

Exhibit 18

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LAW FOR THE PUBLIC INTEREST

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April 3, 2023

VIA EMAIL

Kellie Robinson, Public Liaison
U. S. Department of State
A/GIS/IPS/PP
FOIAstatus@state.gov

Re: Unreasonable Delay in Processing Friends of the Earth’s Freedom of Information Act Request Number F-2022-08430

Dear Ms. Robinson:

I am writing on behalf of my client, Friends of the Earth (“FOE”), regarding the need for the Department of State (“State Department” or the “Department”) to promptly respond to Freedom of Information Act (“FOIA”) request number F-2022-08430, which was received by the Department on May 17, 2022 and granted expedited processing on June 13, 2022. My client hopes to avoid the need for litigation in order to obtain the requested information, but has already experienced substantial delays and difficulties. To avoid litigation over this matter, it is important that by May 3, 2023, the State Department make a final determination regarding this request and produce all responsive materials.

BACKGROUND

Friends of the Earth’s FOIA request here at issue was received by the State Department on May 17, 2022, and was assigned the tracking number F-2022-8430. See Attach. A (Friends of the Earth’s FOIA request). The request sought:

- Any and all ethics forms, agreements, or documentation for Amos Hochstein, Senior Advisor for Energy Security, including but not limited to: ethics agreements; recusal agreements, lists, or other documentation; written waivers; regulatory exemptions; conflict of interest disclosures or other documentation; and disclosures of investments in and/or divestments from fossil fuel companies from August 10, 2021 through the date the records search is made for this request;
- Communications between Mr. Hochstein and the DOS’s Office of the Assistant Legal Advisor for Ethics and Financial Disclosure from August 10, 2021 through the date the records search is made for this request;
- Communications between Mr. Hochstein and members of and participants in the Task Force [on Energy Security (“Task Force”)] from March 25, 2022 through the date the records search is made for this request;

- All calendar entries from Mr. Hochstein’s official calendar from August 10, 2021 through the date the records search is made for this request, including but not limited to: calendar entry titles; dates; times; meeting locations; meeting attendees; and the meeting descriptions from the electronic calendar entries; and
- Any communications generated or received by Mr. Hochstein concerning the encouragement or facilitation of the expansion of domestic natural gas production and infrastructure from August 10, 2021 through the date the records search is made for this request.

In light of the urgent need to inform the public and lawmakers about the State Department’s highly consequential actions undertaken in response to the energy crisis precipitated by the Russo-Ukrainian War—and the extent to which those actions are influenced by fossil fuel special interests—Friends of the Earth’s FOIA request included a well-substantiated request for expedited processing. Specifically, Friends of the Earth’s request included a sworn declaration attesting to the urgency of obtaining information about how the agency was being lobbied to support the expansion of, and investment in, natural gas production and infrastructure, and how the requested information would become substantially less useful if the State Department delayed its release until after the agency has exercised the United States’ authority and influence to address the energy crisis, including by helping secure financing for liquefied natural gas (LNG) export terminals.

By email on May 24, 2022, the State Department acknowledged receipt of FOE’s FOIA request on May 17, 2022, assigned it a tracking number, and explicitly denied FOE’s request for expedited processing. Notably, in denying FOE’s request for expedited processing, the State Department did not address any of the detailed explanations for the need for expedition in this matter, and did not even acknowledge that FOE had provided a highly detailed sworn declaration as to the urgency associated with this FOIA request. Instead, entirely ignoring the evidence FOE actually supplied, the State Department falsely stated that FOE’s “request does not demonstrate a ‘compelling need’ for the requested information.” Moreover, at the same time that the State Department informed FOE that it would not expedite processing of this FOIA request, the agency also informed FOE that it would not comply with FOIA’s 20 working-day deadline. Instead, the State Department claimed that an additional 10 working-day extension was necessary due to ostensibly “unusual circumstances.” However, despite FOIA’s explicit requirement that when an agency claims an extension due to unusual circumstances, it must inform the requester of the specific “date on which a determination is expected to be dispatched,” 5 U.S.C. § 552(a)(6)(B)(i), the State Department violated FOIA by failing to provide any such information.

