United States District Court
Southern District of Texas
ENTERED
December 26, 2024
Nathan Ochsner, Clerk

In the United States District Court for the Southern District of Texas

GALVESTON DIVISION

No. 3:23-cv-402

NEW CIVIL LIBERTIES ALLIANCE, INVESTOR CHOICE ADVOCATES NETWORK, PATRIOT 28, LLC, AND GEORGE R. JARKESY, JR., *PLAINTIFFS*,

v.

U.S. SECURITIES AND EXCHANGE COMMISSION, *DEFENDANT*.

MEMORANDUM OPINION AND ORDER

JEFFREY VINCENT BROWN, *UNITED STATES DISTRICT JUDGE*:

The parties have filed cross motions for partial summary judgment. Dkts. 9, 10. The court will grant the defendant's motion and deny the plaintiffs' motion.

I. Background

New Civil Liberties Alliance ("NCLA"), Investor Choice Advocates Network ("ICAN"), Patriot 28, LLC, and George R. Jarkesy, Jr. submitted a nine-part Freedom of Information Act ("FOIA") request to the U.S. Securities and Exchange Commission over a year ago, seeking records of enforcement personnel's access to adjudication staff's confidential work product ("the

control deficiency").* Dkts. 1 ¶ 13; 9 at 6. The agency declined to expedite processing and placed the request in the "complex track." Dkt. 1 ¶¶ 18, 19. The plaintiffs have since filed two actions in this court—one challenging the expedited-processing denial, among other things, and another challenging the agency's manner of production to date—which the court has consolidated. Dkt. 1; *NCLA, et al. v. SEC*, No. 3:24-cv-42, Dkt. 17 (S.D. Tex. Dec. 11, 2024).

The parties have filed cross motions for partial summary judgment on the expedited-processing claim along with supplemental briefing on whether the Supreme Court's recent decision in *SEC v. Jarkesy* has relevance here. Dkts. 9, 10, 13, 14; 144 S. Ct. 2117 (2024). For the reasons below, the court grants the SEC's motion and denies the plaintiffs' motion.

II. Legal Standard

Summary judgment is proper when "there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law."

* The SEC's internal review of the control deficiency found that agency enforcement staff had access to adjudicatory memoranda in two matters litigated in federal court (*SEC v. Cochran*, No. 21-1239 (S. Ct.), and *Jarkesy v. SEC*, No. 20-61007 (5th Cir.)), but that the access "did not impact the actions taken by the staff investigating and prosecuting the cases or the Commission's decision-making in the matters." *Commission Statement Relating to Certain Administrative Adjudications*, U.S. SECS. & EXCH. COMM'N (April 5, 2022), https://www.sec.gov/news/statement/commission-statement-relating-certain-administrative-adjudications.

Fed. R. Civ. P. 56(a). The court must view the evidence in the light most favorable to the nonmovant. *Coleman v. Hous. Indep. Sch. Dist.*, 113 F.3d 528, 533 (5th Cir. 1997). For each cause of action moved on, the movant must set forth those elements for which it contends no genuine dispute of material fact exists. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the nonmovant to offer specific facts showing a genuine dispute for trial. *See* Fed. R. Civ. P. 56(c); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986). "A dispute about a material fact is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 956 (5th Cir. 1993) (citation omitted).

The court "may not make credibility determinations or weigh the evidence" in ruling on a summary-judgment motion. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). But when "a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact," the court may "consider the fact undisputed for purposes of the motion." Fed. R. Civ. P. 56(e)(2). The court may grant summary judgment on any ground supported by the record, even if the ground is not raised by the movant. *United States v. Hous. Pipeline Co.*, 37 F.3d 224, 227 (5th Cir. 1994).

III. Analysis

FOIA embodies Congress's "general philosophy of full agency disclosure." *DOJ v. Reps. Comm. for Freedom of Press*, 489 U.S. 749, 755 (1989) (citation omitted). The statute requires agencies to promulgate regulations "providing for expedited processing" of records requests in cases where the requestor "demonstrates a compelling need." 5 U.S.C. § 552(a)(6)(E); SEC FOIA Rule, 17 C.F.R. § 200.80(d)(7) (2021) (SEC regulations for expedited processing). This does not, however, "authorize an agency to offer its own definition of 'compelling need.'" *Al-Fayed v. CIA*, 254 F.3d 300, 306–07 (D.C. Cir. 2001); *see also Tax Analysts v. IRS*, 117 F.3d 607, 613 (D.C. Cir. 1997) (stating courts will not defer to agency interpretations of FOIA's government-wide standards, *i.e.*, "compelling need"). Rather, the statute explicitly provides a "compelling need" exists where (1) the requestor is "a person primarily engaged in disseminating information" and (2) there is an "urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. § 552(a)(6)(E)(v)(II). Expedited processing should be granted sparingly because an "unduly generous approach" to fast-tracking requests would "effectively prioritize none." *Al-Fayed*, 254 F.3d at 310.

