



U.S. Department of Justice

Office of Information and Privacy

Telephone: (202) 514-3642

Washington, D.C. 20530

AUG 17 2006

EJ Hurst II, Esq.
PMB No. 124
550M Ritchie Highway
Severna Park, MD 21146

Re: Appeal No. 06-2618
Request No. 2006-05569
DJM:JTR

Dear Mr. Hurst:

You appealed from the action of the Federal Bureau of Prisons (BOP) on your request for certain records pertaining to the living conditions and treatment of inmates at Federal Correction Institution La Tuna. Specifically, you appealed BOP's denial of your request for expedited treatment of your request and BOP's denial of your request for a fee waiver. Additionally, you requested that your appeal be "merged" with Appeal Nos. 06-1604 and 06-1605, and that I reconsider my decision on those appeals.

Concerning your appeal from BOP's denial of expedited treatment of your Request No. 2006-05569, please be advised that a request will be taken out of chronological order based on the date of receipt and given expedited treatment by the Department of Justice only when it is determined to involve: (1) circumstances in which lack of such treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; (2) an urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information; (3) the loss of substantial due process rights; or (4) a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence. See 28 C.F.R. § 16.5(d)(1) (2006). The Department of Justice component involved makes initial determinations regarding the first three categories, while initial requests made pursuant to the fourth standard ordinarily are acted upon by the Department's Director of Public Affairs in the first instance. See id. § 16.5(d)(2).

You assert that your request for expedited treatment should be granted under each of these four standards. For the reasons outlined below, I am affirming the denial of expedited treatment of your request under all four standards.

Under the first standard, expedited treatment will be granted where not doing so "could reasonably be expected to pose an imminent threat to the life or physical safety of an individual." Id. § 16.5(d)(1)(i). In establishing the expedited treatment framework, Congress noted that the "categories for compelling need are intended to be narrowly applied." H.R. Rep. No. 104-795, at 26 (1996). Congress further stated: "A threat to an individual's life or physical safety qualifying

for expedited access should be imminent. A reasonable person should be able to appreciate that a delay in obtaining the requested information poses such a threat." Id.; see also, e.g., Cleaver v. Kelley, 427 F. Supp. 80, 81 (D.D.C. 1976) (criminal defendant, facing possible "loss of freedom or life" in imminent state prosecution, demonstrated "exceptional and urgent need to obtain any and all information that could prove exculpatory"); Exner v. FBI, 443 F. Supp. 1349, 1353 (S.D. Cal. 1978) (plaintiff obtained expedited treatment after leak of information exposed her to harm from organized crime figures), aff'd, 612 F.2d 1202 (9th Cir. 1980). Based on the information that you have provided, and in light of Congress's intent, I have determined that you have not met your burden under this standard. Concerning your allegations of violence at the prison, as I stated in my letter to you of April 12, 2006, unfortunately, federal prisons often are a place of violence, and BOP has accordingly developed a system designed to separate individuals or groups of inmates from each other where conflict is likely. I can discern no difference between your request for expedited treatment for records concerning prison violence and the hundreds of other requests that BOP receives for similar records. Concerning your allegation that there are "questions about the availability of medical care," the only specific incident that you describe to support this allegation indicates that the inmate in question received the medical care he needed, rendering moot any "imminent" threat to an individual's life or physical safety. Concerning your allegations related to contaminated food, animals and pests, and the uncleanliness of the prison, I have determined that you have not provided sufficient facts to meet your burden under this standard. You have provided no further information about these conditions beyond the mere allegation that they exist. See Hunsberger v. U.S. Dep't of Justice, No. 92-2587, 1993 WL 455445, at *1-2 (D.D.C. Oct. 29, 2003) (rejecting as basis for expedited treatment plaintiff's conclusory claim that he had been "deprived of his rights, privileges and his long and short term health is threatened"); cf. Williams v. FBI, No. 99-3378, 2000 WL 1763680, at *2 (D.D.C. Nov. 30, 2000) ("[M]ere unsupported allegations that the documents requested may contain exculpatory evidence cannot support expedited processing."). Moreover, even if the allegations were true, it is not clear how a delay in obtaining the requested records would pose an imminent threat to the life or physical safety of an individual. See H.R. Rep. No. 104-795, at 26 ("A reasonable person should be able to appreciate that a delay in obtaining the requested information poses such a threat.").

