

**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of: Kana Kobayashi

Filing Date: June 20, 2025

Case No.: FIA-25-0042

Issued: June 25, 2025

Decision and Order

On June 20, 2025, Kana Kobayashi (Appellant) appealed a determination by the Department of Energy's (DOE) National Nuclear Security Administration (NNSA) regarding Request No. FOIA 25-00392-R. In that determination, NNSA responded to Appellant's request for expedited processing of her request filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. NNSA denied the request for expedited processing on the grounds that Appellant had not established a compelling need for it. Appellant challenged the decision to deny expedited processing. In this Decision, we deny the appeal.

I. BACKGROUND

On June 3, 2025, Appellant submitted the following FOIA request:

On what date was the 35th U.S. subcritical experiment conducted? Is it correct that the 35th U.S. subcritical experiment was conducted at the Principal Underground Laboratory for Subcritical Experimentation (PULSE) at the Nevada National Security Sites (NNSS)?

FOIA Request from Appellant at 1. Appellant also requested expedited processing of her request, explaining:

I am a newspaper reporter who has been covering the development of nuclear weapons. Since U.S. subcritical experiments are of great interest to experts and people around the world, the information I request should be urgent to inform the public.

Id. at 2.

Later that day, NNSA requested that Appellant clarify her request. Email from NNSA to Appellant (June 3, 2025). Appellant responded the next day and included further information, in the context of a request for a fee waiver, stating:

I am a newspaper journalist, and this request is made as part of news gathering. Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in my commercial interest. I will disseminate the information through our paper's morning edition and website.

Email from Appellant to NNSA at 1 (June 4, 2025).

On June 12, 2025, NNSA sent Appellant a letter acknowledging receipt of the FOIA request and denying her request for expedited processing. Acknowledgement Letter from NNSA to Appellant at 2 (June 12, 2025). NNSA wrote that the FOIA allows for expedited processing when a requester can demonstrate a compelling need for it. *Id.* at 1. It explained that a compelling need exists when “failure to obtain the records quickly ‘could reasonably be expected to pose an imminent threat to the life or physical safety of an individual,’” or when “the requester is ‘primarily engaged in disseminating information’ and can demonstrate that there is an ‘urgency to inform the public concerning actual or alleged Federal Government activity.’” *Id.* (citing 5 U.S.C. § 552(a)(6)(E)(v)(II)). NNSA stated that courts consider the following factors when determining whether a requester has demonstrated an urgency to inform:

- (1) [W]hether the request concerns a matter of current exigency to the American public;
- (2) [W]hether the consequences of delaying a response would compromise a significant recognized interest; and
- (3) [W]hether the request concerns federal government activity.

Id. at 2 (citing *Al-Fayed v. C.I.A.*, 254 F.3d 300, 310 (D.C. Cir. 2001); *In the Matter of Associated Press*, OHA Case No. TFA-0273 (October 7, 2008)). NNSA wrote that Appellant had not adequately demonstrated the first two factors and, therefore, expedited processing was not warranted.

Appellant appealed NNSA's determination regarding expedited processing on June 20, 2025. Appeal Email from Appellant to OHA (June 20, 2025). Appellant included with her appeal links to three news stories about subcritical nuclear experiments at DOE, two from 2024 and one from 2025. *Id.* at 1. The first article was a press release from May 21, 2024, announcing that NNSA had concluded its first subcritical experiment in the PULSE facility. Naomi Cooper, *NNSA Concludes 1st Subcritical Experiment in Nimble Series at PULSE Facility*, ExecutiveGov, <https://executivegov.com/article/nnsa-concludes-1st-subcritical-experiment-in-nimble-series-at-pulse-facility> (May 21, 2024). The second article was a press release published in June 2024 on the Arms Control Association's website in the Arms Control Today section. Daryl G. Kimbal, *U.S. Conducts 34th Subcritical Nuclear Experiment*, Arms Control Assoc., <https://www.armscontrol.org/act/2024-06/news/us-conducts-34th-subcritical-nuclear-experiment> (June 2024). The brief article announced the completion of NNSA's thirty-fourth subcritical experiment, citing a May 16, 2024, statement from NNSA. *Id.* The third article was the transcript of a National Public Radio podcast published on February 11, 2025, in which a science reporter visits and learns at a layman's level about an underground subcritical experiment facility at

NNSA’s Lawrence Livermore National Laboratory. *Inside an Underground Facility Where the U.S. Tests Nuclear Weapons*, Short Wave Podcast, Nat’l Pub. Radio, <https://www.npr.org/transcripts/1263339280> (Feb. 11, 2025). In her appeal, Appellant stated:

As shown in the URL below, subcritical experiments under the jurisdiction of the federal government are often covered by the media and research institutions. These experiments are reported in the news when the date is known because they are huge public projects that are essential to the U.S. nuclear stockpile. Therefore, they are of current concern to the American public, and any delay would compromise a significant recognized interest.

Appeal at 1.

