

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

THE NATIONAL SECURITY ARCHIVE,)
FUND, INC.)
)
Plaintiff,)
)
v.)
)
THE CENTRAL INTELLIGENCE)
AGENCY,)
)
Defendant.)

Case No. _____

**PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND A
PRELIMINARY INJUNCTION**

Pursuant to Fed. R. Civ. P. 65, Plaintiff the National Security Archive Fund, Inc., respectfully moves for entry of a temporary restraining order and a preliminary injunction enjoining Defendant Central Intelligence Agency ("CIA"), from continuing to deny Plaintiff expedited processing of Plaintiff's Freedom of Information Act request for the 2004 Iraq National Intelligence Estimate, which was first reported in the news media on September 16, 2004.

In support of its motion, Plaintiff proffers the accompanying Declaration of Meredith Fuchs, a memorandum of points and authorities, and a proposed order.

Pursuant to Local Rule 65.1(d), Plaintiff requests a hearing on its application for a TRO at the Court's earliest convenience.

Respectfully submitted,

Meredith Fuchs
D.C. Bar No. 450325
General Counsel
The National Security Archive
Gelman Suite 701
2130 H Street, NW
Washington, DC 20037

Counsel for Plaintiff

DATE: October 20, 2004

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**MEMORANDUM IN SUPPORT OF PLAINTIFF'S
MOTION FOR A TEMPORARY RESTRAINING ORDER AND A
PRELIMINARY INJUNCTION**

Plaintiff the National Security Archive Fund, Inc. ("the Archive") respectfully submits this memorandum of points and authorities in support of its motion for a temporary restraining order and a preliminary injunction.

Preliminary Statement

This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, seeking the expedited processing and release of the 2004 Iraq National Intelligence Estimate ("2004 Iraq NIE"), which outlines three possible scenarios for Iraq's political, economic and security prospects through the end of 2005. There has been widespread media interest in this document, and editorials and news articles have raised serious questions about the public policy implications of the outlook for the military action in Iraq. Moreover, U.S. Senators on the Senate Select Committee on Intelligence have requested that the Central Intelligence Agency ("CIA") release an unclassified version of the NIE because of its centrality to congressional consideration of issues surrounding

America's involvement in Iraq. In addition, a CIA official has provided a background briefing to news media concerning the prospects in Iraq that drew on the themes outlined in the 2004 Iraq NIE. As such, the requested information fits squarely within the narrow category for which Congress has mandated expedited processing.

In violation of the expedited processing provisions contained in the FOIA and Defendant Central Intelligence Agency's own regulations, CIA has denied Plaintiff's request for expedited processing of the NIE. The CIA's failure to grant Plaintiff's request is substantively flawed. Because time is at the essence of Plaintiff's rights and Defendant CIA's obligations, Plaintiff seeks the Court's expedited, *de novo* consideration of this matter and entry of an order compelling Defendant CIA to process and disclose the requested record immediately.

Statement of Facts

On September 16, 2004, the front page of the New York Times reported that:

[a] classified National Intelligence Estimate prepared for President Bush in late July [2004] spells out a dark assessment of prospects for Iraq, government officials said Wednesday. The estimate outlines three possibilities for Iraq through the end of 2005, with the worst case being developments that could lead to civil war, the officials said. The most favorable outcome described is an Iraq whose stability would remain tenuous in political, economic and security terms."

"U.S. Intelligence Shows Pessimism on Iraq's Future," Douglas Jehl, The New York Times, September 16, 2004, at A1 (Fuchs Declaration, Exh. A at 2). The disclosure of the 2004 Iraq NIE was widely reported by news media throughout the country.

The NIE was prepared by the National Intelligence Council, which reports to the Director of Central Intelligence. It was approved by the National Foreign Intelligence Board, which is the senior Intelligence Community advisory body to the Director of

Central Intelligence on the substantive aspects of national intelligence. It was approved by then-Acting Director of Central Intelligence John E. McLaughlin. The existence of the NIE has been confirmed by Sean McCormack, a spokesman for the National Security Council, members of Congress who have seen the NIE, and the White House.