The second standard for expedited treatment requires you to demonstrate both that there is an "urgency to inform the public about an actual or alleged federal government activity" and that you are "a person primarily engaged in disseminating information." 28 C.F.R. § 16.5(d)(1)(ii). Although you maintain the Web site www.victorvillefoia.org, and have indirectly involved employees of the KFOX-TV station in your requests and appeals, you have failed to demonstrate that you are "primarily engaged in disseminating information." See ACLU of N. Cal. v. U.S. Dep't of Justice, No. 04-4447, 2005 WL 588354, at *14 (N.D. Cal. Mar. 11, 2005) (determining that public interest law group was not "primarily engaged in disseminating information," because information dissemination was "a main activity" of the group, not "the main activity"). Additionally, I have determined that you have not demonstrated that there is an "urgency to inform the public" about the subject of the requested records. A significant factor to be considered is "whether the request concerns a matter of current exigency to the American public." Al-Fayed v. CIA, 254 F.3d 300, 310 (D.C. Cir. 2001). Beyond the media coverage that

you have discussed in previous correspondence to this Office, the two new articles that you cited in your letter of July 24, 2006 continue to demonstrate only a small amount of local news interest in the subject of the requested records, not the "substantial" national interest required under this factor. See id. at 311; see also IEEE Spectrum v. Dep't of Justice, No. 05-0865, slip op. at 2 (D.D.C. Feb. 16, 2006) (finding that the requester had failed to demonstrate that the requested information was "something that is of broad interest to the American public," as required in order for a matter to be of "current exigency").

Concerning the third standard, courts have held that expedited treatment for due process reasons generally should not be granted unless a requester shows that he is "facing grave punishment" in a pending criminal proceeding, and that "there is a reason to believe that the information produced will aid in the individual's defense[.]" Aguilera v. FBI, 941 F. Supp. 144, 150 (D.D.C. 1996). Based on the information that you have provided, I have determined that you do not meet either of the two parts of this test: You have not alleged that you or anyone you are requesting records on behalf of is facing grave punishment in a pending criminal proceeding, nor have you demonstrated that the requested information will aid in anyone's defense, in a criminal proceeding or otherwise.

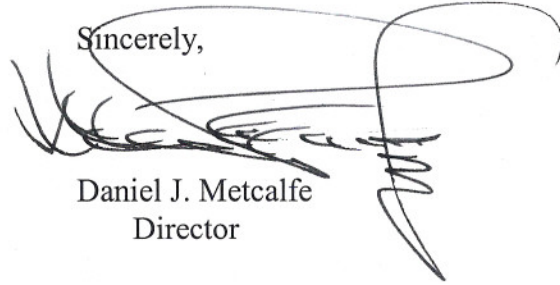
Concerning the fourth standard for expedited treatment, your request was not properly handled at the initial request stage because it was not forwarded to the Director of Public Affairs for consideration. In the interest of adjudicating your appeal most efficiently, without any further delay, I have considered your request for expedited treatment under this standard in the first instance. I have determined that expedited treatment of your request is not warranted under this standard because the limited news coverage that you discuss -- which consists of two local newspaper articles and "television and internet news stories from KFOX-TV 14" -- hardly demonstrates that the subject of your request is "a matter of widespread and exceptional media interest." 28 C.F.R. § 16.5(d)(1)(iv).

Concerning your appeal from BOP's denial of your request for a fee waiver, because BOP has not yet determined that there will be fees applicable to your request, there are not any fees to waive. Accordingly, I am closing this portion of your appeal as moot. However, you may appeal any further adverse determination by BOP.

Finally, I am denying your request that I "merge" this appeal with, and reconsider, your two previous appeals to this Office that requested expedited treatment (Appeal Nos. 06-1604 and 06-1605). After carefully considering the matter, I have determined that my decision of April 12, 2006 was correct (copy enclosed). I note in this regard that the only action that has been taken thus far on these two appeals is related to your request for expedited treatment. Final determinations on the remainder of the issues in your appeals are pending in this Office.

If you are dissatisfied with my action on your appeal concerning expedited treatment of your request, you may seek judicial review in accordance with 5 U.S.C. § 552(a)(6)(E)(iii).

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel J. Metcalfe", is written over the word "Sincerely,". The signature is stylized and somewhat illegible due to overlapping loops and flourishes.

Daniel J. Metcalfe
Director

Enclosure