UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE PROTECT DEMOCRACY PROJECT, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE, *et al.*,

Defendants.

Case No. 20-cv-172-RC

DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiff's emergency motion asks this Court to accelerate the already-expedited processing of Plaintiff's requests under the Freedom of Information Act ("FOIA") for records related to the January 2, 2020 U.S. military strike that killed Iranian General Qassim Soleimani. Plaintiff contends that the lack of publically available records on the President's justification for the January 2 strike prevents the public from engaging in meaningful public debate about the propriety of the strike. The entire premise of Plaintiff's motion, however, is belied by the fact that the White House has already provided now-public notice to Congress outlining its justification for the January 2 strike. Plaintiff's arguments are baseless and its motion for extraordinary relief should be denied in full.

As an initial matter, the relief that Plaintiff seeks by way of its emergency motion is the ultimate relief it seeks in this lawsuit—release of the requested records—not "preliminary" relief designed to protect the status quo. It is thus inappropriate and premature at this early juncture. This Court should not countenance Plaintiff's attempt to invoke the Court's emergency powers—designed to provide a shield against imminent injury while the Court considers the merits of the dispute—as a tactical ploy to leapfrog ahead of other FOIA requesters whose requests have also been expedited.

Second, Plaintiff's demand for a preliminary injunction ordering documents released within their preferred period of time is predicated on the erroneous assertion that the FOIA requires an agency to complete its processing by a date certain. Courts in this District have time and again rejected that argument, including in cases that Plaintiff itself litigated. Defendants have already determined that Plaintiff's requests should be afforded expedited processing, and the plain language of FOIA's expedited processing provision requires only that an agency process an

expedited request "as soon as practicable." 5 U.S.C. § 552(a)(6)(E)(iii). Defendants are proceeding under that exact standard, and Plaintiff offers no proof to the contrary.

Third, the harm that Plaintiff anticipates if it does not obtain its requested records on a rapid timeline (literally, within 24 hours of this Court's order) is entirely illusory. The White House sent its legal justification for the January 2 strike to Congress on January 31, and Congress made the unclassified portion of that justification public on February 14—in other words, Plaintiff already has access to exactly the information it claims to so urgently need. While Plaintiff may not agree or be satisfied with that information, that disagreement cannot create irreparable harm. Nothing prevents Plaintiff from joining the already-robust public debate about the propriety of the January 2 strike or from informing legislators of its views based on already-publically-available information. Moreover, the very nature of Plaintiff's request makes it highly unlikely that Plaintiff will actually receive any records, since any responsive records will likely be protected from disclosure under FOIA's statutory exemptions or be heavily redacted, further undercutting any argument that Plaintiff will be harmed absent the extraordinary relief it seeks.

Finally, the balance of equities and public interest weigh heavily against an injunction here. Forcing Defendants to process Plaintiff's requests on an arbitrary and infeasible timeline would upset Congress's careful balance under the FOIA, disadvantaging numerous other requesters whose FOIA requests were submitted prior to Plaintiff's request and risking the inadvertent disclosure of properly exempt material. Notably, Plaintiff's analysis of the public interest takes into account only the purported public interest in the records Plaintiff has requested in this case, and fails to consider the public interest in the fair treatment of the other FOIA requests that Defendants are processing, including those afforded expedited processing before Plaintiff's.

For these reasons, and those set forth more fully below, Plaintiff's motion for a preliminary injunction should be denied.

BACKGROUND

I. FOIA's Expedited Processing Provision

Agencies typically process FOIA requests on a first-in, first-out basis. *Daily Caller v. U.S. Dep't of State*, 152 F. Supp. 3d 1, 8 (D.D.C. 2015) (citing *Open Am. v. Watergate Special Prosecution Force*, 547 F.2d 605, 616 (D.C. Cir. 1976)). In 1996, Congress amended the FOIA to provide for "expedited processing" of certain categories of requests. *See* Electronic Freedom of Information Amendments of 1996 ("EFOIA"), Pub. L. No. 104-231, § 8 (codified at 5 U.S.C. § 552(a)(6)(E)). Expedition, when granted, entitles requesters to move immediately to the front of an agency's processing queue, ahead of requests filed previously by other persons, but behind outstanding requests that have previously been granted expedited processing.

As part of EFOIA, Congress directed agencies to promulgate regulations providing for expedited processing of requests for records in the following circumstances: (i) "in cases in which the person requesting the records demonstrates a compelling need," 5 U.S.C. § 552(a)(6)(E)(i)(I); and (II) "in other cases determined by the agency," *id.* § 552(a)(6)(E)(i)(II). The FOIA defines "compelling need" to mean, as relevant here, "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." *Id.* § 552(a)(6)(E)(v)(II).