On September 16, 2004, Plaintiff wrote to Defendant CIA and requested under the FOIA:

[T]he National Intelligence Estimate (NIE) prepared in [] 2004 on Iraq. Fuchs Declaration, Exh. A at 1. As noted in the FOIA request, the front page of the September 16, 2004, New York Times, a copy of which was attached to the FOIA request, described the 2004 Iraq NIE as:

the first formal intelligence estimate on the situation in Iraq since October 2002. Described as approximately 50 pages long, the document was prepared by the National Intelligence Council and was approved by the National Foreign Intelligence Board under John E. McLaughlin, the acting Director of Central Intelligence.

Id.

Plaintiff requested that the processing of its FOIA request be expedited pursuant to 5 U.S.C. § 552(a)(6)(E). The FOIA request asked for expedited processing because:

there exists a “compelling need” to review this document because the information is sought “by a person primarily engaged in disseminating information” and is “urgen[tly][needed] to inform the public concerning actual or alleged Federal Government activity.”

Id.

Plaintiff provided extensive evidence to support its assertion that there existed “an urgency to inform the public about an actual or alleged federal activity.” In support of expedited treatment and release, the FOIA request explained:

The front-page treatment of the existence of this document, the front-page treatment on a daily basis of its subject (conditions in Iraq and the future of Iraq), the intense public interest in Iraq as a matter of policy debate, the concerns of the families of the over 100,000 American servicemen and servicewomen in Iraq today – all demonstrate the compelling need for expedited review and release of this document.

Id. The FOIA request further explained, in support of release:

In addition, this document is covered by President Bush's executive order, issued on August 27, 2004, for "strengthening the sharing of terrorism information to protect Americans." President Bush's order requires that the intelligence community's "records and reports related to terrorism information to be produced with multiple versions at an unclassified level and at varying degrees of classification," in "unclassified versions for distribution wherever possible," and "to be shared free of originator controls," among other provisions (posted at www.whitehouse.gov/news/releases/2004/08/20040827-4.html). Since this NIE contains extensive terrorism information about conditions in Iraq, threats to Americans, and future threats, the President's order requires the CIA to undertake declassification review of the NIE and prepare an unclassified version of it.

Id. Finally, in support of its argument for expedition and for its assertion that Plaintiff is "primarily engaged in disseminating information," the FOIA request explained:

As CIA has long recognized, the National Security Archive qualifies for waiver of search and review fees as a representative of the news media. This request is made as part of a scholarly and news research project and not for commercial use.

Id.

On or about September 21, 2004, CIA National Intelligence Officer for the Near East and South Asia Paul R. Pillar delivered a CIA-approved speech concerning the situation in Iraq in his official capacity as a National Intelligence Officer for the CIA. Upon information and belief, his statements were based in part on the 2004 Iraq NIE which he authored. Mr. Pillar's speech was reported in the news media, including a column by columnist Robert Novak that appeared in a number of major newspapers.

On September 23, eight members of the Senate Select Committee on Intelligence asked the CIA to provide a declassified version of the 2004 Iraq NIE. They explained:

[t]he assessment places the current turmoil in an historical context and projects the likeliest scenarios for the next eighteen months. This kind of information not only informs policymakers, but it also can play a critical role as the Congress grapples with the difficult issues surrounding America's involvement in Iraq. To facilitate that role, we believe that the substance of this assessment should be made public in some fashion as soon as possible.

September 23, 2004 Letter to John Mc Laughlin, Acting Director of Central Intelligence (Fuchs Declaration, Exh. B at 6). The Senators further stated that “[a]ny public discussion of such an important intelligence assessment should be balanced, and informed to the greatest extent possible by the document itself,” and that “[a]n unclassified version of this assessment will significantly improve the quality of the debate.” *Id.*

By October 1, 2004 (two weeks after disclosure of the existence of the 2004 Iraq NIE), over 1300 media sources reported on the Iraq National Intelligence Estimate, according to a search on Google News.¹ Fuchs Declaration, ¶ 13.