Faced with the State Department’s explicit—but unsubstantiated—unwillingness to expedite processing of FOE’s FOIA request and a brief and rapidly closing window of opportunity to exert meaningful oversight of the agency’s actions with respect to the Task Force and energy crisis, FOE filed suit on May 31, 2022, to compel the State Department to grant FOE’s request for expedited processing, as required by FOIA.

On June 9, 2022, FOE emailed government counsel to confer on a proposed schedule for a preliminary injunction motion. On June 10, 2022, FOE conferred with government counsel via phone. FOE reiterated the urgency of its FOIA request and its commitment to obtaining the requested information in a timely manner; however, FOE also expressed its willingness to work out a mutually agreeable production schedule.

On June 13, 2022, the State Department abruptly reversed course and granted FOE's request for expedited processing. The State Department explained that it "reconsidered [FOE's] request for expedited processing based on the additional information provided since [FOE] submitted [its] request in [May] 2022, and [the agency] ha[s] determined that [FOE's] request does meet the established criteria for expedited processing." The State Department also informed FOE that it had "further determined to process [FOE's] request, which is now in [the] 'expedited' queue, and to release any responsive, non-exempt records as soon as practicable."

That same day, counsel for Friends of the Earth conferred with counsel for the State Department in the interest of expediting the search for and disclosure of the important records. Relevant here, to reduce the burden on the State Department, Friends of the Earth offered to provide a list of initial search terms to assist the agency in fulfilling request subpart 5 of the request: "communications generated or received by Mr. Hochstein concerning the encouragement or facilitation of the expansion of domestic natural gas production and infrastructure."

In subsequent discussions with counsel for the State Department, Friends of the Earth offered further clarification of subpart 5 by providing additional context for the request and proposing an initial, non-exhaustive list of search terms to assist State Department in fulfilling the request. However, the State Department rejected Friends of the Earth's list of proposed search terms in its entirety.

On June 28, 2022, the State Department informed Friends of the Earth that the agency "denies [subpart 5] as currently written because it does not reasonably describe the records sought." The State Department insisted that "[a] request must reasonably describe the Department records that are sought to enable personnel to begin a search for responsive records." The agency explained that "[s]uch details may include the subject, timeframe, names of any individuals involved, a contract number (if applicable), and reasons why the requester believes the Department may have records regarding the subject of the request." The State Department did not offer any meaningful explanation for why Friends of the Earth's request failed to meet this standard.

The State Department's June 28, 2022 partial denial also addressed subpart 1 of Friends of the Earth's FOIA request, which sought, inter alia, ethics forms for Mr. Hochstein. With respect to subpart 1, the State Department informed Friends of the Earth that "to request the production of financial disclosure reports, you must submit an OGE Form 201 Request to Inspect to the State Department's ethics office." The agency informed Friends of the Earth of its right to administratively appeal the State Department's partial determination on subparts 1 and 5 of its request. Additionally, the State Department informed Friends of the Earth that "processing of the remaining three subparts of your request [i.e., subparts 2-4] remains ongoing."

On August 12, 2022, Friends of the Earth appealed the State Department's June 28, 2022 partial denial, explaining that the FOIA request reasonably described the records sought. In any event, in an effort to assist the State Department in processing its FOIA request, Friends of the Earth provided additional context for its request, as well as a non-exhaustive list of suggested search terms.

Also on August 12, 2022, the State Department informed Friends of the Earth that the agency conducted a search for "potentially responsive records" to subpart 3 of Friends of the Earth's request, which sought "[c]ommunications between Mr. Hochstein and members of and participants in the Task Force." The State Department "determined that two records, responsive to subpart three of your request are exempt from disclosure in their entirety pursuant to 5 U.S.C. § 552(b)(6), which concerns material the release of which would constitute a clearly unwarranted invasion of an individual's personal privacy." The State Department did not offer any meaningful explanation for why the two records at issue fell under the claimed FOIA exemption.

