

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); *see also* 10 C.F.R. § 1004.9(a)(8).

In analyzing the public-interest prong of the above two-prong test, the regulations set forth the following four 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).^{2/}

A. Factors A and B

Factor A requires that the requested documents concern the “operations or activities of the government.” *See Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 775 (1989); *U.A. Plumbers and Pipefitters Local 36*, 24 DOE ¶ 80,148 at 80,621 (1994). Under Factor B, disclosure of the requested information must be likely to 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). In the present case, OIR and the Appellant agree that the requested material concerns the operations and activities of the government and that the information would likely contribute to the public’s understanding of a specifically identifiable government operation. Determination Letter dated November 28, 2011. Because the applicability of Factors A and B are not disputed, we will not further consider OIR’s determination with regard to these issues.

B. Factor C

^{2/} With regard to the commercial-interest prong for the determination of the appropriateness of granting a fee waiver, the Part 1004 regulations specify two factors to be considered in determining whether the disclosure of information is not primarily in the commercial interest of the requester. 10 C.F.R. § 1004.9(a)(8)(ii) (whether the requester has a commercial interest that would be furthered by the requested documents and, if so, whether the identified commercial interest is sufficiently large in comparison with the public interest in disclosure, such that any disclosure would be primarily in the commercial interest of the requester). As discussed *infra*, because we find that the Appellant has not satisfied the public-interest prong, we need not discuss whether the disclosure of information at issue in this case satisfies the commercial-interest prong of the fee waiver test.

Factor C requires that the requested documents contribute to the general public's understanding of the subject matter. The party seeking a fee waiver must show that the disclosure of the requested information will "contribute to the public understanding" of "a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester." *Judicial Watch, Inc., v. Dep't of Justice*, 185 F. Supp. 2d 54, 62 (D.D.C. 2002) quoting 28 C.F.R. § 16.11(k)(2)(iii). In assessing this factor, a court must consider the requester's "ability and intention to effectively convey" or disseminate the requested information to the public. *Id.* Thus, the requester must have the intention and ability to disseminate the requested information to the public. *Roderick L. Ott*, Case No. VFA-0288 (May 16, 1997) (*Ott*); see also *Tod N. Rockefeller*, Case No. VFA-0468 (January 21, 1999); *James L. Schwab*, 22 DOE ¶ 80,133 (1992).^{3/} In his submission, the Appellant states that, "[m]any Amchitka Island workers are being treated for cancer of which the source is unknown. Disclosure of the requested information will aid in their treatments." Request Letter at 1. The Appellant does not state how he will disseminate the requested information, even to this relatively small number of interested individuals, the Amchitka Island workers. Consequently, OIR determined that the Appellant has not demonstrated his ability to disseminate the requested information to the public. We agree as the Appellant did not provide any further information regarding the dissemination of the information in his Appeal. Based on the information provided to us, we find that the Appellant has not satisfied the requirements of Factor C.

C. Factor D

Under Factor D, the requested documents must contribute significantly to the public 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*, slip op. at 5 (quoting *1995 Justice Department Guide to the Freedom of Information Act* 381 (1995)). In the present case, it is not readily apparent how the public's understanding of the activities or operations of the government will be significantly enhanced by the disclosure of the requested documents. The Appellant states that "[a]lthough most nuclear device testing is internationally forbidden by treaties, residual radioactivity will remain for centuries." Request Letter at 2. This statement does not show that granting of the fee waiver and, therefore, release of the information, will significantly enhance the public's understanding of the activities or operations of the government. As a result, the Appellants' request for a fee waiver does not satisfy Factor D.

III. Conclusion

After considering each of the above factors, we have determined that because of the Appellant's failure to demonstrate that he would disseminate the information in the documents and the unlikelihood of the documents contributing significantly to the public's understanding of government activities and operations, the public-interest prong of the fee waiver test has not been

^{3/} Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

satisfied. Because the public-interest prong of the FOIA fee waiver test is not met, we need not address the commercial-interest prong. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Robert M. Balick, Case No. FIA-11-0018, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: January 12, 2012