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*poster by Fred Moore for the  
National Resistance Committee*

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13 March 2020

FOIA Appeals  
National Commission on Military, National, and Public Service  
2530 Crystal Drive, Suite 1000, Box No. 63  
Arlington, VA 22202

(by e-mail to <FOIA@inspire2serve.gov>)

### **FOIA Appeal of Denial of Expedited Processing**

Dear FOIA Appeals Officer (Commission Chair or designee):

This is an appeal of the denial of expedited processing of my request for all records responsive to my FOIA requests 2018-SP-01, 2018-SP-03, 2019-CP-01, 2019-SP-01, or 2020-SP-08 that have not previously been disclosed to me. This request was made by e-mail on 28 February 2020; I have not been informed of what, if any, reference number has been assigned by the Commission to this request.

Today, 13 March 2020, I received notice by e-mail from the Commission's Chief FOIA Officer of the denial of my request for expedited processing of this request.

According to the letter denying my request for expedited processing:

The Commission does not identify a pressing need, because there is no legally recognizable interest that would be compromised by processing your request through the standard process. The Commission has been charged with making recommendations and does not possess independent law-making authority. As a consequence, to the extent Congress may consider any recommendation made by the Commission, it will be members of Congress,

not the Commission, that have the capacity to consider the Commission's recommendations for possible legislative action.

While it is, of course, correct that it is Congress and not the Commission that will decide whether to enact legislation, or what legislation to enact, on the basis of the Commission's recommendations, that is precisely why the public needs to know about the Commission's activities, to enable informed public participation in, and engagement with, Congressional debate. The Commission knows who it did and didn't meet with, what questions it did and didn't ask, what information and advice it received from whom, and the basis for Commission's recommendations. The public does not know this, and needs to know in order to offer informed input to Congress about what Congress should do, and what credibility and weight Congress should give to the Commission's recommendations.

The claim that the public interest in informed engagement with active Congressional debate is not a "legally recognizable interest that would be compromised by processing your request through the standard process" is plain error that must be reversed on appeal. 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:

Defendant acknowledges that plaintiff seeks the information it requested in order to inform the public debate over the FISA amendments Congress is currently and actively considering. Nevertheless, defendant characterizes as "pure speculation" plaintiff's argument that the information will be useless if it is produced after Congress amends the law. Opp'n at 16. Specifically, defendant contends that plaintiff has not established that its request will produce any responsive, non-exempt documents that will contribute to the debate. While defendant is aware that members of Congress have expressed an intent to pass amendments to the FISA before the end of the year, it argues that the debate over that law has been going on for many years, and that any harm would not be "irreparable" because "legislation is always subject to further amendment by Congress."...

Defendant's position is without merit. As another court in this district found, irreparable harm can exist in FOIA cases such as this because ongoing public and congressional debates about issues of vital national importance "cannot be restarted or wound back." *Gerstein v. CIA*, 2006 WL 3462659 at 4 (N.D. Cal. Nov. 29 2006) (order granting motion to compel responses to FOIA requests); see also *EPIC*, 416 F. Supp. 2d at 41 (finding an adequate showing of irreparable harm to support a preliminary injunction). Here, the Protect America Act is set to expire in February 2008, and Congress is currently considering legislation that would amend the FISA further. Plaintiff seeks information from defendant specifically so that plaintiff, Congress, and the public may participate in the debate over the pending legislation on an informed basis. Accordingly, the Court finds that plaintiff has shown the likelihood of irreparable injury."

(*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 pertaining to pending Federal legislation.)

The letter denying my request for expedited processing also claims that:

Moreover, much of the information you have requested has been or will be made publicly available on the Commission's website, and as a small agency with limited staff, the Commission is moving as expeditiously as possible.

This claim is both irrelevant to the need for expedited processing, and incorrect. Most of the records I have requested have not been posted on the Commission's Web site, and there has been no indication that the Commission intends to post them. Even long after they have been released to me and posted publicly by me – along with analysis and commentary informed by them – on my Web site, most of the records previously released to me by the Commission have not been posted by the Commission, and are available to the public only on my Web site. Moreover, whether the Commission may intend eventually, at some unspecified date, intend to post these records says nothing about when the Commission might post them,<sup>1</sup> or the need for expedited processing of them

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 Commission 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,

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Edward Hasbrouck

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1. I have received no response to repeated requests to the Commission's Chief FOIA Officer and FOIA Public Liaison for the estimated dates of completion of Commission action with respect to this and each my other pending FOIA requests.