal year 2002, out of 182,079 total FOIA requests, the Department of Justice granted expedited processing in only 120, or 0.07% of requests.[6] In fiscal year 2001, out of 196.917 total FOIA requests, the Department of Justice granted expedited processing in only 123, or 0.06% of requests.[7] Even a substantial increase in the percentage of requests granted expedited processing would neither tax the government's resources nor significantly prejudice those requests that would have been granted expedited processing under a more restrictive standard. Simply put, the department's finite resources are not put in jeopardy.

III. Substantial media interest is not necessary to show a "compelling need" for expedited processing.

Although media interest in the subject of a request for expedited processing may be one

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[5]2003 Dept. of Justice FOIA Ann. Rep. (VIII)(*available at* http://www.usdoj.gov/oip/annual_report/2003/03contents.htm).

[6]2002 Dept. of Justice FOIA Ann. Rep. (VIII)(*available at* http://www.usdoj.gov/oip/annual_report/2002/02contents.htm). The decrease in requests from 2002 to 2003 is due to the Immigration and Naturalization Service being moved from the Department of Justice to the Department of Homeland Security and due to the Bureau of Alcohol, Tobacco and Firearms moving to the Department of Justice. 2003 Dept. of Justice FOIA Ann. Rep. (VIII).

[7]2001 Dept. of Justice FOIA Ann. Rep. (VIII)(*available at* http://www.usdoj.gov/oip/annual_report/2001/01contents.htm).

indicator of an "urgency to inform the public" and therefore a "compelling need" for expedited processing, such media interest is not a prerequisite. In many cases, there may be an urgency to inform the public about matters that it does not yet know about, or that the media have not yet reported. It is not surprising that there would be a lack of public or media attention to the subject, particularly where all of the relevant information about a topic on which urgency exists is contained in government records not yet released under FOIA and disseminated to the public .

In *Al-Fayed v. C.I.A.*, this court denied expedited processing of a FOIA request for information allegedly possessed by the Central Intelligence Agency concerning the death of Diana, Princess of Wales, and Dodi Al Fayed, in part because there was "no evidence in the record that there is substantial interest, either on the part of the American public or the media, in this particular aspect of the plaintiffs' allegations." 254 F.3d at 311. The District Court relied on this language in holding that EPIC had failed to demonstrate an "urgency to inform" in this case because EPIC had provided too few or an insufficient variety of news media citations in its FOIA request. Appendix, at 75-77.

Nowhere in FOIA's definition of "compelling need" or in the Congressional report discussing expedited processing is "media interest" mentioned as necessary to demonstrate that there is an "urgency to inform." What is important in showing an urgency to inform and compelling need is the nature of the requested records and their potential import to the public, not the attention already paid to the subject by the public or news media before the records are released. The District Court erred in focusing solely on the amount of media attention related to the subject of EPIC's request, and in not considering the nature of the information requested.

Media interest may well be an indicator of an "urgency to inform" because in many cases

substantial media interest will be the best indicator of an exigency to the American public. However, the absence of demonstrated media interest may simply be indicative of strong government effort to maintain secrecy over an issue of vital importance to the public. Requiring media interest to demonstrate a compelling need for expedited processing in every case would turn the urgency to inform standard into "what you don't know won't hurt you."

IV. "Widespread and exceptional media interest" is not merely a function of the quantity of articles published.

In addition to requiring expedited processing when there is a "compelling need," FOIA gives federal agencies latitude to provide expedited processing "in other cases determined by the agency." 5 U.S.C. § 552(a)(6)(E)(i). The Department of Justice has adopted a regulation providing expedited processing to FOIA requests that involve "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(d)(1)(iv).

The District Court erred in holding that EPIC failed to demonstrate widespread and exceptional media interest in the subject of its FOIA request. Although EPIC produced a sufficient number of news articles to satisfy this standard, widespread and exceptional media interest is not only a function of the number of articles published. "It is unworkable to measure the merit of a request for expedited processing under the 'media interest' standard by solely counting the number of news articles that the request cites." *ACLU*, 2004 U.S. Dist. LEXIS 9381 at 12 n.11. In some cases, the media interest will be demonstrated in other ways, such as the number of FOIA requests, or will be obvious from the subject of the government records or from the substance of the articles cited.

In order to demonstrate "widespread and exceptional media interest," EPIC submitted 31 news articles from 14 states and the District of Columbia, including articles from two of the most widely read newspapers in the nation: *The Washington Post* and *The New York Times*. Brief of Plaintiff-Appellant at 4-6, 23. The District Court held that this was an insufficient demonstration, focusing on the number of articles cited and whether they addressed the narrow issue of lobbying by federal prosecutors. Appendix, at 75-77. This analysis by the District Court is too restrictive.

