

United States Department of Energy
Office of Hearings and Appeals

In the matter of John P. Newton)
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Filing Date: October 9, 2012) Case No.: FIA-12-0061
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Issued: October 31, 2012

Decision and Order

On October 9, 2012, John P. Newton (“Appellant”) filed an Appeal from determinations issued to him on September 6, 2012, and September 12, 2012, by the Office of Information Resources (OIR) of the Department of Energy (DOE) (FOIA Request Numbers HQ-2012-01768-F & HQ-2012-01835-F). In those determinations, OIR responded to two requests 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 OIR’s decisions not to grant expedited processing of his FOIA requests or to waive the fees associated with responding to the FOIA requests. Thus, this Appeal, if granted, would require OIR to expedite the processing of his FOIA requests and to grant the Appellant a fee waiver for all costs associated with his FOIA requests.

I. Background

On August 14, 2012, the Appellant submitted a FOIA request (“August 14 Request”) to OIR seeking documents regarding DOE’s investigation of his complaints about his supervisor at the Office of Inspector General (OIG) to support his worker’s compensation claim with the United States Department of Labor (DOL). *See* Online Request from John P. Newton to FOIA Request Website (Aug. 14, 2012). Additionally, his FOIA request sought a waiver of all fees associated with processing the request. On September 2, 2012, the Appellant submitted another FOIA request (“September 2 Request”). In the September 2 Request, the Appellant requested copies of performance appraisals of criminal investigators and special agents within OIG, an expedited review of both his FOIA requests, and a fee waiver for processing the FOIA request.¹ *See* Online Request from John P. Newton to FOIA Request Website (Sept. 2, 2012).

¹The Appellant styled the September 2 Request as an “Addendum” to his August 14 Request.

On September 6, 2012, OIR issued an interim response (“September 6 Response”) to the Appellant’s August 14 Request stating that, for fee determination purposes, it categorized the Appellant as “all other requesters” pursuant to 10 C.F.R. § 1004.9(b)(4) and that accordingly, the Appellant would be entitled to two hours of search time and 100 pages of documents at no cost. The September 6 Response also denied the Appellant’s request for expedited processing of his FOIA request on the grounds that he failed to identify a “compelling need” that would justify expedited processing and failed to identify himself as a person who is primarily engaged in the dissemination of information. On September 12, 2012, OIR issued an interim response (“September 12 Response”) to the Appellant’s September 2 Request. In its September 12 Response, OIR denied the Appellant’s fee waiver request on the ground that the Appellant failed to specifically address the criteria listed in 10 C.F.R. § 1004.9(a)(8) that would justify a fee waiver. OIR’s September 12 Response also denied the Appellant’s request for expedited processing for the September 2 Request for the same reasons outlined in its September 6 Response.

II. Analysis

A. Fee Waiver

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). 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). While we agree with OIR that the Appellant did not address the four factors listed above in his two Requests, for the purposes of administrative efficiency, we will nevertheless review the Appellant’s fee waiver request using information provided in his Appeal.

1. Factor A

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*, 109 S. Ct. 1468, 1481-1483 (1989); *Faye Vlieger*, Case No. TFA-0250 (2008). In the instant case, the requested information – DOE’s investigation of the Appellant’s complaints and performance appraisals of criminal investigators and agents – arguably concerns activities or operations of the government. Therefore, we find that the Appellant’s August 14 and September 2 Requests satisfy Factor A.

2. 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 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)²; see also *Vlieger*, Case No. TF-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.”)).

In the present case, the vast majority of the requested information does not appear to be publicly available. Specifically, the Appellant seeks documents concerning “internal and external OIG communications,” “copies of travel authorizations and corresponding travel vouchers,” for employees that he contends were involved with the investigation of his complaints, and performance appraisals for special agents and criminal investigators. Such information is not typically within the public domain or common knowledge among the general public, and accordingly, we find that the Appellant has satisfied Factor B.

3. 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). Moreover, 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). Thus, the

² 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>.

requester must have the intention and *ability* to disseminate the requested information to the public. *Ott*, Case No. VFA-0288; *see also* *Tod N. Rockefeller*, Case No. VFA-0468 (1999).

