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*poster by Fred Moore for the
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5 February 2021

FOIA Appeals
Deputy Archivist of the United States (ND)
National Archives and Records Administration (NARA)
8601 Adelphi Road, Room 4200
College Park, MD 20740-6001

(by e-mail to <foia@nara.gov>)

FOIA Appeal of Denial of Expedited Processing

Dear Deputy Archivist:

This is an appeal of the denial of expedited processing of a FOIA request to NARA.

I submitted this request to NARA by e-mail on 27 January 2021, and included a request for expedited processing. I have been told that this request has been assigned both of the tracking numbers **NGC21-238** and **NARA-NGC-2021-000428**.

Today, 5 February 2021, I received an unsigned e-mail message from “The FOIA Team”, <FOIA@nara.gov> with an attached, also unsigned, PDF of a letter stating that my request for expedited processing of this request has been denied by an unnamed decision-maker.

According to the letter attached to that e-mail message today:

Edward Hasbrouck, <<https://resisters.info>>
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“NARA processes FOIA requests on an expedited basis if it is determined that the request meets one or more of the following criteria described in its FOIA Regulation, at 36 C.F.R. § 1250.28 (www.archives.gov/foia/regulations):...

“(3) An urgent need to inform the public about an actual or alleged Federal Government activity (this criterion applies only to those requests made by a person primarily engaged in disseminating information to the public);...

“After carefully reviewing your request, we do not believe expedition is warranted, as you have not demonstrated that your request meets the above-referenced criteria. Specifically, you have not provided evidence that there is an urgent need to inform the public or that there is widespread and exceptional media interest involving questions affecting public confidence in the Government’s integrity that can be addressed by the records you seek.”

For purposes of determining entitlement to expedited processing, “the term ‘compelling need’ means — ... (II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity. (vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person’s knowledge and belief.” 5 U.S.C. § 552(a)(6)(E).

I included such a certified statement in my original request. That statement clearly constituted admissible evidence with respect to the existence of an “urgent need to inform the public about an actual or alleged Federal Government activity.”

Regardless of whether the unnamed NARA decision maker in the first instance would have found – if they had read my request, which it appears they did not – that this evidence was (as I believe it was and is) *sufficient* evidence to satisfy the requirement of the FOIA statute for expedited processing, the claim that I had “not presented evidence” at all with respect to this issue is plain error, clearly contradicted by even cursory reading of my request.

The NARA decision-maker’s conclusionary claim, made without explanation, that I “have not provided evidence”, despite the detailed declaration I included with this request, appears on its face to be a boilerplate denial issued summarily without reading the request and the included declaration. As such, it fails to satisfy the requirements of the FOIA statute for diligent consideration of requests, and is compelling evidence of agency bad faith.

An agency may not summarily deny requests for expedited processing without reading them, and defer any consideration of the merits of those request until they are administratively appealed. Improper delay such as this is, of course, especially invidious when it delays processing of requests with respect to which expedited processing has been requested.

The declaration included in this request made an un rebutted *prima facie* case for a “compelling need”, as that term is defined in the FOIA statute, for expedited processing of this request.

I provided *prima facie* and, so far as I know, uncontested evidence (1) that I am “a person primarily engaged in disseminating information” and (2) that there is urgency to inform the public concerning the custody, possession, and location of records originally created by the National Commission on Military, National, and Public Service (NCMNPS) so that these records – which are central to current litigation and legislation pending in both the U.S Supreme Court and Congress, and likely to inform both legal argument and legislative debate – can be requested from the proper agency before they are destroyed by NARA. NARA’s imminent threat to destroy these records, knowing that FOIA requests for them are pending, is clearly unlawful, but unfortunately appears to be a credible threat.

Courts have recognized that Congressional debate can create sufficient urgency to warrant expedited FOIA processing, and that delay through standard processing can result in irreparable injury to that legally recognized interest. See *Electronic Frontier Foundation v. Office of the Director of National Intelligence*, 2007 WL 4208311, N.D. Cal., 27 November 2007 (granting motion for preliminary injunction requiring expedited processing); see also *Electronic Frontier Foundation v. Office of the Director of National Intelligence*, 542 F. Supp. 2D 1181, N.D. Cal. 2008 (requiring expedited processing of request for information relevant to pending Federal legislation). The same argument would apply, I believe, to consideration in the Supreme Court of matters to which former NCMNPS records pertain.

NARA’s activities in taking custody, possession, and/or control of records and making determinations with respect to their ownership, are clearly a “Federal Government activity” – indeed, these activities are central to NARA’s mission. The requested records pertain these activities of NARA, and are urgently needed as the prerequisite to public access to the records created and formerly held by the NCMNPS.

NARA has taken the position – incorrectly, I believe, and as yet without providing any basis for this position – that NARA is not responsible for responding to FOIA requests for records originally created by the NCMNPS because NARA is not their “legal custodian”. While I believe that this position is incorrect, if it were correct, that would only show that records pertaining to the custody, possession, and control of these records – the subject of this request – are urgently needed in order to know to what agency to direct requests for NCMNPS records, so that they can be made available to the public, the Supreme Court, and Congress before decisions are made by the Court or Congress, or the records are destroyed by NARA.

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 NARA 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 are true and correct to the best of my knowledge and belief.

Sincerely,

Edward Hasbrouck