

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Jay Horowitz)
)
Filing Date: July 30, 2018) Case No.: FIA-18-0030
)
)
_____)

Issued: August 23, 2018

Decision and Order

On July 30, 2018, Mr. Jay Horowitz (Appellant) appealed a determination letter issued by the United States Department of Energy's (DOE) National Nuclear Security Administration (NNSA) regarding Request No. 18-00104-H. In that letter, NNSA responded to a request filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE regulations codified at 10 C.F.R. Part 1004. NNSA provided some records responsive to Appellant's request, but asserted that certain records requested by Appellant were publicly available online and that NNSA did not have any additional records to provide. As explained below, we grant the Appeal in part.

I. Background

On January 1, 2018, Appellant submitted a FOIA request for:

“1. The highest resolution/quality available - preferably that of the original scan and any associated video record(s) produced - of every nuclear test film that has been declassified and digitized as part of Dr. Spriggs' project.

2. Additionally and as applicable, a copy of any and all color corrected or otherwise enhanced copies of the original scanned nuclear test films.

3. Also, an electronic copy of the original as well as the amended (see LLNL-TR-727297) MOU between [Los Alamos National Lab (LANL)] and LLNL regarding film digitization, as well as an electronic copy of all contracts for staff and/or services associated with the film digitization project.”

FOIA request from Jay Horowitz (January 1, 2018). The records requested by Appellant concern an effort to digitize films depicting nuclear tests between 1945 and 1962. E-mail from NNSA Information Specialist (August 6, 2018).¹

¹ The digitization process involves making scans of each frame of each nuclear test film, producing many thousands of scans, and assembling the scans into movies. *Id.*

On June 20, 2018, NNSA issued a response to Appellant's FOIA request, providing a redacted copy of the requested MOU and referring the Appellant to YouTube for publicly-available videos of the nuclear test films. Determination Letter from Jane R. Summerson, Authorizing and Denying Official, NNSA, to Jay Horowitz (June 20, 2018) (Determination Letter). According to NNSA, LANL released movies created through the digitization project, stating "as they are created, they have always been released and are still being released in the format in which they were originally created, and we have nothing to provide that is not already in the public domain." *Id.* The response did not address the "contracts for staff and/or services associated with the film digitization project" that Appellant requested.

On July 30, 2018, Appellant appealed NNSA's determination to DOE's Office of Hearings and Appeals (OHA). Jay Horowitz FOIA Appeal (July 30, 2018). In his appeal, Appellant argued that the pattern in which LANL uploaded videos to YouTube, typically dozens of videos on a single day followed by months of inaction before the next upload, demonstrated that LANL did not upload videos as they were created and therefore that LANL likely possessed additional responsive records that were not publicly available. *Id.* at 2. Furthermore, Appellant asserted that NNSA's response failed to address why NNSA did not provide him with the individual frame images of the nuclear test films as .tiff images, that the YouTube videos to which NNSA's response directed him were not of as high quality as records in LANL's possession, and that referring him to videos on YouTube did not actually provide him access to the requested records because YouTube's terms of service prohibited him from downloading the records from YouTube's website. *Id.* at 3-7. Lastly, Appellant objected to NNSA's failure to address his request for contracts in its response. *Id.* at 8-9.

II. Analysis

A. Adequacy of NNSA's Determination Letter

NNSA stated in its determination letter that the "release of the movies created under this program is done as they are created, they have always been released and are still being released in the format in which they were originally created, and we have nothing to provide that is not already in the public domain." Determination Letter at 1. However, NNSA has acknowledged that it possesses movies that are not available to the public on YouTube which NNSA will check for classified material before publishing to YouTube. E-mail from NNSA Information Specialist (August 6, 2018). According to the NNSA, evaluating these records for release to the Appellant "would disrupt timely public releases." *Id.* NNSA did not address the Appellant's request for "all contracts for staff and/or services associated with the film digitization project" in its determination letter.

With respect to the original scans of the nuclear test films, NNSA understood Appellant's request as "focus[ed] on the movies, and not the individual .tif[f] frames." E-mail from NNSA Information Specialist (August 6, 2018). NNSA informed us that, in light of the limiting language in Appellant's request as to declassified films and based upon its own knowledge of the available films, it did not possess any scans of declassified films. However, we note that NNSA's determination letter did not specifically address the .tiff scans.