If an agency grants a request for expedited processing, the FOIA provides that the agency must process the request "as soon as practicable." 5 U.S.C. § 552(a)(6)(E)(iii). In addition to expedited processing, Congress also accelerated litigation involving all FOIA claims. *See id.* § 552(a)(4)(C) (providing that government defendants have 30 days in which to answer a FOIA

complaint as opposed to the ordinary 60 days provided by Fed. R. Civ. P. 12). FOIA litigation is further accelerated in this District because FOIA cases are exempt from Rule 16 requirements. *See* Local Civ. Rule 16.5(c)(1). Notwithstanding these provisions, "[a] district court may of course consider FOIA cases in the ordinary course," as "[t]here is no statutory mandate for district courts to prioritize FOIA cases ahead of other civil cases on their dockets." *Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm'n*, 711 F.3d 180, 189 n.7 (D.C. Cir. 2013).

II. Plaintiff's FOIA Requests and Defendants' Responses

By letter dated January 3, 2020, Plaintiff submitted an identical FOIA request to three components within the Department of Justice ("DOJ") – the Office of Legal Counsel ("OLC"), the Office of Information Policy ("OIP"), and the National Security Division ("NSD") – and to the Department of Defense ("DOD") and the Department of State ("State") (collectively, the "agencies"). ECF No. 13, Am. Compl., Exs. A-E. The request seeks, from December 1, 2019 to the present:

a. Any and all records, including but not limited to emails and memoranda, reflecting, discussing, or otherwise relating to the January 2, 2020 military strike in Iraq and/or the President's legal authority to launch such a strike.

b. Any and all records, including but not limited to emails and memoranda, reflecting or related to communications with Congress, congressional committees, or individual members of Congress regarding the January 2, 2020 military strike in Iraq, including but not limited to records that reflect consideration of whether or not to inform Congress, congressional committees, or individual members of Congress of the strike, and/or the existence or absence of any obligation to inform Congress, congressional committees, or individual members of Congress of the strike.

For each request, Plaintiff sought expedited processing and a fee waiver. Am. Compl., Exs. A-E.

Within two weeks of Plaintiff's request, all agencies had acknowledged receipt of the request, assigned it a tracking number, and provided an agency contact if Plaintiff wished to discuss the request or narrow its scope. *See* Am. Compl., Exs. F, G, H, J, L. Both OLC and OIP

granted Plaintiff's request for expedited processing. *Id.*, Exs. F-G. NSD, DOD, and State initially denied Plaintiff's request for expedited processing. *Id.*, Exs. H, J, L.

On January 22, 2020, Plaintiff filed suit against DOJ, DOD, and State, and sought a preliminary injunction to expedite the processing of its requests. *See* ECF No. 1, Compl. ¶ 59 (alleging that NSD, DOD, and State violated the FOIA by failing to grant expedited processing); ECF No. 3, Pl.'s First Mot. for PI (seeking order to expedite processing). On January 31, 2020, NSD, DOD, and State informed Plaintiff that they would grant Plaintiff's request for expedited processing. *See* Am. Compl., Exs. I, K, M. Plaintiff then withdrew its motion for a preliminary injunction. ECF No. 11.

To date, all agency components have initiated search efforts to identify records responsive to Plaintiff's request. *See* Ex. 1, OLC Decl. ¶ 20; Ex. 2, OIP Decl. ¶¶ 9, 12; Ex. 3, NSD Decl. ¶ 7; Ex. 4, DOD Decl. ¶ 8; Ex. 5, State Decl. ¶ 31. NSD's search yielded no responsive records. Ex. 3, NSD Decl. ¶ 7. OIP's non-email search also yielded no responsive records. Ex. 2, OIP Decl. ¶ 12.

III. The Instant Litigation

On February 19, 2020, Plaintiff amended its complaint, alleging that all five agency or agency components (now including OLC and OIP) violated the FOIA by failing to respond to Plaintiff's request within the statutorily prescribed time limit. Am. Compl. ¶ 65. Plaintiff simultaneously filed a renewed motion for a preliminary injunction seeking a court order requiring the agencies to produce:

a. Within 24 hours of the Court's order, non-exempt portions of: (1) any OLC memoranda addressing the legality of the Soleimani strike and/or any obligation to consult with Congress regarding the strike; (2) any correspondence or memoranda addressing the legality of the strike drafted by officials serving any one of the Defendants and shared with the National Security Council; and (3) any "records of discussions" or "summary of conclusions" related to a meeting or meeting(s) involving lawyers for any of the

Defendants and pertaining to the Soleimani strike; or confirmation that no such records exists;

b. All other non-exempt responsive records by March 18, 2020.

