

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

In the Matter of Krista A. Isham	)		
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Filing Date: December 5, 2016	)	Case No.:	FIA-16-0056
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Issued: December 21, 2016

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**Decision and Order**

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On December 5, 2016, Krista A. Isham (Appellant) appealed a determination issued to her from the Department of Energy’s (DOE) Golden Field Office (GFO) (Request No. GO-16-156). In that determination, GFO denied the Appellant’s request for a fee waiver in conjunction with a request filed 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 has appealed the denial of the fee waiver request. As explained below, we have determined that the Appeal should be denied.

**I. Background**

On September 13, 2016, the Appellant submitted a FOIA request seeking 33 items containing information pertaining to an EEOC complaint she filed. FOIA Request from Krista Isham to Michele Harrington Altieri, GFO (September 13, 2016). On September 20, 2016, GFO sent the Appellant a letter requesting more information in order to make a fee waiver determination, giving the Appellant until September 28, 2016, to provide the additional information. Acknowledgment Letter from Michele Harrington Altieri, Government Information Specialist, GFO, to Krista Isham (September 20, 2016). On October 3, 2016, GFO granted the Appellant an extension to provide the additional information regarding her fee waiver request. Email Chain between Michele Harrington Altieri and Krista Isham (October 3, 2016). On October 5, 2016, GFO sent the Appellant a letter denying her fee waiver request and informed her of the estimated FOIA processing fees related to her request. Determination Letter from Michele Harrington Altieri to Krista Isham (October 5, 2016). On December 5, 2016, the Appellant appealed the fee waiver

denial.<sup>1</sup> Letter from Krista Isham to Director, Office of Hearings and Appeals (OHA) (November 28, 2016).

## II. Analysis

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). In this matter, GFO found that the Appellant's request did not meet the "public interest" requirement for obtaining a fee waiver, and therefore did not analyze the request under the "commercial interest" prong. Determination Letter at 7.

### 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, some of the

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<sup>1</sup> In the Appeal, the Appellant also asked OHA to reopen her FOIA request, which GFO closed after she failed to pay the fees associated with the request. Since we have upheld GFO's determination, we will not address this aspect of the Appellant's Appeal.

information the Appellant requested included phone text messages, email correspondence, meeting records, and documents connected with the management and operations of the National Renewable Energy Laboratory (NREL). Because this information concerns operations or activities of the government, GFO found that the Appellant's request satisfies Factor A. We agree with GFO's analysis.

## **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 P 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 this case, the Appellant requested records concerning internal NREL communications and documents, information not normally within the public domain or common knowledge among the general public. Accordingly, GFO found, and we agree, that the Appellant's 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). GFO found that the Appellant failed to satisfy Factor C because she failed to explain how she would disseminate the records or her ability to effectively convey the information to the public. Determination Letter at 7.

In response to this factor, the Appellant states, "the public has a right to know how tax dollars and federal revenues are being spent." Letter from Krista Isham to Michele Harrington Altieri (October 3, 2016). The Appellant however never addresses her intent or ability to disseminate the requested information to the public to serve this interest, only how she would use the information in furtherance of her EEOC action. Accordingly, we find, as GFO did, that the FOIA request does not satisfy 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.

In this matter, GFO found that the public's understanding would not be significantly enhanced by the disclosure of the requested information because the Appellant did not demonstrate how the information would contribute to the public's understanding of government operations and activities. Determination Letter at 7. The Appellant argues that her FOIA request is an attempt "to obtain information in support of all women who were victimized in ESIF, and by NREL, and to provide the supporting documentation to EEOC. The dissemination of such information would fall primarily on EEOC in resolving the issue raised in [the Appellant's] EEOC complaint." Letter from Krista Isham to Michele Harrington Altieri (October 3, 2016). We cannot find that the Appellant has sufficiently demonstrated how the requested information would contribute significantly to the public understanding of the operations and activities of the government, and therefore find that the request failed to satisfy Factor D.

### **III. Conclusion**

Based on the foregoing, we find that the Appellant did not meet the "public interest" requirement for obtaining a fee waiver. Therefore, we find that GFO properly denied the Appellant a fee waiver due to her failure to satisfy Factor C and Factor D. Thus, we will deny the present Appeal.

It Is Therefore Ordered That:

- (1) The Appeal filed on December 5, 2016, by Krista A. Isham, Case No. FIA-16-0056, 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

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