

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

**AMERICAN OVERSIGHT,**

Plaintiff,

v.

**U.S. DEPARTMENT OF STATE,**

Defendant.

Case No. 19-cv-2934 (CRC)

**OPINION AND ORDER**

In May 2019, Plaintiff American Oversight filed two Freedom of Information Act (“FOIA”) requests with the Department of State. The requests sought the production of, among other records, (1) documents reflecting communications between senior State Department officials and Rudolph W. Giuliani, President Trump’s personal lawyer, and (2) documents reflecting communications between State Department officials and the White House regarding the May 2019 recall of former U.S. Ambassador to Ukraine Marie Yovanovitch. State responded some two months later, advising American Oversight that it would not be able to resolve the requests within the deadlines imposed by FOIA.

In August 2019, the Inspector General of the Intelligence Community received a whistleblower complaint indicating that President Trump may have “us[ed] the power of his office to solicit interference from a foreign country in the 2020 U.S. election.”<sup>1</sup> The complaint specifically alleged that in a July 25, 2019 telephone call, President Trump had pressured

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<sup>1</sup> Unsigned Letter to Sen. Richard Burr, Chairman, S. Select Comm. on Intelligence, and Rep. Adam Schiff, Chairman, H.R. Permanent Select Comm. on Intelligence, at 1 (Aug. 12, 2019).

Ukrainian President Volodymyr Zelensky to “help [his] 2020 reelection bid” by investigating business dealings in Ukraine by former Vice President Biden’s son.<sup>2</sup> It also suggested that, contrary to official statements, Ambassador Yovanovitch had been removed from her post because she disagreed with allegations made by the Ukrainian Prosecutor General that his political rivals had obstructed investigations into Ukraine’s supposed meddling in the 2016 U.S. elections.<sup>3</sup> The complaint identified Mr. Giuliani as “a central figure” in these efforts and indicated that he had corresponded with State Department officials regarding his interactions with Ukrainian officials on the President’s behalf.<sup>4</sup> Mr. Giuliani has since acknowledged having had such communications via text messages. Compl. ¶ 11 (citing news reports of Mr. Giuliani’s statements).

After the whistleblower complaint came to light and the President partially declassified the transcript of his July 25<sup>th</sup> call with President Zelensky, the United States House of Representatives commenced an impeachment inquiry into whether President Trump’s purported conduct constituted an abuse of his presidential power. House leadership have indicated that this inquiry will be conducted swiftly. See Greg Stohr & Erik Wasson, Pelosi Need for Speed on Impeachment Makes Court Help Unlikely, Bloomberg (Oct. 14, 2019), <https://bloom.bg/31g9IBT>. The Senate Majority Leader, in turn, has stated that a trial on any articles of impeachment received from the House could be completed by Christmas. See

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<sup>2</sup> Id. at 2.

<sup>3</sup> Id. at 4–6.

<sup>4</sup> Id. at 1, 7.

Burgess Everett, McConnell Eyes Quick Impeachment Trial in the Senate, Politico (Oct. 16, 2019), <https://www.politico.com/news/2019/10/16/mcconnell-impeachment-trial-senate-048599>.

With this rare impeachment process underway, American Oversight sent a letter to the State Department on September 20, 2019 requesting expedited processing of its two FOIA requests. When the ten-day deadline for responding to an expedited processing request passed, see 5 U.S.C § 552(a)(6)(E)(ii)(I), American Oversight filed this suit, along with a motion for a preliminary injunction, seeking a court order to compel both expedited processing and the release of all responsive, non-exempt records by November 15, 2019. State granted the request for expedited processing a week later. The only issue remaining before the Court, then, is American Oversight's motion for a preliminary injunction ordering State to process its two requests in full by a date certain. The Court held a hearing on that motion on October 23, 2019.

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FOIA specifically permits courts to “enjoin [an] agency from withholding agency records and to order the production of any agency records improperly withheld.” 5 U.S.C. § 552(a)(4)(B). But preliminary 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. Very few cases are that urgent. Moreover, there is rarely a need for an injunction prior to the commencement of the agency's production process because courts are typically able to assess how promptly the agency can and should reply to a particular request in the normal course of FOIA litigation.

Occasionally, however, issuing a preliminary injunction in a FOIA case may be warranted.<sup>5</sup> In making that determination, the familiar factors apply. The party “seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.” Aamer v. Obama, 742 F.3d 1023, 1038 (D.C. Cir. 2014) (alteration in original) (quoting Sherley v. Sebelius, 644 F.3d 388, 392 (D.C. Cir. 2011)). A preliminary injunction is an “extraordinary” remedy, and so “should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.” Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (per curiam) (emphasis in original) (quoting 11A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2948 (2d ed. 1995)).