By letter dated October 4, 2004, Plaintiff amended its FOIA request to inform Defendant of additional information in support of its FOIA request. With respect to arguments in favor of release, Plaintiff explained:

the substance of the NIE has been officially acknowledged and released into the public domain through official CIA channels, including the unclassified comments of CIA National Intelligence Officer for the Near East and South Asia Paul R. Pillar that were delivered on or about September 21, 2004 at a meeting on the West Coast. Mr. Pillar, a senior

¹ Google News presents information culled from approximately 4,500 news sources worldwide. It is updated continuously and covers only articles that appeared within the thirty days prior to the search. *See* “About Google News” < http://news.google.com/intl/en_us/about_google_news.html > (last viewed October 18, 2004).

official in the Agency, presented an Agency- approved text concerning the situation in Iraq in his official capacity as a National Intelligence Officer for the CIA. His statements, which reveal the main themes in the NIE, are official disclosures of the substance of the NIE and thus support the release.

Fuchs Declaration, Exh. B at 1. Plaintiff further noted that:

Moreover, the Agency has previously released portions, including the key findings, of the October 2002 CIA intelligence estimate about Iraq's weapons of mass destruction "NIE 2002-16HC, October 2002, Iraq's Continuing Programs for Weapons of Mass Destruction," and an unclassified summary of that document (which was released in October 2002). Similarly, here, the Agency should be able to quickly review and release the key findings, table of contents, and other segregable portions of the 2004 NIE on Iraq without any harm to sources or methods.

Id.

With respect to arguments in favor of expedited processing, Plaintiff provided extensive additional evidence to support its assertion that there existed "an urgency to inform the public about an actual or alleged federal activity":

I wish to draw the Agency's attention to the compelling urgency to inform the public concerning actual or alleged Federal Government activity that would be served by prompt release of the NIE. The strong public concern about the situation in Iraq and the likely outcome of the war in Iraq is evidenced in part by the overwhelming media interest in the document. A News Search on www.google.com for current news stories concerning the NIE collected more than 1,300 news articles (as of October 1, 2004). The decision of a government to prosecute a military campaign is clearly of the highest public interest, and the coverage generated about the NIE demonstrates that my FOIA request for the document meets the FOIA's and the CIA's standards for expedited processing.

This compelling need and public urgency is also evidenced by the request of several members of the Senate Intelligence Committee who have reviewed the NIE asking the CIA and President George W. Bush to disclose a copy of the NIE. They state that the analysis "can play a critical role as the Congress grapples with the difficult issues surrounding America's involvement in Iraq. To facilitate that role, ... the substance of [the NIE] should be made public in some fashion as soon as possible." September 23, 2004 Letter to Mr. John McLaughlin (attached).

Id.

In further support of its argument for expedited processing and to support its assertion that Plaintiff is “primarily engaged in disseminating information,” Plaintiff again reminded that CIA that expedited processing is appropriate:

when the request is made by ‘a person primarily engaged in disseminating information and the information is relevant to a subject of public urgency concerning an actual or alleged Federal government activity.’ The National Security Archive, as an established member of the news media, is an organization that is primarily engaged in disseminating information to the public. As noted above, the information sought by this FOIA request is pertinent to an urgent public debate concerning the actions of the U.S. government in Iraq, the future conditions in Iraq, and U.S. government involvement in the region. It is difficult to imagine an issue of greater national concern than the state of affairs facing the United States in the current conflict in Iraq. This NIE is central to the public debate on the realities in Iraq and is an essential element in an informed public discourse on Iraq that will serve to hold U.S. officials accountable for their decisions. Such accountability and informed public debate are fundamental principles of the Freedom of Information Act.

Id. In further support of its assertion that it is “primarily engaged in disseminating information” within the meaning of the FOIA and CIA regulations, Plaintiff addressed its news collection and dissemination activities:

The National Security Archive, as an established member of the news media, is an organization that is primarily engaged in disseminating information to the public.

Id.

By telephone communication on October 5, 2004, Defendant CIA informed Plaintiff that it had sent a letter dated September 26, 2004, that denied the request for expedited processing and would send a response to Plaintiff’s supplemental information amending the request. Fuchs Declaration, ¶ 19.

By letter received October 5, 2004, and dated September 26, 2004, Defendant CIA denied Plaintiff's request for expedited processing. Defendant explained:

With regard to your request for expedited processing, I must inform you that all requests are handled in the order received on a 'first-in, first-out' basis. Exceptions to this rule will be made only when a compelling need is established to the satisfaction of the Agency. ... Since your request does not demonstrate a 'compelling need' ... we must decline your request to expedite processing.

