

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

ALLIED PROGRESS,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 17-686
	:	
CONSUMER FINANCIAL PROTECTION	:	
BUREAU,	:	
	:	
Defendant.	:	
	:	

**REPLY TO DEFENDANT'S MEMORANDUM IN OPPOSITON TO
PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

Plaintiff Allied Progress seeks a temporary restraining order (“TRO”) and preliminary injunction from the Court asking for expedited processing of two FOIA requests plaintiff submitted to defendant Consumer Financial Protection Bureau (“CFPB”) concerning correspondence pertaining to 12 CFR Parts 1005 and 1026 or Docket No. CFPB-2014-0031 known as the Prepaid Rule.

Defendant CFPB opposes the motion for expedited processing arguing that plaintiff has failed to demonstrate a "compelling need" for the information and that the prepaid rule issue is not one of "current exigency to the American public." However as demonstrated in the original motion and below, defendant's arguments do not defeat plaintiff's right to expedited processing of its FOIA requests at issue.

ARGUMENT

Defendant argues that plaintiff's motion must fail because it has failed to demonstrate that it is primarily engaged in the dissemination of information and that it

has not established an urgency to inform the public. Despite defendant's assertions, plaintiff has established both of these elements and is entitled to expedited processing of its FOIA requests.

a. “Primarily Engaged in Disseminating Information”

Plaintiff Allied Progress has established that it is primarily engaged in disseminating information. Defendant asserts that plaintiff has failed to establish this element needed for expedited processing and therefore is not entitled to expedited processing of its requests. Defendant's Memorandum in Opposition to Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction ["Defendant's Opposition"] at 7-10. Defendant cites a number of cases that denied expedited processing because disseminating information was not found to be the requester's primary engagement. *Id.* At 7-8. However, the findings in these cases are inapplicable to the present case. Plaintiff Allied Progress is clearly distinguishable from those organizations and individuals seeking expedited treatment but which were found to be only disseminating information incidentally, not as their primary engagement. The first case cited by defendant, *Landmark Legal Found. V. EPA*, 910 F.Supp. 2d 270 (D.D.C. 2012) concerns a public interest law firm where expedited processing was denied because its statements about publicizing improper and/or illegal government activity were found to only be an incidental part of its mission. *Id.* at 270, 275-76. Further, neither of the advocacy groups who were plaintiffs in *Treatment Action Grp. V. Food & Drug Admin.* argued on the record that information dissemination was its primary purpose. *Treatment Action Grp. V. Food & Drug Admin.* No. 15-CV-976, 2016 WL 5171987, at *7-8 (D. Conn. Sept. 20, 2016). The other two cases cited by plaintiff, *ALCU of N. California v.*

U.S. Dep't of Justice, No. C 04-4447, 2005 WL 588354, at *14 (N.D. Cal. Mar. 11, 2005) and *Tripp v. U.S. Dep't of Defense*, 193 F.Supp. 2d 229, 241 (D.D.C. 2002) concern plaintiffs that were not found to disseminate information as a primary activity.

Unlike the cases cited by defendant, the record establishes that plaintiff has demonstrated that it was primarily engaged in disseminating information. Plaintiff expressly stated that it will use the requested information "to educate the public through reports, press releases, or other media" to fulfill its mission which involves "standing up to Wall Street and other powerful special interests and holding their allies in Congress and the White House accountable." Plaintiff's Exhibits 1 and 2 [ECF No. 2-3 at 3,8] to the Declaration of Karl Frisch. This statement clearly expresses plaintiff's primary engagement as disseminating information so that it can fulfill its mission. The statement does not, as defendant's reading would have the Court believe, make disseminating information an incidental function of Allied Progress. As such, plaintiff, like others whose requests have been awarded expedited processing, has met the dissemination of information as a primary activity. *See Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (granting expedited processing and finding plaintiff's "mission [was] to serve as the site of record for relevant and up-to-the minute civil rights news and information").

b. "Urgency to Inform the Public"

Plaintiff has also demonstrated beyond question that its FOIA request pertains to matters about which there is an "urgency to inform the public concerning actual or alleged federal government activity." Defendant claims that the plaintiff has failed to meet this element because it doesn't believe the situation meets the dictionary definition

of exigency nor has Allied Progress demonstrated an urgency to information the public about the information responsive to plaintiff's FOIA requests. Defendant's Opposition at 10-13. Despite defendant's assertions, plaintiff has demonstrated an urgency to inform the public on the matters at issue.

As plaintiff demonstrated previously, the proposed CRA vote, if passed, will abolish the CFPB's prepaid card rule. The CRA vote will occur no later than mid-May. Declaration of Karl Frisch, ¶¶4,6 and Exhibits 1 and 2 [Dkt. Nos. 2-2 and 2-3]. This is clearly a matter of current exigency, even under defendant's dictionary definition of the word exigency.

Defendant also attempts to discredit the public interest in the requested information. Defendant's Opposition at 11-12. However, it is clear that the subject of the requests is in the public interest as the information allows the public to see those who are attempting to influence the government's policymaking process concerning the prepaid rule and what steps they are taking to do so. The urgency in this information is that it will serve this public interest prior to the CRA vote which has a set deadline. The CRA deadline, likely May 9, 2017, despite defendant's assertions otherwise, is imminent. This is inapposite to the facts of *Landmark Legal Foundation* cited by defendant; in that case, it was found that the plaintiff's reason for seeking expedited processing (commenting on a proposed rule) was not affected in any way by receiving the records sought under the FOIA. *Landmark Legal Found.*, 910 F. Supp. 2d. at 277.

