

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

In the Matter of James Kennedy)
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Filing Date: June 18, 2020) Case No.: FIA-20-0036
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Issued: July 7, 2020

Decision and Order

On June 18, 2020, James Kennedy (Appellant) filed an Appeal from a Freedom of Information Act (FOIA) Interim Response Letter issued by the Department of Energy’s (DOE) Office of Public Information (OPI) (FOIA Request No. HQ-2020-00614-F). In the Interim Letter, OPI denied the Appellant’s request for a waiver of fees for processing his request filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 522, as implemented by the DOE in 10 C.F.R. Part 1004. The Appellant appeals OPI’s denial of the fee waiver. As explained below, we deny Appellant’s appeal.

I. Background

On March 17, 2020, the Appellant submitted a FOIA request to the Office of Public Information (OPI) seeking the following information:

Any and all information, reports, memoranda, communication, inter- and intra-office communication surrounding the meeting between Rick Perry and Robert Murray on March 29, 2017, and all later relevant information (i.e. emails, notes, facsimile, and any other means of communicative material) within the Department of Energy be provided to me, regarding: the reasons for the administrative leave of Simon Edelman, the reasons surrounding the decision to enact Mr. Perry's September 28, 2017 letter detailing a ninety-day coal reserve on site of each facility and how that would, in fact, provide "fuel-secure" power, the promulgation of these proposed rules, the reasons why Rick Perry's administration adopted Robert Murray's action plan, and the reason why the private property of Mr. Edelman was ‘permanently compromised’” *See Carolyn Korman, A Whistle-Blower Alleges Corruption in Rick Perry’s Department of Energy*, The New Yorker (April 5, 2018).

FOIA Request at 1 (March 17, 2020). OPI denied the Appellant’s requested fee waiver on the basis that the Appellant did not explain how he intended to disclose information to the public.¹ *Id.* On June 18, 2020, the Appellant appealed the fee waiver denial. The Appellant asserts that he is a law

¹ In determining the fees to be charged to the Appellant, OPI classified him as an “all other requester.” *See* Interim Response Letter. (March 20, 2020); 10 CFR 1004.9(b)(4). The Appellant did not challenge this categorization.

student and intends to make the information available to the public via his university's law library, and he intends to submit the information he receives to www.muckrock.com for publication to the public. Appeal at 1. The Appellant further asserts:

The [requested] information could lead to the discovery of improper conduct within the [DOE] and that Rick Perry, as acting Secretary for the [DOE] at that time, and potentially under the guidance of the White House, has potentially implemented a system of preference towards the coal industry, [that] potentially benefit[ted] specific corporations, contrary to national interest in sustainable and renewable energy sources.

Appeal at 1.

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* 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 (1) disclosure of the 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 (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";
- (B) The informative value of the information to be disclosed: Whether disclosure is "likely to contribute" to an understanding of government operations or activities;
- (C) The contribution to an understanding by the general public of the subject likely to result from disclosure; 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.

10 C.F.R. § 1004.9(a)(8)(i). The D.C. Circuit Court has held that, "For a request to be in the "public interest," [all] four criteria must be satisfied." *Judicial Watch v. Dep't of Justice*, 365 F.3d 1108, 1126 (D.C.Cir.2004). We analyze the above four factors keeping in mind that "[t]he requesting party alone bears the burden of showing, based on the administrative record, that its request satisfies the public interest prong." *Citizens for Responsibility and Ethics in Washington v. U.S. Dep't of Educ.*, 593 F. Supp. 2d 261, 268 (2009).

1. First Factor

The first factor requires that the requested documents concern the "operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii); *Cause of Action v. FTC*, 799 F. 3d 1108, 1115 (D.C. Cir. 2015). Here, the requested documents focus on "the reasons surrounding the decision to enact Mr. Perry's September 28, 2017 letter [recommending] a ninety-day coal reserve onsite of each [coal plant] facility and how it would, . . . provide "fuel-secure" power." Interim Response Letter at 1 (March 20, 2020). The requested information includes documents related to a specific meeting involving Mr. Perry, and communicative material within the DOE concerning the promulgation of specific proposed rules. *Id.* Since the request seeks information pertaining to DOE proposed rules regarding coal storage requirements, we find that the request satisfies the first factor.

2. Second Factor

The second factor requires that the disclosure in question is likely to contribute to an understanding of government operations or activities. 10 C.F.R. § 1004.9(a)(8)(i)(B). To apply this factor, courts have focused on whether the information is already in the public domain. *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1127 (D.C. Cir. 2004) (upholding denial of "blanket fee waiver," emphasizing that requester failed to counter government's representations that requested information "was already in the public domain"); *Carney v. Dep't of Justice*, 19 F.3d 807, 815 (2d Cir. 1994) (observing that where "the requested letters are readily available from other sources, then it is logical to conclude that further disclosure will not significantly contribute to the public's understanding").

