

United States Department of Energy
Office of Hearings and Appeals

In the matter of Hanford Challenge)
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Filing Date: May 1, 2013) Case No.: FIA-13-0026
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Issued: May 20, 2013

Decision and Order

On May 1, 2013, Hanford Challenge (“Appellant”) filed an Appeal from an interim determination issued on April 1, 2013, by the Richland Operations Office (ROO) of the Department of Energy (DOE) (FOIA Request Number HQ-2013-00564). In its determination, ROO responded to a request for information filed by the Appellant pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. Specifically, the Appellant appeals ROO’s decision not to waive the fees associated with responding to its FOIA request. Thus, this Appeal, if granted, would require ROO to grant the Appellant a fee waiver for all costs associated with its FOIA Request.

I. Background

On February 19, 2013, the Appellant submitted a FOIA Request, seeking “copies of any and all records related to or generated in connection with Dr. Walter Tamosaitis,” followed by a list of specific documents that it was seeking from ROO. FOIA Request from Tom Carpenter, Executive Director, Hanford Challenge, to DOE (Feb. 19, 2013). In addition, the Appellant requested a waiver of all fees associated with its FOIA Request, claiming that the information it seeks is in the public interest, and that disclosure of the records is for “public education, advocacy for public interest goals, and a more responsive and accountable government that promotes environmental protection and protection of human health and safety.” *Id.* at 2. Furthermore, the Appellant stated that the results of its investigations are disseminated through its website and newsletters, and are often reported to the news media. *Id.* The Appellant “works with members of the Hanford Site work force on issues affecting worker and public safety, environmental concerns, and site management issues. We monitor internal systems in effect at Hanford for addressing worker issues, including employee concerns, compensation, medical care and treatment issues.” *Id.*

The records sought by the Appellant concern an alleged whistleblower reprisal at the DOE Hanford Waste Treatment Plant involving Dr. Tamosaitis. *Id.* The Appellant states that the requested records would contribute to the public's understanding of government operations because they would reveal "DOE support of activities relating to the payment of litigation fees associated with whistleblower claims of a senior engineer whose case has gained national media and Congressional attention." *Id.* at 3.

On April 1, 2013, ROO issued an interim response to the Appellant's FOIA Request, denying the Appellant's request for a fee waiver because it had not adequately addressed the criteria for a fee waiver under 10 C.F.R. 1004(a)(8). *See* Interim Response from Dorothy Riehle, ROO, to Appellant (Apr. 1, 2013). While ROO acknowledged that the requested information pertains to the operations and activities of the government and that the Appellant demonstrated its ability to disseminate the information to the broad public, ROO denied the fee waiver request stating that it concerns the interest of a single private litigant, and not the public at large. *See id.*

On May 1, 2013, the Appellant filed the instant Appeal, challenging ROO's denial for a fee waiver.

II. Analysis

FOIA provides for a reduction or waiver of fees only if a requester satisfies his burden of showing that disclosure of the information (1) is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and (2) is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii); 10 C.F.R. §1004.9(a)(8). As an initial matter, we note that decisions on fee waiver requests are made on a case by case basis. A requester cannot be granted a blanket fee waiver, even if it believes it will be requesting the same type of information in all requests. Consequently, we reject the Appellant's argument that because it had been granted fee waivers in the past, it should be granted a waiver in this case. The Appellant's success in receiving fee waivers in the past is not necessarily indicative of success in the instant case. *See Government Accountability Project*, TFA-0004 (2002).

"A requester seeking a fee waiver bears the initial burden of identifying the public interest to be served." *Nat'l Treasury Employees Union v. Griffin*, 811 F.2d 644, 647 (1987). In analyzing the public-interest prong of the two-prong test, the regulations set forth the following factors the agency must consider in determining whether the disclosure of the information is likely to contribute significantly to public understanding of government operations or activities:

(A) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government" (Factor A);

(B) The informative value of the information to be disclosed: Whether disclosure is "likely to contribute" to an understanding of government operations or activities (Factor B);

(C) The contribution to an understanding by the general public of the subject

likely to result from disclosure (Factor C); and

(D) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities (Factor D).