The State Department's August 12, 2022 partial denial also addressed subparts 2 and 4 of Friends of the Earth's FOIA request, which sought, *inter alia*, communications between Mr. Hochstein and the State Department's Office for the Assistant Legal Advisor for Ethics and Financial Disclosure, and calendar entries from Mr. Hochstein's official calendar, respectively. The State Department informed Friends of the Earth that it had conducted a search for records responsive to both subparts. The State Department identified four records responsive to subpart 2 appropriate for partial disclosure. Additionally, the State Department informed Friends of the Earth that it "continue[s] to process" subparts 2-4 of Friends of the Earth's request.

On September 23, 2022, the State Department informed Friends of the Earth that it was continuing to process the FOIA request. The State Department noted that it had conducted a search for "potentially responsive records" to subpart 2 of Friends of the Earth's request, which sought "[c]ommunications between Mr. Hochstein and the DOS's Office of the Assistant Legal Advisor for Ethics and Financial Disclosure . . . from August 10, 2021, through the date the records search is made for this request." The State Department located "four records responsive to this subpart" and "determined that all four records are appropriate for release in part pursuant to 5 U.S.C. §§ 552 (b)(5) and (b)(6), which concerns material the release of which would constitute a clearly unwarranted invasion of an individual's personal privacy." According to the State Department, the processing of subpart 2 of the request was concluded.

On September 28, 2022, the State Department informed Friends of the Earth that the agency had received the organization's August 12, 2022 appeal of the State Department's June 28, 2022 partial denial of subpart 5 of the FOIA request in which the State Department had determined that the request for "any communications generated or received by Mr. Hochstein concerning the encouragement or facilitation of the expansion of domestic natural gas production and infrastructure" was invalid. The State Department assigned Friends of the Earth's August 12, 2022 appeal the tracking number A-2022-00372.

On October 6, 2022, the State Department informed Friends of the Earth that it had granted the organization's August 12, 2022 appeal of the agency's June 28, 2022 partial denial of

subpart 5 in its entirety, stating that it was “remanding [the] request for further processing.” Because “this [was] the action sought by [the] appeal,” the Department “closed the appeal.”

On November 4, 2022, the State Department informed Friends of the Earth by letter that the agency “has continued to review and process records responsive to your request, but as of today’s date these records are not yet ready for production.” The State Department additionally stated that it “will continue to process your request and keep you apprised of its progress.”

On November 9, 2022, Friends of the Earth appealed the State Department’s August 12, 2022 partial denial of its FOIA request pursuant to Exemption 6. Friends of the Earth explained that the State Department’s Exemption 6 withholdings were overbroad, vague, and fail to provide segregable records in response to Friends of the Earth’s FOIA request. Moreover, Friends of the Earth reminded the State Department of the agency’s statutory duty to disclose responsive records expeditiously. At that time, nearly four months had passed since Friends of the Earth’s request had been granted expedited processing. Absent *any evidence* that it was impracticable to process Friends of the Earth’s request promptly, such a delay was patently unreasonable. Accordingly, any continued delay would be unlawful and expose the State Department to significant litigation risk.

On November 17, 2022, the State Department informed Friends of the Earth by letter that the agency had received the organization’s November 9, 2022 appeal of the State Department’s August 12, 2022 partial denial, and assigned the appeal tracking number A-2023-00036. To date, Friends of the Earth has not received any response to this appeal.

On December 16, 2022, the State Department informed Friends of the Earth that the agency was continuing to process the organization’s FOIA request. The Department explained that it had “located [twenty-seven] responsive pages responsive to subpart four (Mr. Hochstein’s calendar) of your request subject to the FOIA” and “determined that all [twenty-seven] pages are appropriate for release in part,” subject to partial withholdings pursuant to Exemptions 5 and 6.

