United States Department of Energy
Office of Hearings and Appeals

In the Matter of the Rocky Mountain Peace and Justice Center	)	
	)	Case No.: FIA-16-0025
Filing Date: March 31, 2016	)	
	)	

Issued: April 25, 2016

Decision and Order

On March 31, 2016, the Rocky Mountain Peace and Justice Center (Appellant) filed an Appeal from a Freedom of Information Act (FOIA) determination issued by the Office of Information Resources (OIR) of the Department of Energy (DOE) (FOIA Request No. HQ-2016-00461-F). In that determination, the OIR denied the Appellant's request for expedited processing of its request for information filed under the FOIA, 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require OIR to expedite the processing of the Appellant's FOIA request.

I. Background

On February 4, 2016, the Appellant submitted a FOIA request for "any and all data summarizing climate, hydrologic and hydrogeologic conditions during the 2013 Front Range Colorado Floods." Request from Appellant to DOE (February 4, 2016). The request specifically asks for four categories of data relating to conditions at DOE's Rocky Flats site from around the time of the floods, which occurred in September 2013. *Id*. at 1-2. In addition, the request seeks "all measures of surface flows and ground water levels during August, September and October 2013 collected as part of any monitoring/observation programs" at the site. *Id*. at 2. Regarding the purpose of the request, the request asserts that the data is "critical for the evaluation of potential acitinide migration across the hills of the Rocky Flats Production Facility during these storm events." *Id*. at 1. The request explains: "It is our hypothesis that, due to significant runoff during the September 2013 events . . . [a DOE study from the 1990s] is no longer accurate, and a new evaluation is required before the Rocky Flats site is opened to the public." *Id*.

The request sought expedited processing and a fee waiver. *Id*. at 3-5. As justification for expedited processing, the request observes that "[t]wo and a half years have passed since the catastrophic floods occurred in September of 2013." *Id*. at 5. OIR, in an interim response, granted a fee waiver. Interim Response from Alexander C. Morris, OIR, to Appellant (March 1, 2016) at 1. However,

OIR determined that the Appellant did not provide an adequate justification for expedited processing and therefore denied the Appellant's expedited processing request. *Id*. at 1-2. The Appellant has filed an Appeal challenging the expedited processing denial. Appeal from Appellant to Director, OHA (March 30, 2016) (Appeal) at 2.

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 a "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 determining 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 its Appeal, the Appellant contends that the request "must be expedited to ensure public groundwater safety for nearly 2-3 million inhabitants." Appeal at 2. We will treat this as an argument that the first situation applies and that a failure to obtain the requested data on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. In support of its Appeal, the Appellant makes two factual assertions. First, the Appellant states that in 2011, prior to the flooding, independent scientists collected soil samples on the eastern edge of the Rocky Flats site and found unsafe plutonium levels. *Id*. at 1. Second, the Appellant asserts that a DOE report from January 2014 states that automatic sampling equipment at the site did not collect water samples from 9:49 p.m. on September 11, 2013 to 3:30 p.m. on September 13, 2013. *Id*.[1] The Appellant refers to this time period as "the peak days of flooding." *Id*. The Appellant continues: "Thus, whether acitinide migration flowed freely in the sheet flooding is not known. If acitinides were released, then we do not know where acitinides migrated to or the severity or term of duration of such effects." *Id*.

[1] For the report cited by the Appellant, *see* U.S. Department of Energy, Office of Legacy Management, Doc. No. S11334, *Rocky Flats Site, Quarterly Report of Site Surveillance and Maintenance Activities Third Calendar Year 2013* (January 2014) at 26. The report does, indeed, indicate that certain sampling equipment was not functioning during the time period specified by the Appellant. *See id*.

The FOIA places the burden on the requester to demonstrate a "compelling need" for expedited processing. *See* 5 U.S.C. § 552(a)(6)(E)(i)(I); *Al Fayed*, 254 F.3d at 305 n. 4. In the instant matter, the Appellant has not met its burden of showing that a failure to expedite its request could reasonably be expected to pose an imminent threat to an individual's life or physical safety. The Appellant's original argument in the request—that expedited processing is merited because more than two years have passed since the floods—does not demonstrate the consequences of a failure to expedite the processing of the request. In fact, it may serve to weaken the case for expedited processing, given that the Appellant has not shown any consequences related to the unavailability of the data during the past two years. Similarly, the Appellant's argument regarding soil samples collected in 2011, prior to the flooding, does not demonstrate the consequences of a failure to expedite the processing of the request at issue, which concerns data from the floods in 2013.

