

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON**
1400 Eye Street, N.W., Suite 450
Washington, D.C. 20005,

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530,

Defendant.

Case: 1:08-cv-01468
Assigned To : Sullivan, Emmet G.
Assign. Date : 8/25/2008
Description: FOIA/Privacy Act

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, challenging the failure of the U.S. Department of Justice ("DOJ") to respond to the expedited request of plaintiff for disclosure of records concerning the interviews of Vice President Richard B. Cheney, conducted outside the presence of the grand jury, as part of Special Counsel Patrick J. Fitzgerald's investigation into the leak of Valerie Plame Wilson's covert identity as an operative of the Central Intelligence Agency ("CIA").

2. This case seeks declaratory relief that the DOJ is in violation of the FOIA, 5 U.S.C. § 552(a)(6)(E)(I), for failing to respond to plaintiff's expedited request for records and injunctive relief ordering defendant DOJ to process immediately the requested records in their entirety.

JURISDICTION AND VENUE

3. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the DOJ pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552(a)(6)(C)(I). This Court

also has jurisdiction over this action pursuant to 28 U.S.C. § 1331. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

PARTIES

4. Plaintiff Citizens for Responsibility and Ethics in Washington (“CREW”) is a nonprofit corporation, organized under section 501(c)(3) of the Internal Revenue code. CREW is committed to protecting the right of citizens to be informed about the activities of government officials and to ensuring the integrity of government officials. CREW seeks to empower citizens to have an influential voice in government decisions and in the governmental decision-making process through the dissemination of information about public officials and their actions. To advance its mission, CREW uses a combination of research, litigation and advocacy. As part of its research, CREW uses government records made available to it under the FOIA.

5. CREW has invested considerable organizational resources in pushing the U.S. government to take ethics issues seriously. CREW monitors closely the laws and rules applicable to government agencies and government officials.

6. CREW is harmed by the DOJ’s failure to process CREW’s FOIA request on an expedited basis, because that failure hampers CREW’s ability to satisfy the compelling public need for full, accurate and current information about the role Vice President Cheney played in the leak of Ms. Wilson’s covert CIA identity, the basis for the decision not to prosecute the vice president, and the motivation for the attorney general’s refusal to provide Congress with the FBI interviews of the vice president in response to a congressional subpoena. Absent this critical information, CREW cannot advance its mission of educating the public to ensure that the public continues to have a vital voice in government.

7. Defendant DOJ is an agency within the meaning of 5 U.S.C. § 552(f) and 5 U.S.C. § 702. The DOJ is the federal agency with possession and control of the requested records and is responsible for fulfilling plaintiff's FOIA request.

STATUTORY FRAMEWORK

The Freedom of Information Act

8. The FOIA, 5 U.S.C. § 552, requires agencies of the federal government to release requested records to the public unless one or more specific statutory exemptions apply.

9. An agency must respond to a party making a FOIA request within 20 working days, notifying that party of at least the agency's determination whether or not to fulfill the request and of the requester's right to appeal the agency's determination to the agency head. 5 U.S.C. § 552(a)(6)(A)(I).

10. In "unusual circumstances," an agency may delay its response to a FOIA request or appeal, but must provide notice and "the date on which a determination is expected to be dispatched." 5 U.S.C. § 552(a)(6)(B).

11. The FOIA also requires agencies to promulgate regulations that provide for expedited processing of FOIA requests where the requester has demonstrated a "compelling need" as well as "other cases determined by the agency." 5 U.S.C. § 552(a)(6)(E)(I). The FOIA defines "compelling need" as including requests "made by a person primarily engaged in disseminating information" where there is an "urgency to inform the public concerning actual or alleged Federal Government activity." *Id.* at § 552(a)(6)(E)(v)(II).

12. Agencies are required to make a determination on a request for expedition within 10 calendar days "after the date of the request," 5 U.S.C. § 552(a)(6)(E)(ii)(I), and to give "expeditious consideration" to administrative appeals of such determinations. *Id.* at §

552(a)(6)(E)(ii)(II).

13. Agency decisions to deny or affirm denial of a request for expedition are subject to judicial review “based on the record before the agency at the time of the determination.” 5 U.S.C. § 552(a)(6)(E)(iii).

14. A requester is not required to exhaust administrative remedies prior to seeking judicial review of an agency’s denial of a request for expedited processing. *See, e.g., American Civil Liberties Union v. Dep’t of Justice*, 321 F. Supp. 2d 24, 28-29 (D.D.C. 2004).