For the reasons briefly summarized below, the Court will partially grant American Oversight’s motion and will order State to carry out accelerated processing of the requests after the parties have met and conferred in good faith to narrow and prioritize the requests to allow for processing and production by November 22, 2019.

***Likelihood of Success on the Merits.*** American Oversight is likely to succeed on the merits. Agencies are required to determine “whether to comply with” a FOIA request in twenty business days of the receipt of the request, 5 U.S.C. § 552(a)(6)(A)(i), and may extend that

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<sup>5</sup> Courts in this district have granted a handful of preliminary injunctions in cases like this one where FOIA requestors have sought records to inform an imminent public debate on a matter of national concern. See, e.g., Wash. Post v. U.S. Dep’t of Homeland Sec., 459 F. Supp. 2d 61 (D.D.C. 2006) (seeking records of visitors to the White House and the Vice President’s residence in advance of midterm elections within a month); Elec. Privacy Info. Ctr. v. U.S. Dep’t of Justice, 416 F. Supp. 2d 30 (D.D.C. 2006) (seeking records related to the Bush Administration’s legal justifications for its warrantless wiretapping program in the course of ongoing congressional hearings); Leadership Conference on Civil Rights v. Gonzales, 404 F. Supp. 2d 246 (D.D.C. 2005) (seeking data regarding the Department of Justice’s responses to election-related civil rights violations in advance of the imminent expiration of the Voting Rights Act).

period by ten days in “unusual circumstances,” *id.* § 552(a)(6)(B)(i). “If additional time is required to address the request, the agency ‘shall notify the [requester] . . . and shall provide the person an opportunity to limit the scope of the request . . . or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request.’” Judicial Watch, Inc. v. U.S. Dep’t of Homeland Sec., 895 F.3d 770, 774 (D.C. Cir. 2018) (quoting 5 U.S.C. § 552(a)(6)(B)(ii)) (alteration in original). After the agency responds, it must make non-exempt records “‘promptly available,’” which “‘typically [means] within days or a few weeks of a ‘determination’, not months or years.” CREW v. FEC, 711 F.3d 180, 188–89 (D.C. Cir. 2013) (Kavanaugh, J.) (quoting 5 U.S.C. § 552(a)(3)(A), (a)(6)(C)(i)). When the agency does not respond by the statutory deadline, the requestor may sue in federal court without exhausting internal agency appeal processes. 5 U.S.C § 552(a)(4)(B).

Typical FOIA cases involve either or both of two kinds of claims: (1) that the agency violated FOIA by failing to issue a determination by the statutory deadline or (2) after the agency’s determination and initial production, that the agency performed an inadequate search or improperly withheld documents under one of FOIA’s exemptions, *see, e.g., Francis v. U.S. Dep’t of Justice*, 267 F. Supp. 3d 9 (D.D.C. 2017) (CRC). The first type of claim, which is alleged here, is normally mooted when the agency makes the required determination during litigation and produces documents. Judicial Watch, 895 F.3d at 777. And if a court-supervised production by the agency does not resolve all the issues, the court will then consider the second category of claims. Where, as here, the agency has not yet issued a determination and the statutory deadline has passed, it has violated FOIA. *Id.* at 779–80.

The requests at issue have sat without a determination for five months. And now that State has agreed that the requests should be expedited, it is required to issue a determination (and

produce non-exempt responsive documents) even more quickly. In its motion, American Oversight requests a determination by November 15, 2019, which is twenty-three business days after State granted its request for expedited processing. That is longer than the statutory deadline for a non-expedited case. Because State has missed the statutory deadlines, American Oversight is certain to succeed on the merits of its claim that State owes it a determination on its requests. And since disclosure of non-exempt documents must follow shortly thereafter, the Court may order those disclosures at the same time under its customary supervisory authority in FOIA matters.

***Irreparable Harm.*** American Oversight is also likely to suffer irreparable harm if processing of at least some aspects of its requests is not completed by the end of the ongoing impeachment process. The records it seeks (and has committed to disclosing to the public) potentially go to the heart of one of the issues that the Congress is considering: Mr. Giuliani’s alleged efforts to enlist Ukraine’s assistance in furthering the President’s reelection prospects. As government counsel acknowledged at the hearing, the public interest in this information is significant. Hr’g Tr. 19 (Oct. 23, 2019).

