United States Department of Energy
Office of Hearings and Appeals

In the Matter of Greg Marlowe	)	
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Filing Date: July 7, 2015	)	Case No.: FIA-15-0037
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Issued: July 22, 2015

Decision and Order

On July 7, 2015, Mr. Greg Marlowe (Appellant) filed an appeal (Appeal) challenging a Freedom of Information Act (FOIA) determination issued to him by the Office of Information Resources (OIR) of the Department of Energy (DOE) (FOIA Request No. HQ-2015-01081-F). In that determination, OIR responded to a request for information filed by the Appellant under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appellant specifically appeals OIR's decision not to waive any fees associated with processing his FOIA request or to grant expedited processing status to the request. This Appeal, if granted in its entirety, would require DOE to waive those fees and expedite the processing of the Appellant's request.

I. Background

On March 26, 2015, OIR received a FOIA request from the Appellant seeking "any and all records relating to recent or ongoing international discussions about possible declassification of the gaseous diffusion technology, coupled with the DOE's precise specification about which U.S. federal agencies have participated in that discourse." Request from Appellant to DOE (March 25, 2015) (Request Letter) at 1. The Appellant stated that a "reliable source" had told him that the U.S. government is engaged in such discussions. *Id*. In the request, the Appellant asked for a fee waiver and for expedited processing of the request. *Id*. at 2, 4.

On May 20, 2015, OIR issued an interim response in which it denied the Appellant both a fee waiver and expedited processing status.[1] Determination Letter from Alexander Morris, OIR, to

[1] The May 20, 2015, determination letter assigned the request to the DOE's Office of Environment, Health, Safety and Security (AU) and to the National Nuclear Security Administration (NNSA). Determination Letter at 1. On July 9, 2015, following the filing of this Appeal, OIR issued a final determination with respect to the portion of the Appeal handled by AU. Determination Letter from Alexander Morris, OIR, to Appellant (July 9, 2015). The

Appellant (May 20, 2015) (Determination Letter) at 1-2. OIR denied the fee waiver based on a finding that the Appellant did not describe his ability to disseminate the information to the public. *Id*. at 1. It denied the expedited processing request on the grounds that the Appellant did not demonstrate a compelling need. *See id*. at 2. In his Appeal, the Appellant asks that the fee waiver and expedited processing denials be overturned. *See* Appeal at 3, 8-9.

II. Analysis

A. Fee Waiver

The FOIA generally requires that requesters pay fees associated with processing their requests. 5 U.S.C. § 552(a)(4)(A)(i); *see also* 10 C.F.R. § 1004.9(a). However, the FOIA provides for a reduction or waiver of fees if a requester can satisfy a two-part test. The requester must show 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).

With respect to the public-interest prong in the above test, the regulations set forth four factors for the DOE to 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). We analyze the above four factors keeping in mind that "[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 (D.C. Cir. 1987).

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determination stated that AU found no responsive documents and assessed no fees. *Id*. at 1-2. This Appeal, therefore, applies only to the outstanding portion of the request, currently the portion assigned to NNSA.

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 Appellant requests information on international discussions regarding the declassification of gaseous diffusion technology. Since the request seeks information about discussions that would involve U.S. government officials, we find that the request satisfies 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); *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.")). Here, we find that the subject matter of the request is too recent and specialized to be common knowledge and that, accordingly, the request satisfies Factor B.

3. Factor C

Factor C requires an examination of whether disclosure of the information to the requester would contribute to the general public's understanding of the subject matter. In assessing this factor, courts examine the requester's "ability and intention to effectively convey" or disseminate to the public the requested information. *Judicial Watch, Inc. v. Dep't of Justice*, 185 F. Supp. 2d 54, 62 (D.D.C. 2002). OIR indicated that the Appellant had not satisfied this factor because he had not articulated his ability to convey the information to the public. Determination Letter at 1.

In his Appeal, the Appellant apparently interpreted the determination as questioning his professional qualifications. *See* Appeal at 4. However, OIR advised us that it is familiar with the Appellant's professional background and writing projects. *See* Memo of Telephone Conversation between Gregory Krauss, Office of Hearings and Appeals, and Yordanos Woldai, OIR (July 13, 2015) (Woldai Memo). Although the Appellant did not describe his professional qualifications in this request, in his Appeal he states that, among other qualifications, he has undergraduate and graduate degrees in the history of modern science, that he has taught post-secondary courses on the history of the atomic age, and that he has significant experience as an oral historian and researcher. *See* Appeal at 5-8.