Determination letters must fulfill certain requirements to allow the requester to decide whether the agency's response to its request was adequate and proper and to provide OHA with a record upon which to base its consideration of an administrative appeal. *See, e.g., The Oregonian*, Case No. VFA-0467 (1999). In cases where DOE does not provide requested records in response to a FOIA request, DOE must identify the specific exemption pursuant to which DOE has withheld requested material or, in cases where a requested record does not exist, advise the requester of his or her right to challenge the adequacy of the search for the requested record. 10 C.F.R. § 1004.7(b)(1),(4). The determination letter must also adequately justify the withholding of information by explaining briefly how the claimed exemption applies to the withheld document. *See, e.g., State of New York*, Case No. TFA-0269 (2008); 10 C.F.R. § 1004.7(b)(1) (responses denying a request for a record must include "a brief explanation of how the exemption applies to the record withheld").

In this case, NNSA's determination letter did not set forth any rationale for withholding the movies which have not been cleared for publication to YouTube or specifically acknowledge that these movies exist. The determination letter also failed to address Appellant's request for original scans of nuclear test films and contracts related to the digitization project. Accordingly, consistent with our past practice, we will remand this matter to NNSA to issue a new determination letter so that it can either provide the Appellant these movies or explain its justification for withholding the movies. Additionally, NNSA can address the Appellant's request for original scans of nuclear test films and contracts. *See, e.g., Ayyakkannu Manivannan*, Case No. FIA-17-0038 (2017).

B. Format of Movies Provided to Appellant

The FOIA requires federal agencies to release all non-exempt agency records responsive to a request for production. 5 U.S.C. § 552(a)(3)(A). Under the E-FOIA amendments passed in 1996, agencies are also required to "provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format." 5 U.S.C. § 552(a)(3)(B). That regulatory provision also requires agencies to "make reasonable efforts to maintain their records in forms or formats that are reproducible for purposes of this section." *Id.*; *see also In the Matter of FOIA Group, Inc.*, Case No. FIA-15-0007 (2015). An agency has no obligation to produce a record in any particular format in response to a FOIA request if the requester does not specify the format in which he or she wishes to receive the record. *Citizens for Responsibility and Ethics in Washington v. U.S. Dept. of Educ.*, 905 F.Supp.2d 161, 171 (D.D.C. 2012) (*CREW*).

In his request, the Appellant requested the movies in "[t]he highest resolution/quality available," but did not specify a format in which he wished to receive the movies. NNSA has represented that "YouTube gets the best versions the lab has." Determination Letter at 1. Although the Appellant's appeal stated his belief that NNSA could provide him with higher-quality movies than those available for the public to view on YouTube and noted that he is unable to download the movies from YouTube without violating YouTube's terms of service, he did not specify what format he was seeking. Consequently, NNSA was entitled to exercise its discretion as to how to provide the Appellant with the requested movies. *CREW*, 905 F. Supp. at 171. Had the Appellant requested the movies in a specific format, the fact that the movies are posted on YouTube would not have obviated NNSA's obligation under the E-FOIA amendments to provide Appellant with the movies in the format he requested, if available and not subject to an exemption. In light of FOIA's preference for disclosure and in order to avoid duplicative requests for records by the Appellant in

different formats, we recommend that, on remand, NNSA communicate with the Appellant as to the quality of the movies it possesses and whether those are available to him.²

III. Order

It is hereby ordered that the appeal filed by Jay Horowitz on July 30, 2018, No. FIA-18-0030, is granted in part and denied in part.

This matter is hereby remanded to NNSA, which shall issue a new determination in accordance with the instructions set forth in the above Decision.

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. 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: ogis.archives.gov Email: ogis@nara.gov
Telephone: 202-741-5770 Fax: 202-741-5769
Toll-free: 1-877-684-6448

Poli A. Marmolejos
Director
Office of Hearings and Appeals

² We note that the FOIA does not require an agency to reproduce a requested document in a particular format if the effort to provide such a format would result in an undue burden to the agency. *See Scudder v. CIA*, 25 F. Supp.3d 19, 33-34 (D.D.C. 2014).