Fuchs Declaration, Exh. C. Defendant CIA granted Plaintiff news media status and accepted the FOIA request for regular processing. Defendant CIA advised Plaintiff of its right to file an administrative appeal of the denial of expedited processing.

By letter dated October 6, 2004, Defendant CIA confirmed its denial of the request for expedited processing. Fuchs Declaration, Exh. D.

By telephone conversation on October 20, 2004, Defendant CIA informed Plaintiff that it had considered the matters in Plaintiff's October 4, 2004 amendment to the FOIA request, that the October 4, 2004 communication was interpreted as a continuation of the original September 16, 2004 FOIA request, and that the request for expedited processing was still denied. Fuchs Declaration, ¶ 21.

ARGUMENT

The issues raised in this motion are simple and not subject to serious dispute. In compliance with the FOIA and applicable CIA regulations, Plaintiff requested expedited processing of a document that is central to a critical public policy debate about U.S. policy towards Iraq.

In support of its request, Plaintiff submitted specific and relevant information that clearly established its entitlement to expedited processing. In violation of the statutory

and regulatory requirements for expedited processing, the CIA denied Plaintiff's request. The Agency's action is clearly unlawful and should be enjoined.

I. The Court has Jurisdiction to Grant the Requested Relief

The Court's jurisdiction to consider this matter and grant appropriate relief is clear. The FOIA provides, in pertinent part:

Agency action to deny or affirm denial of a request for expedited processing ... shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

5 U.S.C. § 552(a)(6)(E)(iii). The referenced judicial review provision states, in pertinent part:

On complaint, the district court of the United States . . . in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo

5 U.S.C. § 552(a)(4)(B). *See Al-Fayed v. CIA*, 254 F.3d 300, 304 (D.C. Cir. 2001).²

Plaintiff's claim is ripe for adjudication, as all applicable administrative remedies have been exhausted. This Court has expressly and consistently held that a party requesting expedited processing of a FOIA request may seek judicial review of an agency denial of expedition without first submitting an administrative appeal of such denial. *See, e.g., Al-Fayed v. CIA*, C.A. No. 00-2092, 2000 U.S. Dist. LEXIS 21476, at **7-8 (D.D.C. Sept. 20, 2000), *aff'd on other grounds*, 254 F.3d 300 (D.C. Cir. 2001) ("Nothing in the statute or its legislative history . . . mandates administrative appeals for all denials of expedited processing before an applicant may seek judicial review."); *American Civil*

² This Court also has jurisdiction of this case under 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States.").

Liberties Union v. Dep't of Justice, 321 F. Supp. 2d 24, 28 (D.D.C. 2004) (administrative appeal is not a “prerequisite for judicial review,” thus “plaintiffs’ failure to appeal the FBI’s refusal to expedite their request does not preclude judicial review of the decision”) (emphasis omitted); *Electronic Privacy Information Center v. Dep't of Justice*, 332 F. Supp. 2d 1, 7 (D.D.C. 2003), *appeal docketed*, No. 04-5063 (D.C. Cir. Feb. 27, 2004) (holding that requester need not submit an administrative appeal of agency’s adverse determination on expedited processing before seeking judicial review).

As the FOIA provides, in reviewing the Agency’s actions, “the court shall determine the matter *de novo*.” 5 U.S.C. § 552(a)(4)(B); *see also Al-Fayed*, 254 F.3d at 308 (“[A] district court must review *de novo* an agency’s denial of a request for expedition under FOIA.”).

II. Plaintiff is Entitled to Entry of a Temporary Restraining Order and a Preliminary Injunction

In considering Plaintiff’s request for the entry of a temporary restraining order and a preliminary injunction compelling Defendant CIA to expedite the processing of Plaintiff’s FOIA request, the court must assess “[t]he familiar factors affecting the grant of preliminary injunctive relief – 1) likelihood of success on the merits, 2) irreparable injury to the plaintiff, 3) burden on . . . others’ interests, and 4) the public interest.” *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 57 (D.C. Cir. 1977) (citing *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), and *A Quaker Action Group v. Hickel*, 421 F.2d 1111, 1116 (D.C. Cir. 1969)). Consideration of these factors in this case establishes Plaintiff’s entitlement to injunctive relief.