ECF No. 14, Pl.'s Second Mot. for PI at 1-2. Defendant's response to the amended complaint is not due until March 20, 2020.

ARGUMENT

I. Preliminary Injunctive Relief Ordinarily Is Not Appropriate in FOIA Cases.

Plaintiff's request for mandatory, emergency injunctive relief is entirely inappropriate. The traditional purpose of a preliminary injunction is "to preserve the status quo during the pendency of litigation" so that the court can issue a meaningful final decision on the merits. *Cobell v. Kempthorne*, 455 F.3d 301, 314 (D.C. Cir. 2006) (citation omitted). Preliminary injunctive relief is *not* intended to provide a litigant with the means to bypass the litigation process and achieve rapid victory, and so "a preliminary injunction should not work to give a party essentially the full relief [it] seeks on the merits." *Dorfmann v. Boozer*, 414 F.2d 1168, 1173 n.13 (D.C. Cir. 1969) (per curiam); *see also Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("[I]t is generally inappropriate for a federal court at the preliminary injunction stage to give a final judgment on the merits.").

Yet full relief is exactly what Plaintiff seeks here: an injunction that the agencies produce all responsive documents to Plaintiff on an extremely truncated timeline. Pl.'s Second Mot. for PI at 1-2 (requesting certain documents or confirmation of their non-existence *within 24 hours* of the Court's order, and all other responsive documents by March 18, 2020). Far from justifying an "extraordinary and drastic remedy," *Munaf v. Geren*, 553 U.S. 674, 689 (2008), this Plaintiff—like other institutional FOIA requesters—seeks an emergency mandatory injunction as a means of jumping ahead of other requests (including those already in the expedited processing queue) and

requests that have been in litigation longer than these newly-filed cases. Such tactics are particularly unfair to other FOIA requesters who may not have the means or resources to file lawsuits and seek emergency relief. *See American Oversight v. U.S. Dep't of State*, 414 F. Supp. 3d 182, 184-85 (D.D.C. 2019) ("[P]reliminary injunctions in FOIA cases are uncommon. For good reason. Ordering production in a FOIA case on an accelerated basis, prior even to an answer being filed, effectively allows the requestor to jump the queue in front of other requesters who have been waiting patiently for the agency's response to their requests, including requests that are subject to expedited processing."). Not only is this procedure unfair to other FOIA requesters, but it also results in burdensome and unnecessary motion practice for the parties and the Court. That is especially true where, as here, Defendants are actively processing Plaintiff's requests on an already expedited basis.

For these reasons, Courts in this district routinely deny requests for preliminary injunctions in FOIA cases. *See, e.g.*, *Protect Democracy Project v. Dep't of Defense*, 263 F. Supp. 3d 293, 303 (D.D.C. 2017) (denying in part motion for preliminary injunction seeking records produced by a date certain); *Progress v. Consumer Fin. Prot. Bureau*, No. 17-686, 2017 WL 1750263 (D.D.C. May 4, 2017) (denying motion for preliminary injunction to expedite processing where requester failed to show a likelihood of success on the merits and irreparable harm); *Wadelton v. Dep't of State*, 941 F. Supp. 2d 120, 124 (D.D.C. 2013) (denying motion for preliminary injunction to expedite processing where requester failed to meet all four PI prongs); *Landmark Legal Found. v. EPA*, 910 F. Supp. 2d 270, 279 (D.D.C. 2012) (denying motion for preliminary injunction to expedite processing where agency stated request is already at the top of the queue and requester failed to meet other PI prongs); *Long v. U.S. Dep't of Homeland Sec.*, 436 F. Supp. 2d 38, 44 (D.D.C. 2006) (denying motion for preliminary injunction to compel processing within twenty

days, and explaining that "[t]he government has not yet had a chance to review its files, prepare and file a dispositive motion, and provide the Court the information necessary to make a decision on any material that might be subject to an exemption").

This Court should similarly deny Plaintiff's motion for a preliminary injunction here, and not reward Plaintiff for filing an improper motion for emergency relief by setting a processing schedule to which Plaintiff is not entitled.

II. Even if Preliminary Injunctive Relief Were Appropriate in FOIA Cases, Plaintiff Has Failed to Meet Its Heavy Burden to Show Entitlement to a Preliminary Injunction in this Case.

Preliminary injunctive relief "is 'an extraordinary remedy never awarded as of right.'" *Friends of Animals v. U.S. Bureau of Land Mgmt.*, 232 F. Supp. 3d 53, 60 (D.D.C. 2017) (quoting *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24, (2008)). It "should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion." *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004).