On January 27, 2023, the State Department informed Friends of the Earth that the agency was continuing to process the organization’s FOIA request. The Department explained that “[s]ince the date of our last correspondence, [it] has continued to review and process records responsive to your request, but as of today’s date these records are not yet ready for production.” The agency further stated that it would “continue to process your request and keep you apprised of its progress.”

On March 10, 2023, the State Department again informed Friends of the Earth that the agency was continuing to process the organization’s FOIA request. The Department again explained that “[s]ince the date of our last correspondence, [it] has continued to review and process records responsive to your request, but as of today’s date these records are not yet ready for production.” The agency again further stated that it would “continue to process your request and keep you apprised of its progress.”

Since June 13, 2022, the date Friends of the Earth’s FOIA request was granted expedited processing, the State Department has located and reviewed thirty-seven records for potential

disclosure. Of those thirty-seven records that have been identified as responsive to Friends of the Earth's FOIA request, the State Department has partially disclosed thirty-five.

DISCUSSION

The State Department must immediately make a determination and promptly produce all responsive records to Friends of the Earth's FOIA request without further delay. As the agency well knows, FOIA provides for expedited processing of requests where there is a demonstrated "urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. § 552(a)(6)(e)(v)(II). When expedition is appropriate, an agency is obligated to process the request "as soon as practicable." *Id.* § 552(a)(6)(E)(iii). It is well-established that "unreasonable delays in disclosing non-exempt documents violate the intent and purpose of the FOIA." *Payne Enters. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988). These concerns are heightened where delay risks that the information sought "may be 'history' rather than 'news,' and [the requestor's] ability to inform citizens' views and promote government accountability through FOIA procedures will be significantly dampened." *Nat'l Pub. Radio, Inc. v. U.S. Dep't of Treasury*, 2019 WL 12262726 (D.D.C. Aug. 23, 2019).

As explained, the State Department granted Friends of the Earth's request for expedited processing on June 13, 2022 (shortly after Friends of the Earth filed a lawsuit challenging the agency's initial denial of that request). Since that date, the State Department has identified thirty-seven responsive records, two of which were withheld in their entirety.¹ In other words, over the nearly ten months since the agency moved Friends of the Earth's FOIA request to the front of the line, it has processed an average of 3.7 records per month. At no point has the State Department provided even an estimate of the number of records it has identified as potentially responsive to Friends of the Earth's FOIA request. Nor has the agency provided a production schedule for responsive records, much less an estimated date of completion.

The State Department's delay in processing Friends of the Earth's FOIA request is unreasonable and unlawful. Because Friends of the Earth's request was granted expedited processing, it should have been moved to "the front of the agency's queue" and processed "as soon as practicable." *Leadership Conf. on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 259-60 (D.D.C. 2005) (internal quotation omitted). Yet, in the nearly *ten months* since Friends of the Earth's request was moved to the front of the State Department's queue, the agency still has not issued a final determination on the request and has identified fewer than forty responsive records. "The legislative history of the amendments [to FOIA] makes clear that, although Congress opted not to impose a specific deadline on agencies processing expedited requests, its intent was to 'give the request priority for processing *more quickly than otherwise would occur.*'" *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 416 F.Supp.2d 30, 39 (D.D.C. 2006) (quoting S. Rep. No. 104-272, at 17 (1996)) (emphasis in original). Accordingly, "the phrase 'as soon as practicable,' in the context of a provision of FOIA allowing for *expedited* processing, cannot be interpreted to

¹ As explained, Friends of the Earth appealed the withholding of these two records on November 9, 2022. The State Department acknowledged receipt of this appeal on November 17, 2022. Since that date, Friends of the Earth has not received any further communications concerning this appeal, much less a determination.

impose a lower burden on the agency” than would otherwise be required for standard FOIA requests. *Id.* (emphasis in original); 5 U.S.C. § 552(a)(6)(A)(i). Considering that “courts often find that one to two months is sufficient time for an agency to process broad FOIA requests that may involve classified or exempt material,” the State Department’s delay in processing Friends of the Earth’s expedited request cannot be justified. *Brennan Ctr. for Justice at N.Y. Univ. School of Law v. U.S. Dep’t of State*, 300 F. Supp. 3d 540, 550 (S.D.N.Y. 2018) (citing cases).