10 C.F.R. § 1004.9(a)(8)(i). At issue is whether Factors B, C and D are satisfied, as Factor A is uncontested in this case.

1. Factor B

Factor B requires that disclosure of the requested information must likely contribute to the public’s understanding of specifically identifiable government operations or activities, *i.e.*, the records must be meaningfully informative in relation to the subject matter of the request. *See Carney v. Dep’t of Justice*, 19 F.3d 807, 814 (2d Cir. 1994). This factor is “examined in light of the identity and objectives of the requester; the scope of the requester’s proposed dissemination – whether to a large segment of the public or limited subset of person; and the requester’s capacity to disseminate the requesting information.” *See D.C. Technical Assistance Org., Inc. v. HUD*, 85 F.Supp.2d 46, 49 (D.D.C. 2000). This factor focuses on whether the information is already in the public domain or otherwise common knowledge among the general public. *See Roderick Ott*, Case No. VFA-0288 (1997)¹; *see also Vlieger*, Case No. TFA-0250 (quoting *Seehuus Assoc.*, 23 DOE ¶ 80,180 (1994) (“If the information is already publicly available, release to the requester would not contribute to public understanding and a fee waiver may not be appropriate.”)).

Here, the Appellant seeks documents that are “related to or generated in connection with the legal costs and fees related to litigation related to or generated in connection with Dr. Walter Tamosaitis.” *See* FOIA Request. As it is not indicated that such documents are in the public domain or common knowledge among the general public, we find in favor of the Appellant as to this factor. *See Western Resources Advocates*, TFA-0233 (2007).

2. Factor C

Factor C requires that the requested documents contribute to the general public’s understanding of the subject matter. Disclosure must contribute to the understanding of the public at large, as opposed to the understanding of the individual requester or of a narrow segment of interested persons. *Schrecker v. Dep’t of Justice*, 970 F. Supp. 49, 50 (D.D.C. 1997). In assessing this factor, courts have considered the requester’s “ability and intention to effectively convey” or disseminate the requested information to the public. *Judicial Watch, Inc. v. Dep’t of Justice*, 185 F. Supp. 2d 54, 62 (D.D.C. 2002). Courts have also examined whether the requester has concrete plans for publishing or disseminating the requested information by reviewing the requester’s identification of news media sources to release the information, purpose for seeking the information, and professional or personal contacts with any major news media companies. *See Larson v. C.I.A.*, 843 F.2d 1481, 1483 (D.C. Cir. 1988); *see also Judicial Watch v. Dep’t of Justice*, 122 F.Supp.2d 5, 10 (D.D.C. 2000) (“Because Judicial Watch has not offered any

¹Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at <http://www.energy.gov/oha>.

concrete plans to disseminate the requested information, or identified any specific increase in public understanding that would result from such dissemination, it has failed to meet its burden under the third factor.”). Thus, the requester must have the intention and *ability* to disseminate the requested information to the public. *See Ott*, Case No. VFA-0288; *see also Tod N. Rockefeller*, Case No. VFA-0468 (1999).

While it is uncontested that the Appellant is able to disseminate the requested information, the Appellant must still demonstrate that disclosure of that information would contribute to the understanding of the public at large, as opposed to the understanding of only the Appellant or of a narrow segment of interested persons. *See Schrecker*, 970 F. Supp. at 50. The Appellant asserts that the requested documents are intended for public education and advocacy in order to encourage reform and accountability of the government. Appeal at 3. It further asserts that the “request pertains to the interest of the public in expenditure of tax payer dollars to fight whistleblowers at the world’s largest environmental remediation project.” *Id.* at 1. In support of these claims, the Appellant cites to a transcript of a hearing that took place by Congress in May 2000, entitled “Whistleblowers at Department of Energy Facilities: Is there really “Zero Tolerance” for Contractor Retaliation?” stating that as Congress held hearings on the subject matter of the instant FOIA Request, there is clearly a public interest in the information contained in the requested documents. *Id.* at 4. In his opening statement at the hearing, Congressman Richard Burr of the Energy and Commerce Committees stated that the “committee will review whistleblower retaliation at Department of Energy facilities operated by its contractors,” and will address a few issues, including the question:

is the Department’s policy to reimburse its contractors’ legal defense costs to fight a whistleblower an appropriate use of taxpayer funds, or has the Department all too willingly funded contractor defense costs in an effort to wear down whistleblowers, regardless of the merits of the whistleblower’s claim?