Finally, defendant asked the U.S. Attorney's Office's librarian to conduct research into news coverage of the issue as an attempt to demonstrate a lessened public interest in the matter. Defendant's Opposition at 13. However, the librarian only searched the

printed versions of three newspapers¹. *Id.* Plaintiff has already provided evidence of news coverage of the issue, Plaintiff's Points and Authorities in Support of its Motion for a Temporary Restraining Order and Preliminary Injunction at 9-10 (Plaintiff's Memorandum), and defendant's limited search of three printed versions of newspapers does not disprove that there is public interest as well as media coverage of this issue.

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

Defendant does not directly address plaintiff's arguments in Plaintiff's Memorandum that plaintiff will suffer irreparable injury unless expedited processing is granted. Plaintiff's Memorandum at 10-12. Instead, defendant misconstrues the injury that will occur and claims the injury is created by plaintiff itself. Defendant's Opposition at 13-15. Defendant claims the irreparable injury plaintiff alleges is that without the information, plaintiff cannot inform the public that Congress can invoke the CRA with respect to the Prepaid Rule, (which according to defendant, plaintiff has already done). *Id.* at 14. However, the irreparable injury coming from not receiving the documents on an expedited basis is not what defendant alleges it is; it is that plaintiff's ability (and that of the public) to engage in informed discussion and debate on the Prepaid Rule, *see* Frisch Decl. ¶¶4,6 and Exhibits 1 and 2, will be irreparably injured without expedited processing. It is not that plaintiff wishes to inform the public that there is a possible CRA vote on the prepaid rule. As noted in plaintiff's earlier filing, without the expedited access to information about communications between defendant and others on the Prepaid Rule, plaintiff's ability to engage in an urgent and current public policy debate

¹ Defendant does not explain why the search was limited to printed versions of the newspapers, how those newspapers were the ones searched, or why other forms of media were not included in this search.

will be irretrievably lost. As this Court 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 *Public Citizen v. Dep’t of Justice*, 491 U.S. 440, 449 (1989).² 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, International Association of Machinists and Aerospace Workers v. Panoramic Corp.*, 668 F.2d 276, 290 (7th Cir. 1981).

Injunctive Relief Will Not Burden Others’ Interests

Defendant CFBP claims that if forced to expedite processing, it will make its release no later than May 8, 2017. Declaration of Raynell Lazier, ¶14 [Lazier Decl.]. However, if no expedition is granted, the CFPB will “anticipate completing the non-expedited processing of these documents . . . by no later than May 10, 2017.” *Id.* Defendant states that processing the request “takes a considerable amount of time”, Defendant's Opposition at 15, but the CFPB does not explain how the two-day difference involves additional burden on its resources. Furthermore, the defendant does not state how any others' interests would be burdened by this short expedition of the processing of these requests.

The immediate relief plaintiff seeks will require nothing more of defendant than what the law already mandates -- the expedited processing of plaintiff’s FOIA requests. Nor will the requested relief burden the interests of other parties who have submitted FOIA requests

² Defendant cites to procedural issues with plaintiff's requests as a rationale, without legal citation, as to why expedited processing should be denied. Defendant's Memorandum at 14-15. However, the timing of the submission of plaintiff's requests has no bearing on whether or not plaintiff will suffer irreparable injury and will not be addressed further herein.

to defendant in any manner as defendant cites no burdens imposed on other FOIA requesters. 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, nor has defendant argued that it is in this case.

The Public Interest Favors the Requested Relief

The final criterion for the issuance of a Temporary Restraining Order is clearly satisfied in this case despite defendant's assertions that it is not. Defendant states that granting expedited treatment of this request would have a domino effect that would "encourage sophisticated requesters to seek preliminary injunctive relief in FOIA cases as a matter of course." Defendant's Opposition at 16. However, each case seeking expedited processing must be made on its own merits and a decision granting expedition under the facts of this case would not allow defendant's mythical "sophisticated FOIA requesters" to move to the head of agency FOIA lines.

The D.C. Circuit has long recognized that "there is an overriding public interest . . . in the general importance of an agency's faithful adherence to its statutory mandate." *Jacksonville Port Authority*, 556 F.2d at 59 (D.C. Cir. 1977). Such adherence is all that plaintiff seeks here. The public interest will also be served by the expedited release of the requested records, which will further the FOIA's core purpose of "shedding light on an agency's performance of its statutory duties." *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989). As this court has noted, "[t]here is public benefit in the release of information that adds to citizens' knowledge" of government activities. *Center to Prevent Handgun Violence v. U.S. Department of the*

Treasury, 49 F. Supp. 2d 3, 5 (D.D.C. 1999). The public interest favors the issuance of an order directing defendant to expedite the release of the requested information.

CONCLUSION

The CFPB regulations applicable dictate the manner in which FOIA requests requiring expedition must be processed. The regulations provide the expedited request should be processed as soon as practicable and that the CFPB may assign expedited requests to their own simple and complex processing tracks based upon the amount of work and/or time needed to process them. Within each such track, an expedited request shall be processed in the order of its receipt. 12 CFR § 1070.17(d).

In assessing the practicability of processing plaintiff's requests immediately, the Court should note the narrowness and specificity of the request. Plaintiff seeks disclosure of a limited number of communications concerning only the Prepaid rule. Given the potential significance of these records to the pending CRA vote, their immediate retrieval and review would not unduly burden defendant. Indeed, such priority processing is precisely what Congress mandated for material of the kind at issue here. The Court should order defendant to take whatever steps are necessary to complete the processing of plaintiff's request prior to the mid-May CRA vote on the Prepaid rule.

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

Respectfully submitted,

/s/

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