II. ANALYSIS

It is well-established that “public awareness of the government’s actions is ‘a structural necessity in a real democracy,’” and that “[t]imely awareness is equally necessary because ‘stale information is of little value.’” *Am. Oversight v. United States Dep’t of State*, 414 F. Supp. 3d 182, 186 (D.D.C. 2019) (citing *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004) and *Payne Enters. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988)). Therefore, delays in processing a FOIA request may “‘cause irreparable harm,’ but typically only in ‘rare FOIA cases . . . involving ongoing proceedings of national importance.’” *Brennan Ctr. for Justice at NYU Sch. Of Law v. Dep’t of Commerce*, 498 F. Supp. 3d 87, 101 (D.D.C. Oct. 20, 2020) (quoting *Ctr. for Pub. Integrity v. Dep’t of Def.*, 411 F. Supp. 3d 5, 11–13 (D.D.C. 2019)).

The FOIA requires expedited processing “in cases in which the person requesting the records demonstrates a compelling need and in other cases determined by the agency.” 5 U.S.C. § 552(a)(6)(E)(i). DOE regulations use the FOIA’s language, which states that:

[A] compelling need exists when failure to obtain records expeditiously could reasonably be expected to pose a threat to the life or physical safety of an individual or, when a request is submitted by a person primarily engaged in disseminating information and, with respect to a request made by a person primarily engaged in disseminating information, there is an urgency to inform the public about actual or alleged Federal Government activity.

10 C.F.R. § 1004(d)(6); 5 U.S.C. § 552(a)(6)(E)(v). This case concerns the second definition only. Further, NNSA does not contest that Appellant is primarily engaged in disseminating information or that the records concern Federal Government activity, and therefore the only matter at issue is whether Appellant has established there is an urgency to inform the public about such activity. Acknowledgment Letter at 2.

The D.C. Circuit has held that courts must consider at least three factors to determine whether a requestor has demonstrated “urgency to inform,” and, thus, a compelling need for expedited processing of a FOIA request:

- (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, 254 F.3d at 310. Courts have found that current exigency exists when “the subject matter of the request was central to a pressing issue of the day.” *Wadelton v. Dep’t of State*, 941 F. Supp. 2d 120, 123 (D.D.C. 2013). Courts have also recognized that the media has a “significant recognized interest beyond the public’s mere ‘right to know,’ in quickly disseminating breaking, general-interest news.” *Gerstein v. CIA*, No. C-06-4643 MMC, 2006 U.S. Dist. LEXIS 89847, *22 (N.D. Cal. Nov. 29, 2006); *see also ACLU of N. Cal. v. United States DOD*, No. C-06-01698 WHA, 2006 U.S. Dist. LEXIS 36888, *23 (N.D. Cal. May 25, 2006) (recognizing “the media’s interest in quickly disseminating breaking, general-interest news”).

In *Gerstein*, the plaintiff was a journalist for the New York Sun who had requested expedited processing of a request for records relating to unauthorized disclosure of certain classified information. *Gerstein*, 2006 U.S. Dist. LEXIS 89847 at 2–3. The court found that the numerous news articles Gerstein submitted as evidence sufficiently showed that the issue to which the requested records pertained was not only newsworthy, but also the subject of an ongoing national debate at the time the request was made, and, therefore, the request concerned a matter of then-current exigency to the American public. *Id.* at 18–19. The court further held that while Gerstein did not expressly contend that delay in processing his requests would compromise a significant recognized interest, he did adequately describe such an interest when he argued that recent statements by lawmakers indicated that they were considering legislation in regard to the issue. *Id.* at 19–20. The court held that a delay in processing could “preclude any meaningful contribution to the ongoing public debate and render any disclosure little more than a historical footnote.” *Id.* at 21. As there was no dispute that the request concerned federal government activity, the court found that Gerstein had demonstrated a compelling need for the information sought in his FOIA request and granted his motion for summary judgment on his claim that the denial of expedited processing had violated the FOIA. *Id.* at 23–24.

In the instant case, Appellant asserts that the experiments are reported in the news because they are “huge public projects that are essential to the U.S. nuclear stockpile,” citing in support the three linked articles, and therefore, they are of current concern to the American public and a delay would compromise a significant recognized interest. Appellant does not identify the recognized interest beyond the implications that arise from her journalistic intent and, unlike the requester in *Gerstein*, does not describe a situation that could comprise one. She does not elaborate as to how press releases notifying the public of experiments indicate that there is an ongoing conversation in the American public about subcritical nuclear experimentation. Her supporting documentation is not compelling because it includes a general interest story on a niche podcast and announcements of the first and thirty-fourth experiments. I have no evidence that experiments two through thirty-three were announced and Appellant has not stated what harm may arise from a delay in disclosure. In fact, the cited press release from the Arms Control Association was published weeks after the experiment it referred to was completed. I find that Appellant has not provided evidence sufficient

to demonstrate an urgency to inform the public, and, therefore, a compelling need, to justify granting expedited processing of her request.

III. ORDER

It is hereby ordered that the Appeal filed on June 20, 2025, by Kana Kobayashi, No. FIA-25-0042, is denied.

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 one's right to pursue litigation. OGIS may be contacted 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: <https://www.archives.gov/ogis> Email: ogis@nara.gov
Telephone: 202-741-5770 Fax: 202-741-5769 Toll-free: 1-877-684-6448

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