Even worse, the State Department has not even *attempted* to justify the delay in processing Friends of the Earth’s expedited FOIA request. Indeed, the agency has not provided *any* evidence that it is impracticable to issue a determination on Friends of the Earth’s request within the twenty-day statutory time period. Nor has the agency provided any explanation as to how its nearly ten-month delay in processing Friends of the Earth’s FOIA request can be squared with its obligation to act in “good faith effort and due diligence . . . to comply with all lawful demands [for records] . . . in as short a time as is possible.” *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 616 (D.C. Cir. 1976). To the contrary, the State Department has repeatedly made the bare assertion—here, that additional time was necessary to process the request—the type of which is insufficient to sustain agency actions under FOIA. *EPIC v. Dep’t of Justice*, 416 F. Supp. 2d 30, 40 (D.D.C. 2006) (finding the agency’s two-month delay in processing an expedited FOIA request unreasonable where the agency “has not attempted to present any evidence either that processing EPIC’s FOIA requests within twenty days of the receipt of EPIC’s requests was impracticable”).

The State Department’s delay in processing Friends of the Earth’s request is particularly unreasonable under the factual circumstances presented here. Friends of the Earth sought—and was granted—the relatively rare relief of expedited processing of its FOIA request because of a demonstrated “urgency to inform the public concerning” the agency’s activities. *See* 5 U.S.C. § 552(a)(6)(e)(v)(II). Specifically, there is an urgency to inform the public of the State Department’s engagement with the European Union and the fossil fuel industry to, *inter alia*, develop and implement policy responses to the energy crisis precipitated by the Russo-Ukrainian War. Despite this acknowledged urgency, in the nearly ten months since Friends of the Earth’s request was placed in the expedited track, fewer than forty responsive records have been identified. Meanwhile, the impacts of Russia’s actions and threats continue to reverberate through the global economy, and the conflict has only escalated since Friends of the Earth submitted its FOIA request and appeals.

For instance, recent reporting has revealed that United States oil and gas companies are currently locking in long-term LNG contracts and contract expansions, helping to clear the path for a new generation of export terminals. *See* Amy Westervelt, *US energy firms use Ukraine war to lock in long-term gas contracts, report says*, THE GUARDIAN (Feb. 22, 2023), <https://www.theguardian.com/environment/2023/feb/22/us-oil-gas-lng-contracts-russia-ukraine>; Mary B. Powers & Debra K. Rubin, *Spurt of North America LNG Projects Get First-Quarter OKs to Proceed*, ENR (Mar. 21, 2023), <https://www.enr.com/articles/56132-spurt-of-north-america-lng-projects-get-first-quarter-oks-to-proceed>. Indeed, forty-five such contracts have been locked in since the start of the war. *See* Amy Westervelt, *supra*. Mounting Congressional and public pressure on the Biden Administration to address rising energy prices has conferred a sense of urgency on federal officials to solve the crisis quickly (or at least, appear to be working

to solve the crisis quickly). *See id.* As part of these efforts, Mr. Hochstein and the State Department are reportedly working to encourage and facilitate the financing of new LNG export infrastructure, including by working through the Task Force to support the development of new pan-European contracting mechanisms. To that end, experts have stated that “2022 will definitely go down as an inflection point in the history of energy markets.” Benjamin J. Hulac, *War in Ukraine has reshaped global energy markets*, ROLL CALL (Feb. 23, 2023), <https://rollcall.com/2023/02/23/war-in-ukraine-has-reshaped-global-energy-markets/>. Given this volatile and rapidly evolving climate, any additional delay in processing Friends of the Earth’s FOIA request risks delivering information that is stale and thus “of little value” to Friends of the Earth’s efforts to inform its members, Congress, and the public of matters of extreme public importance and concern. *See Payne Enters., Inc.*, 837 F.2d at 494 (“[S]tale information is of little value.”); *see also Prot. Democracy Proj. Inc. v. U.S. Dep’t of Def.*, 263 F. Supp. 3d 293, 299 (D.D.C. 2017) (finding that a delay in processing FOIA request would compromise a significant recognized interest where the information sought was highly relevant to ongoing debates regarding “high profile government action”).