A party moving for a preliminary injunction must establish: (1) a substantial likelihood of success on the merits; (2) that it would suffer irreparable injury if the injunction is not granted; (3) that an injunction would not substantially injure other interested (nonmoving) parties; and (4) that the public interest would be furthered by the injunction. *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995). The D.C. Circuit has not definitively decided whether the Supreme Court's decision in *Winter* abrogates the "sliding scale" approach for assessing these four factors previously applied in this Circuit, but it nevertheless has indicated that it considers *Winter* "at least to suggest if not to hold 'that a likelihood of success is an independent, free-standing requirement for a preliminary injunction.'" *Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011) (quoting *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288,

1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring)). The D.C. Circuit has also emphasized that a showing of irreparable harm is an "independent prerequisite" for a preliminary injunction. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006).

In addition, because the traditional purpose of a preliminary injunction is "to preserve the status quo," when, as here, a movant seeks mandatory injunctive relief—that is, an injunction that "would alter, rather than preserve, the status quo by commanding some positive act—the moving party must meet a higher standard than in the ordinary case by showing clearly that he or she is entitled to relief or that extreme or very serious damage will result from the denial of the injunction." *Elec. Privacy Info. Ctr. v. Dep't of Justice* ("*EPIC*"), 15 F. Supp. 3d 32, 39 (D.D.C. 2014) (citations omitted). "A district court should not issue a mandatory preliminary injunction unless the facts and law clearly favor the moving party." *Nat'l Conference on Ministry to Armed Forces v. James*, 278 F. Supp. 2d 37, 43 (D.D.C. 2003) (citation omitted).

A. Plaintiff Has Failed to Establish a Likelihood of Success on the Merits Because the FOIA Does Not Require Production by a Date Certain.

Before a court may enter a preliminary injunction, "[i]t is particularly important for the movant to demonstrate a substantial likelihood of success on the merits," because without such a showing "there would be no justification for the [C]ourt's intrusion into the ordinary processes of administration and judicial review." *Hubbard v. United States*, 496 F. Supp. 2d 194, 198 (D.D.C. 2007) (internal quotation marks and citation omitted). Plaintiff has not done so here.

Plaintiff seems to suggest it is likely to succeed on the merits of its claim entitling it to the immediate production of documents because the agencies have failed to process its requests by "FOIA's unambiguous deadlines." ECF No. 14-1, Pl.'s Mem. at 14-15. That argument is plainly erroneous. *See Protect Democracy Project*, 263 F. Supp. 3d at 301-02 (rejecting Protect Democracy Project's argument that under the FOIA the agency was required to process its requests

by a date certain). *See also Daily Caller*, 152 F. Supp. 3d at 9 (agency's failure to meet FOIA's 20-day deadline "does not conclusively demonstrate that the plaintiff is likely to prevail in its underlying effort to accelerate the processing of its FOIA requests and the ultimate production of any responsive, non-exempt records); *EPIC*, 15 F. Supp. 3d at 40 ("[N]othing in the FOIA statute establishes that an agency's failure to comply with this 20-day deadline automatically results in the agency's having to produce the requested documents without continued processing, as EPIC suggests."); *cf. American Oversight*, 414 F. Supp. 3d at 186 (holding that plaintiff was likely to succeed on its claim that the agency owed it a *determination* on its requests and ordering in its discretion that the agency produce documents by a date different from what plaintiff requested).

As many courts in this District have already held, the FOIA does not require an agency to process requests within a specific period of time. Instead, the FOIA directs agencies to "determine within 20 days . . . whether to comply" with a request. 5 U.S.C. § 552(a)(6)(A)(i); *see also id.* § 552(a)(6)(B)(i) (permitting the agency to extend the time limit by up to ten working days "[i]n unusual circumstances"). The D.C. Circuit has made clear that to satisfy this provision, the agency "need not actually produce the documents" but should "at least indicate . . . the scope of the documents it will produce and the exemptions it will claim with respect to any withheld documents." *Citizens for Ethics and Responsibility in Wash. v. Federal Election Comm'n* ("*CREW*"), 711 F.3d 180, 182-83 (D.C. Cir. 2013). Thus, Plaintiff's assertion that this provision requires agencies to "produce responsive documents" is completely contrary to the case law in this Circuit. Pl.'s Mem. at 13.[1]

[1] To the extent Plaintiff argues that Defendants have failed to provide it with a "determination," Defendants have made a determination whether to comply with Plaintiff's requests, s*ee* Am. Compl., Exs. F, G, H, J, L, and, as detailed in the agency's declarations, some of the components have indicated that to date they have located no responsive records, *see* OIP Decl. ¶ 12 and NSD Decl. ¶ 7, and that responsive documents are or likely will be subject at least to FOIA exemptions