The Appellant's other argument, regarding the non-functioning sampling equipment and its reasons for concern about the spread of acitinides during the flood, at least is an argument about the importance of obtaining flood-related data. However, the FOIA requires that there be a reasonable *expectation* that a processing delay would result in an imminent threat to an individual's life or physical safety. The DOE has not announced any public health risk associated with the migration of acitinides during the 2013 Colorado floods and the Appellant has not provided any evidence that the floods resulted in the spread of harmful contaminants. Even the Appellant may not have an expectation that the requested data will prevent any threat to an individual's life or physical safety; the Appellant states that it "is not known" whether acitinide migration occurred and, in its request, describes the migration of acitinides as a "hypothesis." Further, aside from mentioning in its request that the Rocky Flats site may be open to the public at some unspecified date, the Appellant does not provide any argument as to why any public health threat, if it exists, is "imminent." Accordingly, the Appellant has not met its burden—which we recognize is a significant one—of demonstrating that a failure to obtain the data on an expedited basis could reasonably be expected to pose a threat to an individual's life or physical safety.

With respect to the second situation in which the FOIA requires expedited processing, the Appellant has not argued that there exists an "urgency to inform" the public. Nevertheless, even if the Appellant were to advance that argument, it has not demonstrated an "urgency to inform." As noted, to satisfy the first two factors of the "urgency to inform" test, the matter must be one of "current exigency" and the consequences of delay must compromise a "significant recognized interest." A typical scenario in which courts have found exigency is when a FOIA request involves "an ongoing public controversy associated with a specific time frame." *Long v. Dep't of Homeland Sec.*, 436 F. Supp. 2d 38, 43 (D.D.C. 2006); *see also ACLU v. Dep't of Justice*, 321 F. Supp. 2d 24, 29-30 (D.D.C. 2004) (granting expedited processing where information would assist in debate on renewal of expiring provisions in the Patriot Act). Here, the Appellant has not described any public controversy associated with the information it seeks and has provided no time frame beyond which the requested information would lose its value. Although the Appellant's request may regard federal government activity, therefore satisfying the third factor in the "urgency to inform" test, the instant matter does not resemble the most common circumstances in which courts have found an "urgency to inform."

Additionally, this is not a situation in which an agency has acknowledged a public health threat, but denied expedited processing for information related to that threat. *See Bloomberg, L.P. v. U.S.*

Food & Drug Admin., 500 F. Supp. 2d 371, 376-78 (S.D.N.Y. 2007). In *Bloomberg*, the FOIA requester sought expedited treatment for its request for information from the Food and Drug Administration (FDA) related to an agency inquiry into the link between suicide and certain anti-epileptic drugs on the market. *Id*. at 373. The U.S. District Court found that the request concerned an "exigent need" and involved a "significant recognized interest" because the FDA had acknowledged a public health risk by publicly announcing that it was conducting the inquiry. *Id*. at 373, 377-78. In the instant matter, as observed, the DOE has not raised any public health concerns associated with the migration of acitinides during the 2013 floods. We thus do not have a basis for concluding, on public health grounds, that the request concerns a matter of "current exigency" or that a delay would compromise a "significant recognized interest." Consequently, we find that the Appellant has not demonstrated an "urgency to inform" or a "compelling need."

For the reasons above, we have determined that OIR properly denied the Appellant's request for expedited processing.

It Is Therefore Ordered That:

(1) The Appeal filed on March 31, 2016, by the Rocky Mountain Peace and Justice Center, Case No. FIA-16-0025, 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 the right to pursue litigation. FOIA requesters may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740
Web: ogis.archives.gov
Email: ogis@nara.gov
Telephone: 202-741-5770 / 1-877-684-6448
Fax: 202-741-5769

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: April 25, 2016