As the Supreme Court has observed, public awareness of the government’s actions is “a structural necessity in a real democracy.” Nat’l Archives & Records Admin. v. Favish, 541 U.S. 157, 172 (2004). *Timely* awareness is equally necessary because “stale information is of little value.” Payne Enters. v. United States, 837 F.2d 486, 494 (D.C. Cir. 1988). When “time is necessarily of the essence,” the harm in agency delay is more likely to be irreparable. Elec. Privacy Info. Ctr. v. U.S. Dep’t of Justice, 416 F. Supp. 2d 30, 40–41 (D.D.C. 2006) (“EPIC”) (granting a preliminary injunction in FOIA case involving a request for documents related to the

Bush Administration’s legal justifications for its warrantless wiretapping program in light of related ongoing congressional hearings).

Time is clearly of the essence here. The impeachment inquiry is in full swing, and, as noted above, congressional leaders expect it to conclude by Christmas. American Oversight filed its requests with State over five months ago. Apart from offering a very preliminary and incomplete estimate of the number of potentially responsive documents, the agency has not even begun to process them. That State has agreed to process the requests on an expedited basis, while helpful, does not ensure that any responsive records will see the light of day while the impeachment process is ongoing.

The likely irreparable harm to American Oversight also stems from the fact that, if non-exempt responsive records exist, the public may not otherwise have access to them. Congress has sought similar—if not identical—documents through subpoenas to the State Department.<sup>6</sup> Congress may not get them, however, as the White House has indicated that the Administration “cannot participate” in the impeachment inquiry out of purported concerns about the inquiry’s partisanship and constitutionality.<sup>7</sup> And even if Congress were to obtain the subpoenaed records, there is no assurance that they would be made public.

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<sup>6</sup> Letter from Rep. Eliot L. Engel, Chairman, H.R. Comm. on Foreign Affairs, Rep. Adam Schiff, Chairman, H.R. Permanent Select Comm. on Intelligence, and Rep. Elijah E. Cummings, Chairman, H.R. Comm. on Oversight and Reform, to Michael R. Pompeo, Sec’y of State, U.S. Dep’t of State (Sept. 27, 2019).

<sup>7</sup> Letter from Pat A. Cipollone, Counsel to the President, The White House, to Rep. Nancy Pelosi, Speaker, House of Representatives, Rep. Eliot L. Engel, Chairman, H.R. Comm. on Foreign Affairs, Rep. Adam Schiff, Chairman, H.R. Permanent Select Comm. on Intelligence, and Rep. Elijah E. Cummings, Chairman, H.R. Comm. on Oversight and Reform (Oct. 8, 2019).

State rightly points out that American Oversight will not be irreparably harmed by further delay if the documents it seeks can be lawfully withheld from disclosure under FOIA's exemptions. Certain categories of the requested documents may well meet that description. Others, however, would not appear to be subject to any FOIA exemptions. This is especially true for communications between Department officials and Mr. Giuliani, who is not a government employee.

Accordingly, the Court finds that the harm of delay beyond the anticipated timeline of the impeachment inquiry would be irreparable, especially with respect to those categories of requested records that are unlikely to be subject to FOIA exemptions.

***Public Interest and Balancing of the Equities.*** This is the extraordinary case where the public interest favors placing American Oversight's requests ahead of other requests in the State Department's FOIA queue. Presidential impeachment investigations are solemn affairs, which Congress thankfully has seen fit to undertake only a few times in the Nation's history. The records American Oversight seeks, if they exist, could directly inform the present investigation and the surrounding public debate. The public's interest in disclosure of responsive, non-exempt records is therefore high and outweighs any harm to other FOIA requesters that might result from a temporary diversion of the State Department's FOIA resources to accelerate processing of this request. That said, the Court appreciates that the Department faces a substantial FOIA backlog, including numerous other Ukraine-related requests that post-date American Oversight's. It will therefore order the parties to meet and confer in an effort to narrow the specific requests so as reduce the number of records that will require accelerated processing.

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For the foregoing reasons, it is hereby

**ORDERED** that [ECF No. 4] Plaintiff's Motion for a Preliminary Injunction is GRANTED in part. It is further

**ORDERED** that the parties shall Meet and Confer to prioritize and narrow the requests consistent with this ruling and the Court's observations at the hearing. It is further

**ORDERED** that the parties shall file a Joint Status Report on or before October 30, 2019 summarizing the results of their discussions and noting any disagreements, which the Court is prepared to resolve promptly. It is further

**ORDERED** that the Department of State shall process and release all non-exempt documents from the narrowed requests on or before November 22, 2019. Any remaining non-expedited aspects of the requests may be processed thereafter. It is further

**ORDERED** that the parties shall file a further Joint Status Report on or before November 25, 2019, which shall include an update on the status of the disclosures and the need for further proceedings.

**SO ORDERED.**

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CHRISTOPHER R. COOPER  
United States District Judge

Date: October 25, 2019