Id.

Hence, the Appellant contends that the request “pertains to the interest of the public in expenditure of tax payer dollars to fight whistleblowers at the world’s largest environmental remediation project, not the interest of a single private litigant.” *Id.* at 1. Moreover, the Appellant cites to several recent online news articles regarding the whistleblower complaints at DOE’s Hanford site, including the complaint concerning Dr. Tamosaitis. *Id.* at 2 (citing King5 News, *Dept. of Energy Helps Hanford Contractors Fight Whistleblowers*, Apr. 29, 2013, <http://www.king5.com/news/environment/Dept-of-Energy-Helps-Hanford-Contractors-Fight-Whistleblowers-205322671.html>). Thus, the public’s interest in the requested documents is concrete as “media outlets have already sought and reported information we received from the limited fulfillment of our request.” *Id.*

ROO states that the Appellant has its own private interest in the requested documents because in a previous case, which is similar to the one at issue, the Appellant was involved as support and counsel to Dr. Tamosaitis. Memorandum Letter from Dorothy Riehle, FOIA/PA Officer, ROO, to Shiwali Patel, Attorney-Examiner, OHA (May 7, 2013). To that end, ROO cited a press release from a law firm, dated September 10, 2010, wherein the firm announced “the filing of a

civil suit on behalf of Dr. Walter Tamosaitis for damages resulting from retaliation by Hanford contractors after he raised safety and technical concerns regarding the Hanford Waste Treatment,” and that “Tom Carpenter and Hanford Challenge are providing support and counsel to Dr. Tamosaitis to assist in his public disclosures and assist with agency investigations.” Hence, ROO asserts that the Appellant is pursuing the interests of a single litigant, rather than the public at large, and attempting to substitute the FOIA for civil discovery. *Id.* at 3-4.

Nonetheless, based on the information offered by the Appellant regarding the public interest in DOE’s funding of contractors who are involved in whistleblower investigations, we conclude that the Appellant has the ability and intention to disseminate the requested information, and therefore, its request satisfies Factor C.

3. Factor D

Factor D requires that the requested documents contribute significantly to the public’s understanding of the operations and activities of the government. “To warrant a fee waiver or reduction of fees, the public’s understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be enhanced by the disclosure to a significant extent.” *Ott*, Case No. VFA-0288 (quoting *1995 Justice Department Guide to the Freedom of Information Act* at 381 (1995)).

The Appellant asserts that the requested information would contribute significantly to the public’s understanding of how taxpayer dollars are paid to DOE contractors “who are accused of harassing, firing and isolating whistleblowers at the Hanford site.” Appeal at 3. ROO, on the other hand, contends that rather than contributing to the public’s understanding of whistleblower activities by DOE, the requested documents pertain to DOE’s internal management of litigation pertaining to only one whistleblower, Dr. Tamosaitis. *See* Memorandum Letter.

As the Appellant only requests records pertaining to Dr. Tamosaitis, we are not convinced that the requested records would contribute significantly to the public’s understanding of DOE’s financial support to contractors who are defending whistleblower investigations at the Hanford site. While the Appellant asserts that it intends to seek this information for all Hanford whistleblowers in litigation, it has not done so in the instant FOIA Request, and accordingly, that assertion is inapposite to our conclusion here. Hence, this Appeal shall be denied.²

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Hanford Challenge, on May 1, 2013, OHA Case Number FIA-13-0026, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester

² Because we find that the Appellant has not met the “public interest” requirement for obtaining a fee waiver, we need not determine whether the Appellant’s request for a fee waiver meets the “commercial interest” requirement. *See Robert M. Balick*, Case No. FIA-11-0018 (2012).

resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

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