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12 October 2018

Ms. Joo Chung
Director of Oversight and Compliance
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by e-mail to <osd.foia-appeal@mail.mil>

FOIA Appeal of Denial of Expedited Processing
Re: FOIA Consultation/Referral 19-F-0020 (NCMNPS Request 2018-SP-01)

Dear Ms. Chung:

This is an appeal of the denial of expedited processing of the portion of my FOIA request 2018-SP-01 to the National Commission on Military, National, and Public Service (NCMNPS) which was received by the NCMNPS on 3 May 2018 and forwarded to the Department of Defense (DOD) on 1 October 2018. This request was assigned reference number 2018-SP-01 by the NCMNPS, and the portion forwarded to the DOD (or some portion of it) was assigned reference number 19-F-0020.

According to a letter dated 10 October 2018 from Stephanie L. Carr, Chief of the DOD Office of Freedom of Information, “this Office finds that you have not clearly demonstrated how the information will lose its value if not processed on an expedited basis. For this reason, your request for expedited processing is denied.”

This denial is in error and should be reversed on appeal.

The records responsive to the portion of this request referred to the DOD are records of or pertaining to information provided to the NCMNPS by, or in consultation with, the DOD.

The value of these records to the public will be lost if they are not released in time for the public to take them into consideration in formulating and submitting fully informed comments to the NCMNPS for consideration by the NCMNPS in its public consultation and the formulation of its interim and final report and recommendations to Congress and the President.

The NCMNPS was created by statute (Public Law 114-328, “National Defense Authorization Act for Fiscal Year 2017”, sections 551-557) as a temporary agency to operate for a limited duration fixed by statute, with deadlines fixed by statute for specific phases of its work including the publication of its final report and legislative recommendations and the termination of its operations.

Information provided by, and consultations with, the DOD are essential to the task assigned to the NCMNPS by statute. The records of this information responsive to this FOIA request are essential to understanding the issues and options being considered by the NCMNPS, and to fully informed public participation in the work of the NCMNPS. The statute creating the NCMNPS explicitly requires specific input from the DOD to the NCMNPS on a list of specific issues.

At the time that this FOIA request was submitted in May 2018, the NCMNPS had extended the period for public comments concerning the issues before it until 30 September 2018. (National Commission on Military, National, and Public Service, Request for comments, “Notice of Extension to Comment Period”, NCMNPS Docket No. 05–2018–01, 83 *Federal Register* 17573, 20 April 2018.)

The NCMNPS waited five months after its receipt of this request to forward this portion of the request the DOD, and did so only on 1 October 2018, the day after the deadline for public comments.

However, although the “Notice of Extension to Comment Period” had stated that, “Comments must now be received by the Commission on or before 30 September 2018,” the NCMNPS official Web site now states that, “The Commission will be accepting comments until December 31, 2019,” and still has a form for comment submission at <<https://inspire2serve.gov/content/share-your-thoughts>>.

So public comments to the NCMNPS, potentially informed by the response to this FOIA request, are still being accepted – but only as late comments, presumably at the discretion of the NCMNPS, with decreasing likelihood as time passes that the NCMNPS will be able to take them into consideration, or give them as much weight as earlier comments.

If this request had been processed within the time limits prescribed by the FOIA statute, the public would have had access to the responses months ago, in ample time for this information to inform comments submitted to the NCMNPS before the end of the public comment period.

While this request has been pending, the NCMNPS has conducted and concluded an initial national series of public and closed-door meetings, conducted a solicitation of public comments, commissioned a program of internal and external research and consultation, and worked actively – within the timeline set by statute for its operations – to begin formulating its recommendations.

The closer the NCMNPS gets to finalizing first its interim and then its final report and recommendations, the less meaningful opportunity there will be for consideration of public input.

Time is of the essence for the public to obtain access to this information.

The need for expedited processing is even greater than it was five months ago when the request for expedited processing was originally submitted to the NCMNPS.

According to an an interview with the Chair of the NCMNPS published by Politico and reposted this week by the NCMNPS on its official Web site, “The panel plans to issue an interim report laying out those issues and potential recommendations in January” of 2019. (“POLITICO Pro Q&A: Joe Heck, chairman of the National Commission on Military, National and Public Service”, by Connor O’Brien, 4 October 2014, <<https://www.politico.com/story/2018/10/04/q-a-joe-heck-819214>>; reprinted at <<https://inspire2serve.gov/news-events/politico-pro-qa-joe-heck-chairman-national-commission-military-national-and-public>>.)

The window of time for the public to submit comments to the NCMNPS that can be considered by the NCMNPS in formulating a report and recommendations to be published in January 2019 is already narrow, and closing rapidly. Without expedited processing, it is unlikely that the records responsive to this request will be released before the interim recommendation and report are finalized.

Later comments will inevitably have less ability to influence the NCMNPS’s deliberations, the more so the later in the NCMNPS’s deliberative and decision-making process they are received. Comments received after the NCMNPS has formulated and issued an interim report will inevitably have less ability to influence its final recommendations than comments submitted at an earlier stage of the deliberative and decision-making process, before the issuance of any interim report.

Please respond as soon as possible to confirm your receipt of this appeal and to advise the reference number assigned to this appeal and the expected date of completion of DOD action with respect to this request, including action on this appeal.

I note that 5 U.S. Code § 552 (a)(6)(E)(ii) requires that, “Notwithstanding clause (i), regulations under this subparagraph must ensure — ... (II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.”

I look forward to your expeditious consideration of this appeal of the denial of my request for expedited processing of my request. To avoid unnecessary delays, please contact me immediately by telephone or e-mail should you have any questions regarding this appeal and/or request.

I certify under penalty of perjury that the statements above and in my original request for expedited processing are true and correct to the best of my knowledge and belief.

Sincerely,

Edward Hasbrouck
San Francisco, CA
12 October 2018