15. The DOJ has promulgated regulations providing for expedited processing of FOIA requests in four instances. 28 C.F.R. § 16.5(d). Under those regulations, a requester may seek expedited processing where there is an urgency to inform the public about an actual or alleged federal government activity and the person making the request is primarily engaged in disseminating information. Alternatively, expedition is warranted under DOJ regulations if the request involves a matter of widespread and exceptional media interest and the subject matter raises possible questions about the government’s integrity affecting public confidence. *Id.* at §§ 16.5(d)(1)(ii), (iv).

16. Requesters seeking DOJ expedition based on a matter of widespread and exceptional media interest must submit their request for expedition to the director of DOJ’s Public Affairs. 28 C.F.R. § 16.5(d)(2). All requesters seeking expedition must certify that the basis for their request is true and correct to the best of their knowledge and belief. *Id.* at § 16.5(d)(3).

17. DOJ regulations require the DOJ to grant or deny a request for expedited processing within 10 calendar days of receipt. 28 C.F.R. § 16.5(d)(4). If expedition is granted, the request is given priority and must be processed “as soon as practicable.” *Id.*

18. This Court has jurisdiction, upon receipt of a complaint, “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B).

FACTS UNDERLYING PLAINTIFF’S PRAYER FOR RELIEF

The CIA Leak Investigation and the Role of Vice President Cheney

19. As part of Special Counsel Patrick J. Fitzgerald’s investigation into the leak of the covert CIA identity of Valerie Plame Wilson, the FBI interviewed I. Lewis Libby on November 26, 2003. During that interview, Mr. Libby told the FBI that it was “possible” that Vice President Richard B. Cheney had instructed him to leak the covert identity of Ms. Wilson.

20. The leak of Ms. Wilson’s covert identity followed the publication of a *New York Times* op-ed column by her husband, former Ambassador Joseph Wilson, outlining what he found in his trip to Niger to investigate allegations that Iraq had sought uranium from Africa. During the criminal trial of Mr. Libby, Cathie Martin, Assistant to the Vice President for Public Affairs, testified that she, Mr. Libby and Vice President Cheney all participated in a press strategy to discredit Ambassador Wilson’s account.

21. Special Counsel Fitzgerald, in his closing remarks to the jury during the criminal prosecution of Mr. Libby, stated that “[t]here is a cloud over what the Vice President did that week. He wrote those columns. He had those meetings. He sent Libby off to Judith Miller at the St. Regis Hotel. At that meeting, the two-hour meeting, the defendant talked about the wife. We didn’t put that cloud there. That cloud remains.”

22. For more than a year, the House of Representatives Committee on Oversight and Government Reform (“the Committee”) has been seeking documents from defendant DOJ relating to the Committee’s investigation into the leak of Ms. Wilson’s covert CIA identity. As

part of that investigation, the DOJ provided the Committee with redacted versions of reports of FBI interviews of White House staff, but has refused to permit any access to the interview reports of the president and vice president.

23. Special Counsel Fitzgerald has advised the Committee that as to the FBI's interviews of the president and vice president, "there were no agreements, conditions, and understandings between the Office of Special Counsel or the Federal Bureau of Investigation and either the President or Vice President regarding the conduct and use of the interview or interviews."

24. On July 15, 2008, Attorney General Michael B. Mukasey requested that the president assert executive privilege in response to a subpoena from the Committee seeking the FBI's reports of the Special Counsel's interviews with the vice president as well as notes prepared during the interviews. On July 17, 2008, the Committee announced that President Bush had invoked executive privilege to block the DOJ from providing the Committee with the subpoenaed documents.

Plaintiff's FOIA Request and Request for Expedited Processing

25. On July 17, 2008, plaintiff sent a FOIA request by facsimile and first-class mail to defendant DOJ seeking records, regardless of format and including electronic records and information, "relating to any interview outside the presence of the grand jury of Vice President Richard B. Cheney that are part of Special Counsel Patrick Fitzgerald's investigation into the leak of the identity of Valerie Plame Wilson, a covert CIA officer." CREW explained that its request is coextensive with the subpoena issued by the Committee to the attorney general on June 16, 2008, for the same records concerning Vice President Cheney. CREW's request was directed to the DOJ's Office of Information and Privacy ("OIP"), which is responsible for FOIA

requests seeking records of the attorney general, deputy attorney general and associate attorney general.

26. CREW sought a waiver of fees associated with processing its request given that the request concerns the operations of the federal government, the disclosures will likely contribute to a better understanding of relevant government procedures by CREW and the general public in a significant way, and the request is primarily and fundamentally for non-commercial purposes. Specifically, the requested records are likely to contribute to the public's understanding of the role of the vice president in the disclosure of Ms. Wilson's covert identity, the information that formed part of the basis for the DOJ's decision not to prosecute Mr. Cheney, and whether the attorney general advocated that the president assert executive privilege in response to the congressional subpoena to protect the vice president and prevent the public from learning the truth about the vice president's role in the leak of Ms. Wilson's covert identity.