"The automatic 'penalty' for failing to meet FOIA's twenty-day timeline is not the imposition of *another* explicit timeline, but rather 'that the agency cannot rely on the administrative exhaustion requirement to keep cases from getting into court.'" *Protect Democracy Project*, 263 F. Supp. 3d at 302 (quoting *CREW*, 711 F.3d at 189). The requester instead is "deemed to have exhausted his administrative remedies" and can file suit in federal district court without first pursuing an administrative appeal. 5 U.S.C. § 552(a)(6)(C)(i). *See Daily Caller*, 152 F. Supp. 3d at 10 ("[The twenty-day] provision . . . serves primarily as a means to obtain immediate judicial supervision over an agency's response to an outstanding FOIA request."). If suit is filed, the district court "will supervise the agency's ongoing process, ensuring that the agency continues to exercise due diligence in processing the request." *CREW*, 711 F.3d at 189.

In cases where the agency has granted expedited processing, such as here, "it follows that the district court's supervision will aim to ensure that the agency is processing a request with 'due diligence' *and* as quickly 'as practicable.'" *Protect Democracy Project*, 263 F. Supp. 3d at 302 (quoting 5 U.S.C. § 552(a)(6)(E)(iii)). Indeed, far from dictating a specific, compressed schedule for processing expedited requests, the FOIA only directs an agency to "process *as soon as practicable* any requests for records to which the agency has granted expedited processing." 5 U.S.C. § 552(a)(6)(E)(iii) (emphasis added). As explained in the Senate Report accompanying the FOIA amendments that included the expedited processing provision: "*No specific number of days for compliance is imposed by the bill* since, depending on the complexity of the request, the time needed for compliance may vary. *The goal is not to get the request processed within a specific*

1 and 5, since Plaintiff seeks confidential legal advice within the government on a sensitive subject of national security, *see* OLC Decl. ¶ 21, DOD Decl. ¶¶ 8-12, State Decl. ¶ 33. Thus Defendants have fairly made a determination. *See CREW*, 711 F.3d at 182-83.

time frame, but to give the request priority for processing more quickly than would otherwise occur." S. Rep. No. 104-272 (May 15, 1996), 1996 WL 262861, *17 (emphasis added).

In short, FOIA's expedited processing provision serves as an ordering mechanism, allowing certain FOIA requesters to jump to a faster processing queue. But once a request is in the expedited queue, "practicability" is the standard that governs how quickly any particular request should be processed. What is practicable—and hence what is statutorily required—will vary depending on the size, scope, detail, and complexity of issues presented by the request; the number of offices with responsive documents; other entities which must be consulted or to which documents might have to be referred for additional review; exemption issues; and the resources available to process the request.

Here, Plaintiff has made no effort whatsoever to demonstrate that the agencies are not in fact processing its requests as soon as practicable, let alone that it is practicable to complete processing within Plaintiff's extraordinarily short timeline. As detailed in the agency declarations, all agencies have initiated searches for records responsive to Plaintiff's requests, but work remains to be done to identify and review potentially responsive records for responsiveness and deduplication. Moreover, Plaintiff itself recognizes that it is entitled only to "non-exempt" responsive records, *see* Pl.'s Mem. at 13-14, but determining whether any information is exempt from disclosure under FOIA's statutory exemptions cannot (and should not) be done instantly. Many of the records Plaintiff seeks will contain material that is plainly subject to one or more privileges and thus exempt from disclosure under 5 U.S.C. § 552(b)(5). *See* Am. Compl., Exs. A-E (seeking any and all records relating to the President's legal authority to launch the January 2 strike); *see, e.g.*, Ex. 1, OLC Decl. ¶ 21 (explaining that given the nature of Plaintiff's request any responsive records will "very likely contain a high proportion of material" exempt from disclosure

under the attorney-client, deliberative process, and presidential communications privileges). And many of the requested records undoubtedly will contain sensitive information, including, *inter alia*, classified national security information that must be evaluated for release under 5 U.S.C. § 552(b)(1) and Executive Order 13526, "Classified National Security Information," 75 Fed. Reg. 707 (Dec. 29, 2009). *See* Am. Compl., Exs. A-E (seeking any and all records "reflecting, discussing, or otherwise relating to" the January 2 strike, which would include military operational matters); *see, e.g.*, Ex. 2, DOD Decl. ¶¶ 8-9 (noting that most of the responsive records found so far are classified). Given that Plaintiff's request seeks communications within and among agencies, Defendants also likely must consult with or refer responsive documents for additional review to a number of other agencies or components, as required by agency regulations. *See, e.g.*, 28 C.F.R. § 16.4(d)(1).