Agency denials of expedited-processing requests are subject to de novo review "based on the record before the agency at the time of the determination." *Id.* at 311; 5 U.S.C. § 552(a)(6)(E)(iii). The requestor must show expedition is warranted. *Al-Fayed*, 254 F.3d at 305 n.4.

The defendant argues the plaintiffs' claim fails because they have satisfied neither requirement for expedited treatment as a matter of law. Dkt. 9. In their cross motion, however, the plaintiffs contend there is no genuine dispute that they are primarily engaged in disseminating information and have shown an urgency to inform the public about the subject of their request. Dkt. 10.

A. Person Primarily Engaged in Disseminating Information

The court first determines whether at least one plaintiff is a "person primarily engaged in disseminating information." 5 U.S.C. § 552(a)(6)(E)(v)(II); *see Al-Fayed*, 254 F.3d at 309 (recognizing at least one plaintiff must qualify as a "person primarily engaged in disseminating information"). This depends on the record before the agency when it denied the expedited-processing request, which here "consist[ed] solely of the FOIA [r]equests themselves." *Energy Pol'y Advocs. v. U.S. Dep't of the Interior*, No. CV 21-1247 (JEB), 2021 WL 4306079, at *2 (D.D.C. Sept. 22, 2021) (citation omitted); Dkt. 9-3.

Courts "routinely h[o]ld that media organizations and newspapers qualify under this category" but "must be cautious in deeming non-media organizations" as such. *Energy Pol'y Advocs.*, 2021 WL 4306079, at *2 (citation omitted). Non-media organizations may qualify if information dissemination is their "main activity, and not merely incidental to other activities that are their actual, core purpose." *Id.*; *compare Protect Democracy Project, Inc. v. DOJ*, 498 F. Supp. 3d 132, 139 (D.D.C. 2020) (finding organization with primary function of gathering information, editorializing, and informing the public about government operations and activities qualifies), *with ACLU of N. Cal. v. DOJ*, No. 04-4447 PJH, 2005 WL 588354, at *9, 14 (N.D. Cal. Mar. 11, 2005) (denying expedited processing to group engaged in both litigation and information dissemination, but not primarily the latter).

Here, the plaintiffs claim NCLA and ICAN are primarily engaged in disseminating information. Dkts. 9-3 at 3–4; 10 at 13. The application for expedited processing states that NCLA is "a nonpartisan, nonprofit civil rights group" and "media organization" that is "primarily engaged in disseminating information through litigation and extensive messaging and advocacy to the public" about government misconduct and overreach. Dkt. 9-3 at 3. The application further characterizes ICAN as "a nonprofit public

interest litigation organization dedicated to breaking down barriers to entry to capital markets and pushing back on overreach by the [SEC]" that "broadly disseminates information to the public about unconstitutional" agency actions. *Id.* at 4.

While both groups share information of public interest, the court finds neither are media organizations. NCLA and ICAN do not primarily "serve as the site of record for relevant and up-to-the minute . . . news and information" nor "use [their] editorial skills to turn the raw material into a distinct work" for distribution like a full-time member of the news media. Dkt. 9-3; *Leadership Conf. on C.R. v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005); *Protect Democracy Project*, 498 F. Supp. 3d at 139 (citation omitted).

Rather, NCLA and ICAN's publications are best characterized as "incidental" to their primary function—litigating against government overreach. Dkt. 9-3 at 3–4 (stating ICAN is a "*litigation* organization" and that "NCLA has issued multiple articles and analyses to the public *regarding these cases*") (emphasis added). Indeed, most of the description in the application pertains exclusively to ICAN and NCLA's litigation activities. *Id.* at 3; Dkt. 9 at 13 n.2; *see Century Found. v. Devos*, 18-cv-1128(PAC), 2018 WL 3084065, at *5 (S.D.N.Y. June 22, 2018) ("[M]ission statements . . . that

do not specify whether information dissemination is the organization's *primary* activity fail to satisfy the test.") (emphasis added). And because non-media organizations satisfy § 552(a)(6)(E)(v)(II) only if information dissemination is their "main," not "incidental," activity, the court agrees with the agency that the plaintiffs do not qualify as "person[s] primarily engaged in disseminating information" as a matter of law. Dkt. 9; *Energy Pol'y Advocs.*, 2021 WL 4306079, at *2.

B. Urgency to Inform the Public

The court determines next whether the defendant is entitled to summary judgment as to § 552(a)(6)(E)(v)(II)'s second requirement. To determine whether the plaintiffs' application shows an "urgency to inform," the court must consider "(1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity." *Al–Fayed,* 254 F.3d at 310.