Here, the Appellant's original FOIA request cites to an article published in *The New Yorker* magazine. FOIA Request at 1 (March 17, 2020) (citing to Carolyn Korman, *A Whistle-Blower Alleges Corruption in Rick Perry's Department of Energy*, *The New Yorker* (April 5, 2018); Interim Response Letter at 1 (March 20, 2020). The article is in the public domain. Carolyn Korman, *A Whistle-Blower Alleges Corruption in Rick Perry's Department of Energy*, *The New Yorker* (April 5, 2018), <https://www.newyorker.com/science/elements/a-whistle-blower-alleges-corruption-in-rick-perrys-department-of-energy> (last visited July 2, 2020). Nonetheless, the Appellant seeks inter-agency and intra-agency communications documents "regarding . . . promulgation of . . . proposed rules" by Secretary Perry concerning required coal stockpiles. Such communications themselves are not in the public domain. FOIA Request at 1 (March 17, 2020). Moreover, such information, if released would enlighten the public as to the genesis of the proposed coal stockpile rules appellant contends DOE sought. Therefore, we find that the request satisfies the second factor.

3. Third Factor

The third factor 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 evaluating this factor, courts have examined 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) (*Judicial Watch*). The court in *Judicial Watch* evaluated the requester's explanation of how it planned to disseminate information. *Id.* The court determined that the requester satisfied the third factor because the requester "described several methods it uses

to make information available to the public, it has a record of conveying to the public information obtained through FOIA requests, and it has stated its intent to do so in this case.” *Id.*

In applying the third factor, courts have also evaluated the qualifications of the requester, including the requester’s expertise in the subject area of the request and his ability and intention to disseminate the information to the public. In *Perkins v. United States Dep’t of Veterans Affairs*, 754 F. Supp. 2d 1, 7-8 (D.D. C. 2010), the court found that the requester “must demonstrate that he is able to understand, process, and disseminate the information.” *Perkins*, 754 F. Supp. 2d. at 7. The *Perkins* Court relied on its precedent in *Southern Utah Wilderness Alliance v. U.S. Bureau of Land Management*, 402 F. Supp. 2d 82 (D.D.C. 2005), to determine the types of evidence a requester would need to sufficiently establish its expertise regarding the requested information. *Perkins*, 754 F. Supp. 2d. at 7-8.

Similar to *Judicial Watch*, the *Perkins* Court also assessed whether the requester “described in reasonably specific and non-conclusory terms his ability to disseminate the requested information.” *Perkins*, 754 F. Supp. 2d at 8. It found that, “merely stating one’s intention to disseminate information does not satisfy this factor; instead, there must be some showing of one’s ability to actually disseminate the information.” *Id.* The court concluded that although the requester identified one newspaper to which he intends to distribute his research, his lack of “professional or personal contacts” with the newspaper and no “history of publishing in it” does not support his stated intention to disseminate the requested information. *Id.*

In this case, OPI indicated that the Appellant had not satisfied the third factor because he had not articulated his intent and ability to disclose the requested information to the public. Interim Response Letter at 2 (March 20, 2020). In his Appeal, the Appellant states that he is a law student and intends to make the requested information available to the public through his university’s law library. Appeal at 1. He also states that he intends to submit the information he receives to a website, www.muckrock.com, for publication to the public. *Id.* While the Appellant identifies himself as a law student, he provides no evidence of having expertise in the subject of the request. He also does not provide any indication that he will actually use the requested information in a scholarly or other analytic work in a manner that will contribute to an understanding of the subject by a “reasonably broad audience of persons interested in the subject.” *See Nat’l Sec. Counselors v. U.S. Dep’t of Justice*, 848 F.3d 467, 474 (D.C. Cir. 2017)(citing *Cause of Action v. FTC*, 799 F.3d 1108, 1116 (D.C. Cir. 2015)).

Moreover, the Appellant does not provide sufficient evidence or explanation of his ability and intention to effectively convey or disseminate the requested information to the public. Unlike the requester in *Judicial Watch*, the Appellant does not describe several methods he uses to make information available to the public. Instead, he only states he is going to make the information available in his university’s law library and publish it on a website. www.muckrock.com. Although the Appellant states his intent of publishing the requested information on this website, he does not provide any evidence that he has a record of conveying information obtained through FOIA requests to the public, whether through www.muckrock.com, or through another method of dissemination. The Appellant also provides no information about the amount of traffic received by the website or the size of its audience, which would be relevant to assessing his ability to disseminate the requested information to a sufficiently broad audience that is interested in the subject. In addition, like the requester in *Perkins*, the Appellant provides no evidence of

“professional or personal contacts” with the website www.muckrock.com, nor does he provide any evidence that shows he has a history of publishing on the website. Thus, there is a lack of evidence to support his stated intention to disseminate the requested information.

Because the Appellant has not satisfied the third factor of the “public interest” prong, we need not decide whether the fourth factor of this prong has been met (i.e., whether the disclosure is likely to contribute significantly to public understanding of government operations or activities). Likewise, we also need not determine whether the “commercial interest” prong regarding the granting of fee waivers has been met in this case.

In sum, because we find that the Appellant has not sufficiently demonstrated that disclosure of the requested documents would contribute significantly to the public’s understanding of the operations and activities of the government due to his failure to satisfy the public interest prong of the two-part test for a waiver of fees, we find that OPI properly denied the Appellant a fee waiver.

III. Order

It is hereby ordered that the appeal filed on June 18, 2020, by James Kennedy, Case No. FIA-20-0036, 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 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