As courts in this district have recognized, the “failure to process FOIA requests in a timely fashion is ‘tantamount to denial.’” *Wash. Post Co.*, 459 F. Supp. 2d at 74 (quoting H.R. Rep. No. 93-876, at 6 (1974)). Although Friends of the Earth is sympathetic to the challenges faced by agencies in responding to FOIA requests within the statutory period, “[t]he statute’s commands can only be stretched so far to fit the needs of the agency; ultimately the agency must find a way to conform to the statute’s mandates.” *Nat’l Pub. Radio*, 2019 WL 12262726, at *2. The identification of fewer than forty responsive records in nearly ten months violates the letter and intent of the statute’s expedited processing provision. Indeed, as explained, courts often find that one to two months is sufficient time for an agency to process even broad FOIA requests that may involve classified or exempt material. *See, e.g., Am. Civil Liberties Union v. Dep’t of Def.*, 339 F. Supp. 2d 501, 504–05 (S.D.N.Y. 2004) (despite the fact that national security issues were raised by the FOIA request at issue, ordering production of all responsive documents within one month); *Nat’l Pub. Radio*, 2019 WL 12262726, at *2 (finding a schedule that “results in production over the next two-to-twelve years (most likely somewhere in the middle of that range) is unreasonable” where the request was granted expedited processing and rejecting the agency’s reliance on the backlog of FOIA requests to justify the delay); *Judicial Watch, Inc. v. Dep’t of Energy*, 191 F.Supp.2d 138, 140–41 (D.D.C. 2002) (ordering agencies to process over 6000 pages of material within 60 days); *NRDC v. Dep’t of Energy*, 191 F.Supp.2d 41, 43 (D.D.C. 2002) (ordering the “vast majority” of the processing of 7500 pages to be completed within 32 days). Accordingly, the State Department must immediately process and disclose all records that are responsive to Friends of the Earth’s expedited FOIA request.

Given the circumstances, we hope that the State Department will be willing to seriously discuss a comprehensive, non-adversarial approach to resolving this situation. To facilitate the prompt disclosure of responsive records and avoid litigation on the State Department’s unreasonable and unlawful delay in processing Friends of the Earth’s expedited FOIA request, Friends of the Earth requests that by **May 3, 2023**, the State Department:

- (1) Provide an estimate of the total number of records that are responsive to Friends of the Earth’s expedited FOIA request;

- (2) Propose a processing schedule that would produce the documents within a reasonable amount of time, especially in light of the important fact that the agency has already prioritized this FOIA request by expediting it to the front of its search and disclosure queue.²

If we do not hear from you by May 3, 2023, we will assume that no changes to the State Department's processing of our expedited FOIA request will be made, and we will consider all available avenues, including litigation, to ensure our rightful access to the requested records and rectify the legal violations set forth above.

Sincerely,

/s/Elizabeth L. Lewis

Elizabeth L. Lewis

Associate

Lizzie@eubankslegal.com

² When developing its processing schedule, the State Department must be mindful that “[a] schedule that results in production over the next two-to-twelve years . . . is unreasonable” where, as here, the requestor “represent[s] a news organization with the ‘capacity to disseminate information to the public’ and the records sought ‘relate to an issue of national importance,’ factors which favor expeditious processing of [the] FOIA request[.]” *Nat’l Pub. Radio*, 2019 WL 12262726, at *2.