A. Plaintiff is Likely to Prevail on the Merits

Plaintiff's likelihood of prevailing on the merits is extremely high because this FOIA request provides a textbook case for expedited processing. In assessing Plaintiff's likelihood of success, the Court must consider one discrete issue: whether Plaintiff has satisfied the statutory and regulatory criteria for expedited processing. Plaintiff is likely to prevail on this issue.

1. The "Urgency to Inform" Standard

The FOIA provides that "[e]ach agency shall promulgate regulations . . . providing for expedited processing of requests for records . . . in cases in which the person requesting the records demonstrates a compelling need and . . . in other cases determined by the agency." 5 U.S.C. § 552(a)(6)(E)(i). "Compelling need" includes, "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." 5 U.S.C. § 552(a)(6)(E)(v).

Pursuant to the statutory directive, the CIA issued regulations establishing that "[r]equests for expedited processing will be approved only when a compelling need is established to the satisfaction of the Agency." 32 C.F.R. 1900.34(c). A "compelling need" is defined to exist under Agency regulation in two circumstances, only one of which is relevant here: "[w]hen the request is made by a person primarily engaged in disseminating the information and the information is relevant to a subject of public urgency concerning an actual or alleged Federal government activity. 32 C.F.R. 1900.34(c)(2).

Plaintiff provided the CIA with clear evidence of its entitlement to expedited processing under the "public urgency" standard set forth in CIA's regulations.

2 . Plaintiff's Request Meets the "Public Urgency" Standard

Plaintiff satisfies the threshold requirement of the "urgency to inform" standard because it is "primarily engaged in disseminating information" within the meaning of the FOIA and CIA regulations. The D.C. Circuit has expressly held that the National Security Archive "is a representative of the news media." *National Security Archive v. Department of Defense*, 880 F.2d 1381, 1388 (D.C. Cir. 1989). Further, the CIA has a history of granting Plaintiff's request for news media status and has granted Plaintiff's request for news media status with respect to the very request that is the subject of this law suit.

Plaintiff has also demonstrated beyond question that its FOIA request pertains to a matter about which there is an "urgency to inform the public concerning actual or alleged federal government activity." The D.C. Circuit has held that in determining whether requestors have demonstrated "urgency to inform," and hence "compelling need," courts must consider at least three factors: (1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity. *Al-Fayed*, 254 F.3d at 310. All three factors are satisfied here.

First, Plaintiff's request for the 2004 Iraq NIE clearly "concerns a matter of current exigency to the American public." *Id.* The D.C. Circuit has held that, to meet that test, a requester must show "substantial interest, either on the part of the American public or the media," evidenced by "news reports." *Id.* at 311. Plaintiff amply demonstrated that its FOIA request implicates serious questions about the U.S. government strategy in Iraq

and that this issue has received considerable news media and congressional attention in recent weeks. In its September 16 letter, Plaintiff described the “front-page treatment” of the existence of the NIE and its subject. Further, in its October 4, 2004, amendment to its FOIA request, Plaintiff certified that over 1300 news stories had reported on the existence of the 2004 Iraq NIE and that eight members of the Senate Select Intelligence Intelligence Committee had requested an unclassified version of the NIE be made public because the record was critical to an urgent policy debate. Plaintiff thus demonstrated that the NIE’s assessment of the situation in Iraq is a matter of “current exigency to the American public.”

Second, it is clear that “the consequences of delaying a response would compromise a significant recognized interest.” *Al-Fayed*, 254 F.3d at 310. As the New York Times reported (in an article Plaintiff attached to its FOIA request) on the day that Plaintiff submitted its FOIA request, “National Security Panel Spokesman Sean McCormack stated that the NIE “makes clear why it is so important to stand with the Iraqi people as they face these challenges.” Fuchs Declaration, Exh. A at 3. Thus, disclosure of information about the situation in Iraq is important for reasons other than merely the “public’s right to know.” *Cf. Al-Fayed*, 254 F.3d at 310. The NIE is critical to the American people’s understanding of the central policy debate in our country at this time: the nature and the extent of the U.S. commitment to Iraq and the prospects for the involvement in Iraq.