First, the requestor must show the requested records are exigent, *i.e.*, "the subject of a currently unfolding story" or "central to a pressing issue of the day." *Id.*; *Wadelton v. U.S. Dep't. of State*, 941 F. Supp. 2d 120, 123 (D.D.C. 2013). Claims that the public has a "right to know" or will benefit

from the records are insufficient to demonstrate exigency. *Al-Fayed*, 254 F.3d at 310 (citation omitted).

Here, the plaintiffs' application claims the control deficiency is a matter of current exigency for two reasons: (1) "substantial recent public interest" and "media attention" on the subject, specifically Jarkesy and Patriot 28's lawsuit challenging the SEC's $300,000 assessment of civil penalties against them, and (2) the disclosure will enhance the public's understanding on the subject "to a significant extent." Dkt. 9-3 at 6–7.

Because several years separate the SEC's public disclosure of the control deficiency and the plaintiffs' FOIA request, the records are not "breaking news [] of general public interest" nor "central to a pressing issue of the day," but rather one that concerns only a specialized audience. *Wadelton*, 941 F. Supp. 2d at 123; *see* Dkt. 9-3 at 6 (stating only "Jarkesy, along with at least two of NCLA's clients, are directly impacted by the Control Deficiency"). Indeed, the plaintiffs' application refers generally to "media stories that make reference to the *Jarkesy* case" before the Supreme Court yet cites only one article. *Id.* at 7; *cf. Wadelton*, 941 F. Supp. 2d at 124 (stating plaintiffs' submission of one article, blog posts, and their intent to publish another story "do[es] not come close to demonstrating a comparable level of media interest").

Moreover, media interest in *Jarkesy* does not count as public interest in this case. The majority's opinion does not discuss, much less hinge upon, the subject of the plaintiffs' underlying FOIA request. *See Jarkesy*, 144 S. Ct. at 2139 (holding the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties for securities fraud); *id.* at 2142 (Gorsuch, J., concurring) (stating SEC-enforcement employees "accessed confidential memos by the Commissioners' advisors about [Jarkesy's] appeal"—the sole mention of the subject of the records request here). And, in any case, that opinion had not been rendered at the time the SEC made its expedited-treatment determination. *See* 5 U.S.C. § 552(a)(6)(E)(iii) (limiting scope of judicial review to "the record before the agency at the time of the determination").

The plaintiffs' remaining assertion that the disclosure will benefit the public's understanding is, in essence, a claim that the public has a "right to know." Dkts. 9-3 at 6–7. Such a claim alone lacks sufficiency to establish this factor. *Al-Fayed*, 254 F.3d at 310; *Treatment Action Grp. v. FDA*, No. 15-CV-976 (VAB), 2016 WL 5171987, at *8 (D. Conn. Sept. 20, 2016) ("Neither claiming that requested information will benefit . . . the public nor citing the public's right to know is sufficient to show that a matter is of exigency to the American public." (quotations and citation omitted)).

The court next considers whether delayed processing of the plaintiffs' request "compromise[s] a significant recognized interest." *Al–Fayed,* 254 F.3d at 310. A mere potential impact upon the interested parties is insufficient to meet this high standard. *See Landmark Legal Found. v. EPA*, 910 F. Supp. 2d 270, 277 (D.D.C. 2012) (finding the potential impact of proposed environmental regulation on the "health and wellbeing of the public and economic wellbeing of the country" insufficiently urgent).

The plaintiffs' application fails to offer evidence that a "significant adverse consequence" will result from delaying disclosure here. Dkt. 9-3; *Al-Fayed*, 254 F.3d at 311 (citation omitted). Indeed, the plaintiffs concede that at the time of the application, the SEC had already dismissed forty-two enforcement cases, including those against NCLA's clients, and oral argument in *Jarkesy* had already occurred. Dkts. 9-3 at 6, 8; 9 at 21. The court finds this factor weighs in the agency's favor.

Finally, the court considers whether the plaintiffs' request concerns federal government activity. *Al–Fayed,* 254 F.3d at 310. Although the control-deficiency records detailing internal agency operations clearly concern federal government activity, the plaintiffs have failed to establish the other elements of the "urgency to inform the public" requirement.

* * *

For the foregoing reasons, the court grants the SEC's motion for partial summary judgment, Dkt. 9, and denies the plaintiffs' cross motion for partial summary judgment, Dkt. 10. The court will enter a partial final judgment as to the plaintiffs' expedited-processing claim separately.

Signed on Galveston Island this 26th day of December, 2024.

JEFFREY VINCENT BROWN
UNITED STATES DISTRICT JUDGE