In his Appeal, the Appellant contends that he will disseminate his findings with the news media and government oversight groups, such as Project on Government Oversight and FOIA sharing websites, such as, www.archive-it.org and www.foiaarchive.org. Appeal at 4. Additionally, the Appellant states that he will make the documents available to the public at the University of Washington Law Library. *Id.* However, the Appellant still fails to explain his “ability and intention to effectively convey” that information to the public. *See Judicial Watch, Inc.*, 185 F. Supp. 2d at 62. The Appellant does not describe his expertise in the information requested such that he may effectively explain it to the public. Moreover, while he plans to provide his findings to various government oversight websites and one law library, those forums are not sufficient for reaching a broad audience of interested individuals, but rather appear to reach a narrow segment of interested persons. *See Schrecker*, 970 F. Supp. at 50; *see also Brown v. USPTO*, 445 F. Supp. 2d 1347, 1360 (M.D. Fla. 2006) (“Plaintiff does not, in his FOIA requests, discuss any plans to convey the information to the public beyond alluding to the website. Simply maintaining a website is not disseminating information to a broad audience of interested individuals.”). The Appellant also fails to identify any personal or professional contacts with the government oversight groups, websites, or the law library, and accordingly, he cannot demonstrate how he would disseminate his findings in those forums. *See Larson*, 843 F.2d at 1483. Consequently, for the reasons stated above, we find that the Appellant has not satisfied Factor C.

4. 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)).

We are not convinced that the public’s understanding will be enhanced by the disclosure of the requested information. Significantly, the Appellant has not demonstrated how such information would contribute to the public’s understanding of government operations and activities. Indeed, the Appellant clearly expresses that his request for those documents is to inform his *own* understanding of OIG’s investigations so that he could support his EEO complaint and DOL worker’s compensation claim. In his August 14 Request, the Appellant states that “the requested information is needed in furtherance of an official Department of Labor worker’s compensation claim I filed regarding work related aggravation of pre-existing medical conditions.” Online Request from John P. Newton to FOIA Request Website (Aug. 14, 2012). Further, in his September 2 Request, the Appellant asserts that “this FOIA request is made in furtherance of both official U.S. Department of Energy Equal Opportunity Employment (EEO) Complaint and U.S. Department of Labor Workers’ Compensation Claim.” Online Request from John P. Newton to FOIA Request Website (Sept. 2, 2012). Finally, in his Appeal, the Appellant writes that the requested information “concerns official internal DOE Office of Inspector General (OIG) operations that will likely affect my claims and complaint.” Appeal at 1. He fails to mention the

public in August 14 and September 2 Requests, and only barely does so in his Appeal to respond to OIR's denial of his fee waiver request. Further, the subject matter of the requests, documents relating to the Appellant's worker's compensation claim, and the performance appraisals of OIG investigators, do not, in themselves, suggest how the public's understanding of the government's operations and activities would be significantly enhanced.

Based on the foregoing, we find that the Appellant has not sufficiently demonstrated how the requested documents would contribute significantly to the public's understanding of the operations and activities of the government. Therefore, we find that OIR properly denied the Appellant a fee waiver for his failure to satisfy Factors C and D.³

B. Expedited Processing

Agencies generally process FOIA requests on a "first in, first out" basis, according to the order in which they are received. Granting one requester expedited processing gives that person a preference over previous requesters, by moving his request "up the line" and delaying the processing of earlier requests. Therefore, the FOIA provides that expedited processing is to be offered only when the requester demonstrates a "compelling need," or when otherwise determined by the agency. 5 U.S.C. § 552(a)(6)(E)(i).

"Compelling need," as defined in the FOIA, arises in either of two situations. The first is when failure to obtain the requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. The second situation occurs when the requester, who is primarily engaged in disseminating information, has an "urgency to inform" the public about an activity of the federal government. 5 U.S.C. § 552 (a)(6)(E)(v). In order to determine whether a requester has demonstrated an "urgency to inform," and hence a "compelling need," courts have considered at least three factors: (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 v. C.I.A.*, 254 F.3d.300, 310 (D.C. Cir. 2001).

In the present case, the Appellant concedes that there is no threat to anyone's life or physical safety. Appeal at 3. However, the Appellant contends that his FOIA request concerns a time-sensitive matter because the requested information is required to process his worker's compensation claim. Despite this argument, we find that neither of the Requests, which both center on the Appellant's worker's compensation claim, concern a matter of exigency to the American public to warrant expedited processing. *See Al-Fayed*, 254 F.3d. at 310. Given this, we find that OIR properly denied the Appellant's request for expedited processing of his FOIA request.

³ 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).

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the Appellant on October 9, 2012, OHA Case Number FIA-12-0061, 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 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.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

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