Moreover, as Plaintiff noted in its amended FOIA request, members of Congress have stated that the NIE “can play a critical role as the Congress grapples with the difficult issues surrounding America’s involvement in Iraq. To facilitate that role, we

believe that the substance of this assessment should be made public in some fashion as soon as possible,” that “[a]ny public discussion of such an important intelligence assessment should be balanced, and informed to the greatest extent possible by the document itself,” and that “[a]n unclassified version of this assessment will significantly improve the quality of the debate.” Fuchs Declaration, Exh. B at 6.

It is vital that lawmakers, as well as their constituents, be as informed as possible about the situation in Iraq as they vote in the upcoming elections and as Congress determines the support it can provide to reconstruction efforts in Iraq. Indeed, this Court recently recognized that the disclosure of material that would “inform” the debate on relevant and timely Congressional deliberations, when there is demonstrated “newsworthiness” in the underlying issue, is “more than sufficient to satisfy” the “urgency to inform” standard. *American Civil Liberties Union*, 2004 U.S. Dist. LEXIS 9381, at *16-17.

The current and ongoing debate on the situation in Iraq clearly would be hampered by further delay in the CIA’s response to Plaintiff’s request. The Supreme Court has long recognized our democracy’s interest in “the ‘uninhibited, robust, and wide-open’ debate about matters of public importance that secures an informed citizenry.” *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 815 (1985), quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). See also *Board of Educ. v. Pico*, 457 U.S. 853, 876 (1982) (“[T]he Constitution presupposes the existence of an informed citizenry prepared to participate in governmental affairs.”). This recognized interest clearly would be compromised by further delay in the disclosure Plaintiff seeks.

Finally, Plaintiff's request indisputably concerns Federal government activity. The NIE concerns prospects for a country that the United States attacked, where the United States is principally responsible for reconstruction, and where members of the United States military have suffered over 1000 deaths. The NIE revisits issues raised in prior intelligence assessments of Iraq, including one that was subject to intense scrutiny by the Senate Select Committee on Intelligence concerning the existence of weapons of mass destruction in Iraq. Fuchs Declaration, Exh. A at 3.

Because Plaintiff has demonstrated that it is "primarily engaged in disseminating information" and that an "urgency to inform the public" exists "concerning actual or alleged Federal Government activity," it is legally entitled to expedited processing of its FOIA request.

B. Plaintiff Will Suffer Irreparable Injury in the Absence of the Requested Injunctive Relief

Unless the CIA's unlawful failure to expedite the processing of Plaintiff's FOIA request is immediately enjoined, Plaintiff will suffer irreparable harm.³

The very nature of the right that Plaintiff seeks to vindicate in this action — expedited processing — depends upon timeliness. The courts have recognized that the requisite injury is present, and preliminary injunctive relief is appropriate, in cases where "time is of the essence." *See, e.g., United States v. BNS, Inc.*, 858 F.2d 456, 465 (9th Cir.

³ Given the strength of Plaintiff's position on the merits, even "a relatively slight showing of irreparable injury" is adequate to justify the issuance of a preliminary injunction. As the D.C. Circuit has held,

[i]f the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak. An injunction may be justified, for example, where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury.

CityFed Financial Corp. v. Office of Thrift Supervision, 58 F.3d 738, 747 (D.C. Cir. 1995) (citation omitted). Nonetheless, Plaintiff's showing of harm here is substantial.

1988); *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982). Under the statutory scheme Congress established in the FOIA, it is clear that “time is of the essence” here and that any further delay in the processing of Plaintiff’s request will cause irreparable injury. Unless Defendant CIA is ordered to process Plaintiff’s request immediately, Plaintiff’s right to expedition under the FOIA will be irretrievably lost.

In addition to the loss of its clearly established legal right, any further delay in the processing of Plaintiff’s FOIA request will irreparably harm Plaintiff’s ability (and that of the public) to obtain information vital to the current and ongoing debate surrounding U.S. activity in Iraq. Fuchs Declaration, ¶¶ 22-24. As this Court has noted, a private party (such as Plaintiff) “suffers an injury-in-fact when . . . denied information that must be disclosed pursuant to statute.” *Walker v. Cheney*, 230 F. Supp. 2d 51, 66 n.10 (D.D.C. 2002) (citing *FEC v. Akins*, 524 U.S. 11, 21 (1998) and *Pub. Citizen v. Dep’t of Justice*, 491 U.S. 440, 449 (1989)).