These consultations, referrals, and exemption issues will necessarily take time. And all of this must account for the fact that the rate at which Defendants can practically process Plaintiff's request is limited by the resources that are currently devoted to processing the expedited requests received prior to Plaintiff's requests. *See, e.g.*, Ex. 1, OLC Decl. ¶ 13 (72 expedited requests received before Plaintiff's) Ex. 2, OIP Decl. ¶ 10 (20 requests in the expedited search queue before Plaintiff's); Ex. 5, State Decl. ¶ 19 (approximately 150 requests on the expedited processing track). Producing Plaintiff's select records, to the extent they exist, within 24 hours of this Court's order, and then completing the processing of all records responsive to Plaintiff's requests by March 18, is not practicable in any sense of the word.

Because the FOIA does not require the agencies to complete the processing of Plaintiff's expedited requests by a date certain, and certainly not by a date of Plaintiff's choosing, Plaintiff is highly unlikely to succeed on the merits of its claim.

B. Plaintiff Has Failed to Establish It Will Suffer Irreparable Harm Absent Mandatory, Emergency Injunctive Relief.

"[T]he basis of injunctive relief in the federal courts has always been irreparable harm[.]" *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (citations omitted). The D.C. Circuit "has set a high standard for irreparable injury." *In re Navy Chaplaincy*, 534 F.3d 756, 766 (D.C. Cir. 2008) (citation omitted). The party seeking injunctive relief must show that its injury is "both certain and great," and that it is "actual and not theoretical." *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam). Moreover, the movant "'must demonstrate a causal connection between the alleged harm and the actions to be enjoined; a preliminary injunction will not issue unless it will remedy the alleged injuries.'" *Navistar, Inc. v. U.S. EPA*, No. 11-449, 2011 WL 3743732, *2 (D.D.C. Aug. 25, 2011) (quoting *Hunter Group, Inc. v. Smith*, 164 F.3d 624 (4th Cir. 1998)). Because Plaintiff has not made the requisite showing of a non-speculative injury that could be remedied by preliminary injunctive relief, its application should be denied on this basis alone. *See Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep't of Hous. & Urban Dev.*, 639 F.3d 1078, 1088 (D.C. Cir. 2011).

Plaintiff's sole argument on irreparable harm is that it needs responsive records immediately because the "window for public input" on congressional legislation regarding the President's war powers against Iran "could close in a matter of days." Pl.'s Mem. at 16-17. Plaintiff is correct that the Senate has already passed a resolution limiting the President's war powers against Iran, and that the House could vote on it in the coming weeks.[2] But Plaintiff's argument for why this fact translates to irreparable harm to Plaintiff is a red herring.

[2] The Senate passed S.J. Res. 68 on February 13, 2020. *See* Congress.gov, https://www.congress.gov/bill/116th-congress/senate-joint-resolution/68?q=%7B%22search%22%3A%5B%22sjres68%22%5D%7D&s=1&r=1

The entire premise of Plaintiff's motion is that the lack of public written records on the President's legal and policy authority for the January 2 strike prevents it, and by extension the public, from meaningfully providing input on the pending congressional legislation. Plaintiff itself acknowledges, however, that the administration has already provided written notice to Congress explaining that the strike was executed pursuant to the President's Article II powers and the 2002 Authorization for Use of Military Force against Iraq, and Congress released the unclassified portion of that notice to the public on February 14.[3] Plaintiff's acknowledgement completely belies its assertion that the public is in the "dark" about the administration's stated justification for the strike and will be irreparably harmed absent an emergency injunction.[4] Moreover, Plaintiff's complaint and emergency motion cites numerous public statements made by administration officials and myriad media articles regarding the President's authority to launch the January 2 strike. *See, e.g.*, Pl.'s Mem. at 4-8 & n.38. Clearly there is information in the public record that permits the public and Plaintiff to contribute views on the legality of the January 2 strike and participate in any ongoing public debate.

What Plaintiff really is complaining about is that, in its view, the President's stated justification is insufficient and the public statements made by administration officials regarding the January 2 strike are inconsistent. *See* Pl.'s Mem. at 17-18. But that dissatisfaction is entirely

[3] *See* Notice on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, *available at* https://foreignaffairs.house.gov/_cache/files/4/3/4362ca46-3a7d-43e8-a3ec-be0245705722/6E1A0F30F9204E380A7AD0C84EC572EC.doc148.pdf.