27. In addition, CREW sought expedited processing of its FOIA request for the express purpose of disseminating any responsive documents to the public and in view of the particular urgency to inform the public about the role Vice President Cheney played in the leak of Ms. Wilson's covert CIA identity and the basis for the decision not to prosecute the vice president. In addition, Attorney General Mukasey's actions raise a serious question of whether he is subverting a legitimate congressional inquiry in order to cover up the truth and protect the vice president. Disclosure of the requested documents will go a long way toward answering those questions. As required by 28 C.F.R. § 16.5(d)(3), CREW certified that the basis for its request for expedition is true and correct to the best of its counsel's knowledge and belief.

28. By letter dated July 17, 2008, and sent by facsimile and first-class mail, CREW also requested that Brian Roehrkaase, DOJ's Director of Public Affairs, grant CREW's request for

expedition in light of the widespread and exceptional media interest in this matter and the substantial concerns that have been raised about the government's integrity that affect public confidence in the president, the attorney general and the agency he heads. CREW included numerous news articles demonstrating the widespread and exceptional media interest in this matter.

Defendant DOJ's Purported Grant of Expedited Processing

29. By letter dated July 24, 2008, Carmen L. Mallon, Chief of Staff for the OIP, acknowledged receipt of CREW's FOIA request in her office on July 17, 2008, and advised CREW that its request for expedition had been granted by the director of Public Affairs. Ms. Mallon stated that her office had initiated records searches of the Offices of the Attorney General and Deputy Attorney General as well as the Departmental Executive Secretariat. Ms. Mallon further advised CREW that OIP has not yet made a decision on CREW's request for a fee waiver and provided the name of Matthew M. Carr in OIP as the person to contact with any questions about OIP's processing of CREW's request.

Defendant DOJ's Failure to Expedite the Processing of Plaintiff's FOIA Request

30. On July 28, 2008, CREW's counsel contacted Mr. Carr to inquire about the status of CREW's request, but was unable to reach Mr. Carr. CREW's counsel left a telephone message requesting that Mr. Carr call back.

31. On August 1, 2008, having heard nothing from defendant DOJ or Mr. Carr, CREW's counsel again telephoned Mr. Carr to ascertain the status of CREW's request. Mr. Carr advised CREW's counsel that the DOJ would complete its processing of the request "as soon as possible," but was unable to identify a more precise date by which processing would be complete.

32. Notwithstanding defendant DOJ's purported decision to expedite the processing of plaintiff's FOIA request, to date the DOJ has neither produced a single document to CREW nor withheld or otherwise accounted for any responsive documents. Nor has defendant DOJ informed plaintiff of an anticipated date for completing the processing of plaintiff's FOIA request.

33. Not only has defendant DOJ failed to expedite the processing of plaintiff's request, it has also exceeded the generally applicable twenty-day deadline for the processing of *any* FOIA request.

34. Plaintiff has exhausted the applicable administrative remedies.

35. Defendant DOJ has wrongfully withheld the requested records from plaintiff.

CAUSE OF ACTION

Violation of the Freedom of Information Act for Wrongful Withholding of Agency Records

36. Plaintiff re-alleges and incorporates by reference all preceding paragraphs.

37. Plaintiff properly requested that defendant DOJ expedite the processing of plaintiffs' FOIA request, which sought agency records within the custody and control of the DOJ.

38. Defendant DOJ wrongfully withheld agency records requested by plaintiff by failing to comply with the statutory time limit for the processing of plaintiff's FOIA request.

39. Plaintiff has exhausted the applicable administrative remedies with respect to defendant DOJ's wrongful withholding of the requested records.

40. Plaintiff is entitled to injunctive and declaratory relief with respect to the expedited release and disclosure of the requested records.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully requests that this Court:

- (1) Issue a declaration that plaintiff is entitled to expedited processing of its FOIA request submitted to defendant DOJ on July 17, 2008;
- (2) Issue a declaration that plaintiff is entitled to a complete waiver of processing fees associated with its FOIA request submitted to defendant DOJ on July 17, 2008;
- (3) Order defendant DOJ to process immediately the requested records in their entirety;
- (4) Order defendant DOJ upon completion of such expedited processing to disclose the requested records and make copies available to plaintiff;
- (5) Provide for expeditious proceedings in this action;
- (6) Retain jurisdiction of this action to ensure that the processing of plaintiff's FOIA request is expedited and that no agency records are wrongfully withheld;
- (7) Award plaintiff reasonable attorney fees and litigation costs in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and
- (8) Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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