

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

In the Matter of Citizen Action New Mexico)
and Concerned Citizens for Nuclear Safety)
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Filing Date: December 23, 2016) Case No.: FIA-16-0060
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Issued: January 11, 2017

Decision and Order

On December 23, 2016, Citizen Action New Mexico and Concerned Citizens for Nuclear Safety (hereinafter collectively referred to as CANM or Appellant) jointly appealed a determination received from the Department of Energy’s (DOE) Office of Public Information (OPI) (HQ-2017-002620-F). In that determination, OPI denied CANM’s request for expedited processing of its request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require OPI to expedite the processing of CANM’s FOIA request.

I. Background

On December 12, 2016, CANM filed an expedited request with OPI for information regarding the reopening of the Waste Isolation Pilot Plant (WIPP) located at Carlsbad, New Mexico. Specifically, CANM requested DOE internal and external documents dealing with:

Operational Readiness Review (ORR) for the reopening of the Waste Isolation Pilot Plant (WIPP); Unanswered Safety Questions (USQs); corrective action plans for the issues that need to be resolved prior to reopening; issues that will be resolved after the reopening after waste emplacement gets underway; and bonus amount that would be awarded to Nuclear Waste Partnership for emplacement of the first drum of waste.

FOIA Request Email from David B. McCoy, Executive Director, CANM, to Alexander C. Morris, FOIA Officer, OPI (December 12, 2016). On December 16, 2016, OPI provided CANM an interim response denying the request for expedited processing. Determination Letter Email from

Alexander C. Morris, FOIA Officer, OPI, to David B. McCoy, Executive Director, CANM (December 16, 2016). On December 23, 2016, CANM appealed the expedited processing denial. Appeal Letter Email from David B. McCoy, Executive Director, CANM, to OHA Filings (December 23, 2016).

II. Analysis

Generally, agencies 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).

“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. The second situation occurs when the 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). 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, 133 (D.D.C. 2013).

In its Appeal, CANM claims “the continuing history of radioactive waste disposal at WIPP demonstrates ongoing threats to life and physical safety.” Appeal Letter at 2. In support, CANM cites various past incidents such as a “diesel truck fire caused by lack of maintenance; an explosion of radioactive drum(s); [a] radioactive breach of WIPP facility filter containment to the environment; [and] worker and public exposures to radionuclides. . . .” *Id.* In addition to past incidents from WIPP operations, CANM alleges a number of present “threats to workers and public health and safety.” *Id.* at 3. Those allegations include: improperly storing six hundred drums of organic kitty litter that have the potential to explode if combined with radioactive waste despite a February 14, 2014, explosion of one such waste drum; radioactive contamination; inadequate ventilation for workers; several unresolved Mining and Safety Health citations from 2016; “potential hazards associated with the operation of the diesel-powered roof bolters from the accumulation of toxic atmospheres . . .”; and a failure to conduct basic equipment maintenance and inspections per DOE orders and the management contract. *Id.* at 3-4.

Additionally, CANM argues the “consequences of delay in furnishing the requested information compromise[s] [its] ability to provide information to the public, workers, and regulatory agencies about the extreme dangers for the planned premature reopening [of] WIPP for emplacement of radioactive waste.” *Id.* at 1. In essence, CANM relies upon the reopening date of WIPP as an urgent deadline.

In the Determination Letter, OPI stated that CANM failed to provide “material that establishes that there is any threat to the life or safety of an individual that would justify expeditious processing of the request.” Determination Letter at 1. Furthermore, OPI stated that CANM “did not sufficiently address factors one or two” of the “compelling need” test. *Id.*

A. The imminent threat to the life or physical safety of an individual.

CANM’s request for expedited processing does not demonstrate an “imminent threat” to the life or safety of an individual. With respect to an imminent threat, a “reasonable person should be able to appreciate that a delay in obtaining the requested information poses such a threat.” *Citizen Action New Mexico*, OHA Case No. FIA-15-0022 (2015).¹ In this case, CANM attempts to demonstrate that the reopening of WIPP poses an imminent threat to the safety of employees and the public by referencing several dangerous conditions that allegedly existed and currently exist at the facility.

The past events referenced by CANM, which include incidents roughly two years old, do not support a finding that the current conditions at WIPP present an imminent threat to workers or the public. Similarly, the allegations of WIPP’s current conditions do not rise to the level of imminent threat. CANM specifically references two recent sources describing conditions at WIPP. The DOE’s Office of Enterprise Assessments Assessment of Work Planning and Control at the Waste Isolation Pilot Plant and the Defense Nuclear Facilities Safety Board WIPP Activity Report for August 2016 identify vulnerabilities at WIPP and identify areas for management attention. However, the findings in these documents do not illustrate an atmosphere of imminent threat to workers or the public. To the extent deficiencies are identified, the related dangers are speculative. We therefore find OPI appropriately denied CANM’s expedited request on the basis of an “imminent threat.”

B. An urgency to inform the public about an activity of the federal government.

CANM’s request for expedited processing also fails to meet the three-factor “urgency to inform” test outlined above. Although the request clearly concerns federal government activity, it fails to satisfy the first two factors. First, CANM failed to establish that the request concerns a matter of current exigency to the American public. CANM references four news articles discussing the conditions at WIPP, and only two of the articles cover recent events. CANM has not established that the reopening of WIPP, which has already occurred, or its current conditions are a matter of current exigency to the American public. Furthermore, CANM fails to demonstrate how a delayed response would compromise a significant recognized interest. CANM intends to immediately release the requested information to inform the public. However, we have consistently stated “[t]he public’s right to know, although a significant and important value, would not by itself be sufficient to satisfy [the urgency to inform] standard.” *Wall Street Journal*, OHA Case No. FIA-11-0007 (2011); *Landmark Legal Found v. E.P.A.*, 910 F. Supp. 2d 270, 277 (D.D.C. 2012) (stating “justifications that the matters are of public interest and concern the health and economic wellbeing of the public are not sufficient to satisfy the [urgency to inform] standard”). While CANM

¹ Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at www.energy.gov/oha.

presumably cites the scheduled reopening of WIPP as a deadline past which the requested documents lose their value, CANM does not provide any support for us to conclude the same. We therefore find that OPI properly denied the Appellant's request for expedited processing on the basis of an "urgency to inform."

III. Conclusion

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

It Is Therefore Ordered That:

- (1) The Appeal filed on December 23, 2016, by Citizen Action New Mexico and Concerned Citizens for Nuclear Safety, Case No. FIA-16-0060, 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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