[4] In addition to the now-publicly available notice sent to Congress, the U.S. Government submitted, on January 8, 2020, an Article 51 letter to the U.N. Security Council explaining its justification for the strike under international law. *See* https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/007/28/pdf/N2000728.pdf.

irrelevant to the question of whether Plaintiff's ability to participate in any ongoing public debate is hampered such that it is entitled to the extraordinary relief that it seeks. Nothing prevents Plaintiff from publicizing its concerns or providing input about the pending legislation, whether based on the explanations provided in the public notice sent to Congress, the public letter sent to the U.N. Security Council, or in any of the public statements of administration officials that Plaintiff cites, or the purported absence of any explanations. *See Landmark Legal Found.*, 910 F. Supp. 2d at 277 (denying plaintiff's motion for a preliminary injunction to expedite a request because "nothing prevent[ed] Landmark from filing comments (citing already-public information) expressing concern that the delay in issuance of the rule may have been politically motivated").

Further, as explained above, the very nature of Plaintiff's FOIA request makes it highly likely that much of the information it seeks will be exempt from disclosure. Indeed, Plaintiff's request specifically seeks records relating to internal Executive Branch deliberations about the President's legal authority for the January 2 strike and any obligation to consult with Congress regarding the strike. Am. Compl., Exs. A-E. To the extent these records exist, such documents very likely include classified national security information and material that is subject to one or more privileges and thus protected from disclosure. *See* 5 U.S.C. § 552(b)(1), (b)(5). Simply put, "there is no guarantee, even if the Court were to issue a preliminary injunction that the records [Plaintiff] seeks would be disclosed." *Landmark Legal Found.*, 910 F. Supp. 2d at 278. Plaintiff's purported need for these documents to inform meaningful public debate is therefore illusory.

In the absence of a showing that Plaintiff would likely be entitled to the information it seeks, Plaintiff cannot meet its burden to establish that it will be irreparably harmed if it fails to receive this information within its accelerated timeframe. *See EPIC*, 15 F. Supp. 3d at 46 (finding that a requestor "cannot claim to be injured—much less 'irreparably' so—if the [defendant]

withholds documents that [plaintiff] is not entitled to access in the first instance"); *Nation Magazine v. U.S. Dep't of State*, 805 F. Supp. 68, 74 (D.D.C. 1992) (denying preliminary injunction on ground that plaintiff had failed to demonstrate irreparable harm because "[e]ven if this Court were to direct the speed up of the processing of their requests, [plaintiffs] have not shown at this time that they are entitled to [the] release of the documents they seek" as "it is undisputed that at least some of the documents . . . are probably exempt from production under the FOIA").

Finally, in *American Oversight*, on which Plaintiff relies almost exclusively, the court acknowledged that the plaintiff would "not be irreparably harmed by further delay if the documents it seeks can be lawfully withheld from disclosure." 414 F. Supp. at 187. It found, however, that certain categories of the requested records would likely not be subject to any FOIA exemptions and thus harm in the delayed processing would be irreparable. *Id.* (noting that communications between the State Department and Rudolph Giuliani, "who is not a government employee," "would not appear to be subject to any FOIA exemptions"). By contrast here, Plaintiff's FOIA request seeks only internal Executive Branch communications, many of which necessarily involve attorneys and sensitive national security information, and there is no easily identifiable category of responsive records likely to be disclosed to Plaintiff.

In sum, Plaintiff makes no showing that proceeding on the statutorily-provided expedited processing timeline will cause it irreparable injury that is both "certain and great," and has accordingly demonstrated no reason for the Court to invoke its emergency powers at this early stage in the litigation.

C. The Balance of Equities and the Public Interest Weigh Against a Mandatory Emergency Injunction.

Along with alleged harm to the plaintiff, the Court must consider whether a preliminary injunction of the sort demanded by Plaintiff would be in the public interest or harm other third parties, such as other FOIA requesters. *See Al-Fayed v. CIA*, 254 F.3d 300, 303 (D.C. Cir. 2001). In this case, the balance of equities and the public's interest weigh heavily against the requested injunction for several reasons.

First, granting Plaintiff's request for an unnecessarily hurried processing schedule presents a real risk that exempt material will be inadvertently disclosed. Indeed, Plaintiff's effort to impose an arbitrary, artificial timeline on Defendants ignores the fact that an agency has a "responsibility" when processing FOIA requests to "safeguard[] potentially sensitive information." *Daily Caller*, 152 F. Supp. 3d at 14 (citing *United Techs. Corp. v. U.S. Dep't of Defense,* 601 F.3d 557, 559 (D.C. Cir. 2010) (FOIA "represents a balance [of] the public's interest in governmental transparency against legitimate governmental and private interests that could be harmed by release of certain types of information")). As the court in *Daily Caller* explained, releasing records without sufficient time for processing "raises a significant risk of harm to the public and private interests served by the thorough processing of responsive agency records prior to their ultimate production," particularly through "inadvertent disclosure of records properly subject to exemption under FOIA." *Id.* at 14-15. That risk has especially grave consequences here where responsive documents likely contain classified national security information and privileged material protected from disclosure.