Courts and agencies should not merely be counting the number of articles cited in order to determine "widespread and exceptional media interest." Before government records have been released, there may not be much to report on other than speculation and allegations. But this lack of media action does not mean that there is a lack of media interest. A small number of articles may reflect a lack of available facts on which to report, not a lack of interest by the media in the subject matter. This is precisely why expedited processing is valuable. It allows information to be released more quickly so there will be facts to report. Otherwise, valuable and important information does not reach the public, or the media must rely on less accurate sources of information and leaks.

A striking example of this is the American Civil Liberties Union's request for expedited processing of its FOIA requests for information regarding the treatment of individuals detained abroad by the United States after the September 11, 2001 terror attacks. Based on a few news reports of inhumane treatment of prisoners, the ACLU filed FOIA requests on October 7, 2003, with the Department of Defense, Department of Justice, Department of State and the Central

Intelligence Agency for documents related to the treatment of such detainees.[8] The federal departments denied the ACLU's requests for expedited processing, citing insufficient media interest.[9] When *The New Yorker* magazine published a story on April 30, 2004, based on a leaked Army report that detailed the abuse of detainees at Abu Ghraib prison in Iraq,[10] a flurry of media activity followed leading to public and Congressional debate on the treatment of detainees and the prosecution of U.S. soldiers for abuse.[11]

Had the federal departments granted the ACLU's request for expedited processing, the abuse of detainees could have been brought to light and acted on months earlier. The problem is that the federal departments took too narrow a view of "widespread and exceptional media interest" by looking only at the number of articles published and not the subject matter of the requested records. As the volume of media activity following the revelations in the leaked Army reports show, media interest in the treatment of detainees was obviously widespread and exceptional. It was a lack of available information, and not a lack of interest, that was responsible for the few published articles at the time of the ACLU's FOIA request.

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[8]Request Submitted Under the Freedom of Information Act by Amrit Singh, Staff Attorney, American Civil Liberties Union, to Freedom of Information Officers, Department of Defense, Department of Justice, Department of State and Central Intelligence Agency (October 7, 2003)(*available at* http://www.aclu.org/International/International.cfm?ID=13964&c=36).

[9]Press Release, American Civil Liberties Union, ACLU Requested Information on Prisoner Abuses in October; Pentagon Stonewalled, Saying Information Wasn't "Breaking News" (May 13, 2004)(*available at* http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=15729&c=206).

[10]Seymour M. Hersh, *Torture at Abu Ghraib*, The New Yorker, May 10, 2004, at 42. Although the article appeared in the May 10, 2004 edition of the magazine, it was first published on the magazine's website on April 30, *at* http://www.newyorker.com/fact/content/?040510fa_fact.

[11]*See, e.g.*, Stephen J. Hedges, *Bush calls abuse 'abhorrent'; President promises Arab TV viewers a full investigation*, Chicago Tribune, May 6, 2004, at 1; Jackie Spinner, *Soldier Gets 1 Year In Abuse of Iraqis; 'I Let Everybody Down,' He Says After Guilty Plea*, The Washington Post, May 20, 2004, at A1; John Hendren, *Lull in Iraq Prison Probe Won't Last, Senator Says; Republican Warner has plans for a series of hearings on the abuse scandal. He promises politics won't stop him, even in an election year*, L.A. Times, July 6, 2004, at A18.

As in this case, allegations of possible illegal behavior by government officials, especially in the context of the ongoing debate over the USA PATRIOT Act, are of obvious media interest. An approach to determining "widespread and exceptional media interest" that focuses only on the number of articles published is shortsighted and will continue to result in important information being unacceptably delayed in reaching the public.

CONCLUSION

For the aforementioned reasons, *amici curiae* respectfully request this court to affirm the judgment of the District Court that administrative appeal is not a prerequisite to judicial review of a denial of expedited processing, and to reverse the judgment of the District Court that Plaintiff-Appellant Electronic Privacy Information Center is not entitled to expedited processing of its Freedom of Information Act request.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because this brief contains 5,112 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Cir. R. 32(a)(2). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Cir. R. 32(a)(1), and the type style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using WordPerfect 10 in Times New Roman 12-point font in the body of the brief and Times New Roman 11-point font in footnotes.

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I HEREBY CERTIFY that on this 27th day of July, 2004, I caused two true and correct copies of the forgoing Brief to be mailed to the following recipients via First-Class Mail and an original and 14 true and correct copies to be hand-delivered to the clerk of the court in accordance with Fed. R. App. P. 25:

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