Because time is of the essence in this matter, Plaintiff will be irreparably harmed unless the Court acts now, “when it [is] still possible to grant effective relief,” and before “all opportunity to grant the requested relief [is] foreclosed.” *Local Lodge No. 1266, Int’l Ass’n of Machinists and Aerospace Workers v. Panoramic Corp.*, 668 F.2d 276, 290 (7th Cir. 1981).

C. Injunctive Relief Will Not Burden Others’ Interests

Defendant CIA cannot be said to be “burdened” by a requirement that they comply with the law. The immediate relief Plaintiff seeks will require nothing more of the government than what the law already mandates — the expedited processing of Plaintiff’s FOIA request. Nor will the requested relief burden the interests of other parties

who have submitted FOIA requests to the CIA in any manner beyond that foreseen by Congress. In providing for expedited processing of qualifying requests, Congress intended that such requests would take precedence over those that do not qualify for such treatment. Fulfillment of the legislative intent cannot be characterized as a burden on any party's interests.

D. The Public Interest Favors the Requested Relief

The final criterion for the issuance of a temporary restraining order and a preliminary injunction is clearly satisfied in this case. The strong public concern about the situation in Iraq and the likely outcome of the war in Iraq is evidenced in part by the overwhelming media interest in the document. As described above, over 1300 news articles concerning the 2004 Iraq NIE were published in the two weeks after its existence was disclosed. Members of Congress called for release of an unclassified version because of its centrality to congressional deliberations and public understanding of an issue of great public concern. The decision of a government to prosecute a military campaign and strategy for reconstruction is clearly of the highest public interest. As this Court has noted, "[t]here is public benefit in the release of information that adds to citizens' knowledge" of government activities. *Ctr. to Prevent Handgun Violence v. Dep't of the Treasury*, 49 F. Supp. 2d 3, 5 (D.D.C. 1999). The public interest favors the issuance of an order directing Defendants to expedite the release of the requested information.

III. The Court Should Order the CIA to Process Plaintiff's FOIA Request Immediately

While Plaintiff recognizes that preliminary injunctive relief is not the norm in FOIA cases, Plaintiff nonetheless submits that such relief is appropriate when, as in this

case, an agency has denied a well-founded request for expedited processing.⁴ Congress expressly required agencies to make determinations on such requests within ten calendar days, 5 U.S.C. § 552(a)(6)(E)(ii)(I), and provided for immediate judicial review of adverse determinations, 5 U.S.C. § 552(a)(6)(E)(iii). The legislative mandate that disputes over expedited processing should be quickly resolved would be frustrated if aggrieved requesters were required to remain idle for twenty days after initiating suit before moving for partial summary judgment. Fed. R. Civ. P. 56(a). As such, claims of entitlement to expedited processing are appropriately addressed through motions for preliminary relief.

Likewise, the appropriate form of relief is clear. The applicable CIA regulations dictate the manner in which FOIA requests requiring expedition must be processed. The CIA regulations provide that CIA ordinarily handle requests on a “strictly ‘first-in, first-out’ basis,” 32 C.F.R. § 1900.34(a), but that requests will be taken out of order and given expedited treatment whenever “a compelling need is established.” *Id.* § 1900.34(c)

The Court should order Defendant CIA to take whatever steps are necessary to complete the processing of Plaintiff’s requests as expeditiously as possible.

⁴ Judicial resolution of the expedited processing issue would not resolve all issues raised in the complaint concerning defendant CIA. Once the question of processing time is resolved, the Court would retain jurisdiction to review the completeness and propriety of CIA’s substantive determination of Plaintiff’s FOIA request. *See Open America v. Watergate Special Prosecution Force*, 547 F. 2d 605 (D.C. Cir. 1976).

CONCLUSION

For the foregoing reasons, Plaintiff's motion for a temporary restraining order and a preliminary injunction should be granted.

DATE: October 20, 2004

Respectfully submitted,

Meredith Fuchs
D.C. Bar No. 450325
General Counsel
The National Security Archive
Gelman Suite 701
2130 H Street, NW
Washington, DC 20037
Counsel for Plaintiff