United States Department of Energy
Office of Hearings and Appeals

In the Matter of Greg Marlowe	)	
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Filing Date: May 20, 2015	)	Case No.: FIA-15-0028
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Issued: June 12, 2015

Decision and Order

On May 20, 2015, Mr. Greg Marlowe filed an appeal challenging a Freedom of Information Act (FOIA) determination issued to him by the National Nuclear Security Administration (NNSA) (FOIA Request No. 15-00175-M). Mr. Marlowe had sought expedited processing of his request for information filed under the FOIA, 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. In its determination, the NNSA denied Mr. Marlowe's request for expedited processing. This Appeal, if granted, would require the NNSA to expedite the processing of Mr. Marlowe's FOIA request.

I. Background

On April 8, 2015, Mr. Marlowe submitted a FOIA request (FOIA Request No. HQ-2015-01145-F) to the DOE's Office of Information Resources (OIR) asking that Oak Ridge National Laboratory (Oak Ridge) and Los Alamos National Laboratory (LANL) search their intellectual property files for records pertaining to the World War II endeavors of Dr. W.F. Libby. Request from Greg Marlowe to DOE (April 8, 2015). In particular, the request sought documents regarding the role of Dr. Libby, a scientist who assisted with the Manhattan Project, in the development of gaseous diffusion barrier technology. *Id*. Mr. Marlowe sought expedited processing of his request on the grounds that he is becoming more advanced in age. *Id*. He contended that "time is of the essence" because a delay could prevent him from completing his planned writing projects relating to Dr. Libby, including a partial biography. *Id*.

On April 22, 2015, OIR informed Mr. Marlowe that it had transferred his request to the Oak Ridge Office, which oversees Oak Ridge, and to the NNSA, which has oversight responsibility for LANL. Letter from Alexander Morris, OIR, to Greg Marlowe (April 22, 2015). On May 1, 2015, the NNSA issued a determination in which it denied Mr. Marlowe's expedited processing request. Determination Letter from Jane R. Summerson, NNSA, to Greg Marlowe (May 1,

2015). The determination found that the documents Mr. Marlowe requested "do not have a particular value that will be lost if the information is not disseminated quickly." *Id.*

On May 20, 2015, the Office of Hearings and Appeals (OHA) received an appeal from Mr. Marlowe challenging the NNSA's denial of his expedited processing request. Appeal Letter from Greg Marlowe to the OHA (May 14, 2015). In his appeal, Mr. Marlowe argues that his FOIA request merits expedited processing status due to his own advancing age, and because no other scholar is equally positioned to complete an account of Dr. Libby's important career. *Id*. Mr. Marlowe further argues that his request should be expedited because he had previously sought the same intellectual property records from Oak Ridge and LANL in a February 1, 2013, FOIA request. *Id*. He states that he would already have the records he now seeks if he had not agreed to narrow that earlier request. *Id*. Therefore, he contends, his instant request should be handled on an expedited basis. *Id*.

II. Analysis

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); *see also* 10 C.F.R. § 1004.5(d)(6).

A "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. 5 U.S.C. § 552(a)(6)(E)(v)(I). The second situation occurs when a 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)(II). In order to determine whether a requester has demonstrated an "urgency to inform," courts, at a minimum, must consider 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); *Wadelton v. Dep't of State*, 941 F. Supp. 2d 120, 122 (D.D.C. 2013).

Mr. Marlowe does not complain that failure to grant expedited processing status to his request would pose an imminent threat to his own, or any individual's, life or physical safety. Hence, his situation does not meet the definition set forth in 5 U.S.C. § 552(a)(6)(E)(v)(I). His primary argument can be understood as contending that the second situation above applies, and that his own age creates an "urgency to inform" the public about Dr. Libby. However, at least one court has found that, under the plain language of the FOIA, the requester's age is not a factor when agencies consider expedited processing requests. *Appleton v. FDA*, 254 F. Supp. 2d 6, 10 n.5 (D.D.C. 2003) ("Nor does [the] FOIA provide for expedited consideration of FOIA requests based on age."). Further, although Mr. Marlowe's request concerns federal government activity, thereby satisfying the third factor in the "urgency to inform" test, his request does not satisfy the other two factors. In evaluating those factors, the inquiry focuses not on the desires or

characteristics of the requester, but on whether the subject matter of the FOIA request involves breaking news on a major national issue. *See Al Fayed*, 254 F.3d at 310 (denying expedited processing because the matter did not involve a "currently unfolding news story"); *Wadelton*, 941 F. Supp. 2d at 123 (stating that courts generally grant expedited processing requests only where the subject matter is "central to a pressing issue of the day"). Mr. Marlowe's FOIA request relates to issues of historic importance, not to any breaking national news. Accordingly, he has not demonstrated an "urgency to inform" the public or a "compelling need," as courts have interpreted those terms.[*]

Based on the foregoing, we have determined that the NNSA properly denied Mr. Marlowe's request for expedited processing.

It Is Therefore Ordered That:

(1) The Appeal filed on May 20, 2015, by Mr. Greg Marlowe, Case No. FIA-15-0028, 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.

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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Poli. A. Marmolejos
Director
Office of Hearings and Appeals
Date: June 12, 2015

[*] Furthermore, we find little merit to Mr. Marlowe's argument that his request should be expedited because he was not satisfied with the DOE's response to his FOIA request in 2013. This argument does not establish a "compelling need."