

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

In the Matter of Citizen Action New Mexico	)	
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Filing Date: April 24, 2015	)	Case No.: FIA-15-0022
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Issued: May 7, 2015

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**Decision and Order**

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On April 24, 2015, Citizen Action New Mexico (CANM or Appellant) filed an Appeal from a Freedom of Information Act (FOIA) determination issued by the National Nuclear Security Administration (NNSA) of the Department of Energy (DOE) (FOIA 15-00137-R). In that determination, NNSA denied CANM’s request for expedited processing of its request for information filed under the FOIA, 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require NNSA to expedite the processing of CANM’s FOIA Request.

**I. Background**

On March 12, 2015, the Appellant filed a request with NNSA for “documents pertaining to disposal of radioactive and hazardous waste in the Sandia National Laboratories’ (SNL) Mixed Waste Landfill (MWL)” during the period 1985 to 1988. FOIA Request Email from David B. McCoy, Director, CANM, to Carolyn A. Becknell, Freedom of Information Officer, NNSA (March 8, 2015). CANM also requested expedited processing. *Id.* On March 18, 2015, NNSA provided CANM an interim response in which it denied the request for expedited processing. Determination Letter from Pamela Arias-Ortega, Denying Official, NNSA, to David B. McCoy, Executive Director, CANM (March 18, 2015).<sup>1</sup> On April 24, 2015, CANM filed this Appeal of the expedited processing denial. Appeal Letter from David B. McCoy, Executive Director, CANM, to DOE (April 20, 2015).

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<sup>1</sup> After the March 18, 2015, denial of the request for expedited processing, NNSA discovered that the March 12, 2015, FOIA request was a duplicate. As a result, NNSA closed the March 12, 2015, request and is continuing to process the earlier request. Email from Roberto Marquez, Information Management Program Specialist, NNSA, to David McCoy, Executive Director, CANM (March 24, 2015). Because the earlier request for the same records is still pending, we are exercising our discretion to consider the instant Appeal, rather than dismissing the Appeal and requiring the Appellant to refile its request for expedited processing in connection with the earlier pending request.

## 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 support of its request for expedited processing, the Appellant claims an “imminent threat to the lives or physical safety of workers at SNL and residents of Albuquerque, New Mexico from the disposal...of high level nuclear mixed waste in canisters that contain metallic sodium that is explosive and could ignite uranium fires in the MWL.” FOIA Request Email from David B. McCoy, Director, CANM, to Carolyn A. Becknell, Freedom of Information Officer, NNSA (March 8, 2015). CANM also claimed an “urgency to inform” based on the expectation of a public hearing on this subject to be held sometime in mid-2015, with negotiations beginning at the end of April. *Id.*; Appeal Letter from David B. McCoy, Executive Director, CANM, to DOE (April 20, 2015).

The request for expedited processing does not demonstrate an “imminent threat” to the life or safety of an individual. The relevant legislative history indicates that the “specified categories for compelling need are intended to be narrowly applied.” H.R. Rep. No. 104-795 at 26 (1996). With respect to an imminent threat, the legislative history further specifies that a “reasonable person should be able to appreciate that a delay in obtaining the requested information poses such a threat.” *Id.* In this case, the Appellant maintains that the requested information would “reveal a greater threat to the public and environment...than what is currently known.” Appeal Letter from David B. McCoy, Executive Director, CANM, to DOE (April 20, 2015). That assertion, even if accurate, does not establish an “imminent threat”.

Similarly, the request for expedited processing does not meet the three-factor “urgency to inform” test outlined above. Although this request clearly involves a government activity, it does not satisfy the other two factors necessary to support an “urgency to inform”. The Appellant asserts that the requested information is needed expeditiously in order to assess SNL claims that the MWL is a safe facility and to present these findings at any public hearings that might be held

in the future. FOIA Request Email from David B. McCoy, Director, CANM, to Carolyn A. Becknell, Freedom of Information Officer, NNSA (March 8, 2015). These assertions, however, are too general to conclude that this is a matter of current exigency to the American public or that the consequences of delaying a response would compromise a significant recognized interest as required by the “urgency to inform” test. *Al-Fayed*, 254 F.3d at 310. Based on the foregoing, we have determined that NNSA properly denied the Appellant’s request for expedited processing.

### **III. Conclusion**

After considering the Appellant’s claim, we conclude that the request for expedited processing was appropriately denied.

It Is Therefore Ordered That:

- (1) The Appeal filed on April 24, 2015, by Citizen Action New Mexico, Case No. FIA-15-0022, 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.

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