Congress specifically recognized that, depending on the subject matter of the request, sufficient time would be required to ensure that the public's interest in preventing the disclosure of protected material was not compromised. *See* H.R. Rep. No. 104-795, at 23 (1996), *as reprinted*

in 1996 U.S.C.C.A.N. 3448, 3466 ("In underscoring the requirement that agencies respond to requests in a timely manner, the Committee does not intend to weaken any interests protected by the FOIA exemptions. Agencies processing some requests may need additional time to adequately review requested material to protect those exemption interests."). Ordering Defendants to disclose documents on Plaintiff's unfeasible and unwarranted schedule threatens this careful balance. *See Baker v. Consumer Fin. Prot. Bureau*, No. 18-2403, 2018 WL 5723146, at *5 (D.D.C. Nov. 1, 2018) ("Ordering Defendant to process and release documents according to Plaintiff's timeline risks that, in its haste, Defendant will inadvertently release records which fall under a FOIA exception and Congress has decided should not be released."); *Protect Democracy Project*, 263 F. Supp. 3d at 302 ("Imposing on Defendants an arbitrary deadline for processing would run the risk of overburdening them, and could even lead to the mistaken release of protected information."). For this reason alone, the public interest weighs heavily in favor of applying the normal, statutorily-provided processing schedule to Plaintiff's request.

Second, ordering the accelerated processing of Plaintiff's already-expedited request would disadvantage other, similarly situated members of the press or the public who themselves have FOIA requests pending before Defendants, which those requesters consider just as urgent and that have also been granted expedited processing. *See Baker*, 2018 WL 5723146, at *5 (finding that a "preliminary injunction ordering the immediate processing and release of the requested records" "would harm the approximately 100 other requesters . . . in line ahead of Plaintiff and would erode the proper functioning of the FOIA system"). Plaintiff argues that injunctive relief in this case would not cause "much delay" to other requesters given the limited nature of Plaintiff's requests. Pl.'s Mem. at 19. But Plaintiff's request is not that discrete; it essentially seeks any and all records touching on the January 2 attack. Am. Compl., Exs. A-E. Plaintiff's argument also ignores the

fact that many of the defendant agencies are already having to manage other court-ordered production deadlines, making it virtually impossible for them to adhere to Plaintiff's unrealistic timeline. *See, e.g.*, OLC Decl. ¶ 18 (listing cases in which OLC has court-ordered production deadlines); State Decl. ¶ 17 (court recently ordered a 5,000 page/month processing schedule on top of other court-ordered processing schedules).

More than bypassing the normal course of FOIA litigation, a preliminary injunction requiring production *within 24 hours of this Court's order* would require that resources be diverted from requests submitted prior to Plaintiff's, and thus would undermine the interests of such requests as well as the overall public interest in proper operation of the FOIA, including its provision for expedition. *See EPIC*, 15 F. Supp. 3d at 47 ("Allowing EPIC to jump to the head of the line would upset the agency's processes and be detrimental to the other expedited requesters, some of whom may have even more pressing needs.") (citing *Nation Magazine*, 805 F. Supp. At 74 (entry of a preliminary injunction expediting a FOIA request over other pending requests "would severely jeopardize the public's interest in an orderly, fair, and efficient administration of the FOIA")).

Weighed against these substantial interests, Plaintiff does little more than recite the broad purpose of an agency adhering "to its statutory mandate" and invoke the public's interest in a meaningful debate about the legality of the January 2 strike. Pl.'s Mem. at 20. But, as discussed, Defendants are in full compliance with its obligations under the FOIA, and Plaintiff's "bald reliance on its own interest in obtaining the sought-after records and the more generalized public interest in the disclosure of those records" does little to distinguish its requests from any other expedited FOIA request. *Daily Caller*, 152 F. Supp. 2d at 15. Moreover, the public has had plenty of opportunity to debate this very topic, and Plaintiff's suggestion that the requested records will

further inform the debate is entirely illusory. That is particularly true since many of those records, to the extent they exist, will be exempt from disclosure.[5]

CONCLUSION

For all of the foregoing reasons, the Court should deny Plaintiff's Motion for a Preliminary Injunction.

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Respectfully submitted,

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[5] Defendants note that Plaintiff has provided no arguments for why it so urgently needs the records requested in the second part of its FOIA request, and has therefore waived any emergency relief as to that part of its request.