As to his plans for disseminating the information, the Appellant has stated that he has an agreement with the National Academy of Sciences (NAS) to publish a "Biographical Memoir" of Dr. W.F. Libby, a Nobel Prize-winning chemist who worked on the Manhattan Project. *See* Request Letter at 1. According to the Appellant, NAS makes its memoir series available to the

public online. Appeal at 3. He has further explained that Dr. Libby is responsible for many of the patent applications associated with the gaseous diffusion method for uranium enrichment. *See id.* at 5. The Appellant states that in the "working footnotes" of the NAS memoir he will discuss Dr. Libby's patent applications and record of invention forms for that technology as a way of illuminating Dr. Libby's scientific achievements. *See id.* at 4. He also refers generally to the idea of publicizing the requested information. *See* Request Letter at 2-3. Nevertheless, the Appellant does not directly explain either in his request or Appeal whether he intends to publicize in the NAS memoir, or in some other writing project,[2] the specific information he seeks in the instant request—namely, information relating to current international discussions about declassifying the relevant intellectual property records.

Further, the Appellant has indicated that one purpose of his FOIA request is to understand why an earlier FOIA request for those patents and record of invention forms has not resulted in their declassification. *See* Request Letter at 2. He writes that "[t]his petition relates directly to prior FOIA filings by this applicant" for various intellectual property records. *Id.* He adds that his earlier request "dovetails" with this current one. *Id*. at 5. In short, the Appellant's filings leave the impression that he filed the request principally to learn more about the prospects for a successful release of previously requested historical documents, not because he wishes to publicize information about recent or ongoing international discussions involving U.S. officials. We therefore agree with OIR that the Appellant has not met his burden of showing his intent to disseminate the requested information to the public at large. Consequently, we find that the Appellant has not satisfied the requirements of Factor C.

4. Factor D

Factor D requires that disclosure of 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)). Courts evaluating this factor have found that where a requester seeks information primarily to benefit the requester's own interests, the information is "not likely to significantly contribute to public understanding." *Cause of Action v. FTC*, 961 F. Supp. 2d 142, 159 (D.D.C. 2013). In *Cause of Action*, a FOIA requester who was denied a fee waiver filed a second FOIA request seeking information about the FTC's history of granting fee waivers. *Id.* at 151-52. The requester then sought a fee waiver for that second request. *Id*. at 152. In denying the fee waiver for the second request, the Court found that the requester had not shown a significant benefit to public understanding because, although the requester promised to publicize the information, the individual had filed the second request mainly to help him in contesting the denial of his first fee waiver. *Id*. at 159-60.

[2] The Appellant states, for example, that separate from the NAS memoir he intends to write a partial biography of Dr. Libby as well as an academic essay. Request Letter at 4.

Here, the Appellant states that he suspects the U.S. government may be considering declassifying the technology at issue because it is outdated. *See* Request Letter at 1, 3. He continues that it is important to now clarify the U.S. government's position for the public. *See id*. at 3. However, in asserting the informative value of the information he requests, he also states that it is "commensurately now long past time to allow the public to understand and appreciate the incredibly significant contributions made to this country as a result of Dr. Libby's work on the Manhattan Project." *Id*. at 2. This statement again suggests that the Appellant's purpose is not to inform the public but to gain insight into deliberations surrounding whether the intellectual property records credited to Dr. Libby, and requested in another FOIA, will be released to the Appellant.

Based on the foregoing, we find that the Appellant has not sufficiently demonstrated that disclosure of 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 due to 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); *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).

In the present case, the Appellant does not allege 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. The Appellant instead contends that there is an urgency to inform the public because he is becoming more advanced in age and because he is uniquely positioned to write a memoir of Dr. Libby. *See* Appeal at 9. However, at least one court has rejected the assertion that agencies

[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 is not primarily in his commercial interest. *See Robert M. Balick*, Case No. FIA-11-0018 (2012).

should consider the requester's age when deciding on expedited processing requests. *See 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."). We further find that the subject matter of the request does not concern a matter of sufficient exigency to the public to warrant expedited processing. *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 find an urgency to inform only when the subject matter is "central to a pressing issue of the day"). Accordingly, we have determined that OIR properly denied the Appellant's request for expedited processing.

It Is Therefore Ordered That:

(1) The Appeal filed on July 7, 2015, by Greg Marlowe, Case No. FIA-15-0037, 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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