

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

In the Matter of Dan Zak )  
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Filing Date: July 28, 2015 ) Case No.: FIA-15-0040  
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Issued: August 7, 2015

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**Decision and Order**

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On July 28, 2015, Dan Zak (Appellant) filed an Appeal from a determination issued to him by the Department of Energy’s (DOE) National Nuclear Security Administration (NNSA) in response to a request the Appellant submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. As explained below, we have determined that the Appeal should be granted in part.

**I. Background**

On February 13, 2013, the Appellant filed a request with NNSA for, among other things, “security video footage of the break-in at the Y-12 National Security complex on July 28, 2012, including but not limited to footage of the trespassers encountering—and being detained by—first-responder security officers.” FOIA Request from Dan Zak to FOIA/PA Officer, NNSA/Office of the General Counsel (February 13, 2013).

On March 20, 2014, NNSA issued a determination releasing a 51-second DVD entitled “*Security Event—Apprehension*.” Determination Letter from Elizabeth L. Osheim, Authorizing and Denying Official, NNSA to Dan Zak (March 20, 2014). No mention was made of any other responsive footage or any exemptions being use to withhold any footage in relation to this part of the FOIA Request. *Id.* The Appellant did not appeal this determination.

On August 5, 2014, the Appellant filed a request with NNSA for, among other things:

Any security video footage of Megan Rice, Michael Walli, and Gregory Boertje-Obed during their intrusion onto the Y-12 National Security Complex on July 28, 2012, including the footage in which they encountered former protective-force officer Kirk Garland, employed at the time by WSI-Oak Ridge, inside the Perimeter Intrusion Detection and Assessment System (PIDAS) next to the Highly Enriched Uranium Materials Facility. The footage involving Mr. Garland was presented in open court as evidence during the May 2013 trial of Rice, Walli and Boertje-Obed (Case 3:12-cr-00107 in U.S. District Court in the Eastern District of Tennessee), so I expect this portion of video to be made available without question. It was Exhibit

3 and included 12 minutes of footage. I previously received a 51-second excerpt of the footage, and this is insufficient; it was only a fraction of what was shown in open court .... I am looking for those 12 minutes of footage from Exhibit 3, plus all the available footage of the trespassers, from entry into the PIDAS, to their cuffing, to their wait in custody before their removal from site.

Letter from Dan Zak to FOIA/PA Officer, NNSA/Office of the General Counsel (August 5, 2014). On June 30, 2015, NNSA issued a determination stating that all of the releasable footage from the July 28, 2012, event had been released to the Appellant under his previous February 13, 2013, FOIA Request. Determination Letter from Jane Summerson, Authorizing Official, NNSA to Dan Zak (June 30, 2015).

On July 28, 2015, the Appellant appealed the June 30, 2015, Determination Letter to the Office of Hearings and Appeals (OHA). Appeal from Dan Zak to OHA (July 20, 2015). In this Appeal, the Appellant acknowledges his receipt of video footage in response to his February 13, 2013, FOIA Request; however, he states that this footage was insufficient because it did not include the footage shown in court in May 2013. *Id.*

## II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. However, pursuant to the FOIA, there are nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine exemptions are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). We must construe the FOIA exemptions narrowly to maintain the FOIA's goal of broad disclosure. *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001) (citing *U.S. Dep't of Justice v. Tax Analyst*, 492 U.S. 136 (1989)). The agency has the burden to show that information is exempt from disclosure. 5 U.S.C. § 552(a)(4)(B).

If the DOE decides to withhold information, both the FOIA and the DOE's regulations require the agency to (1) specifically identify the information it is withholding, (2) specifically identify the exemption under which it is withholding the information, and (3) provide a reasonably specific justification for its withholding. 5 U.S.C. § 552(a)(6); 10 C.F.R. § 1004.7(b)(1); *Mead Data Central, Inc. v. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977). These requirements allow both the requester and OHA to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc.*, VFA-0304 (1997). It also aids the requester in formulating a meaningful appeal and facilitates OHA's review of that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE ¶ 80,109 at 80,517 (1992).

Although the February 13, 2013, FOIA Request and the August 5, 2014, FOIA Request are not identical, they are seeking the same video footage. Anything that would be responsive under the more specific August 5, 2014, FOIA Request, would no doubt have also been responsive under the February 13, 2013, FOIA Request. Although the Appellant missed the deadline to appeal the March 20, 2014, Determination Letter, nothing stops him from filing a subsequent FOIA request for the same information and appealing the determination relating to that request, which is what the Appellant did in this case.

In this Appeal, the Appellant is challenging why he was not given more footage, specifically the footage which was shown in open court in May 2013. Appeal from Dan Zak to OHA (July 20, 2015). In the June 30, 2015, Determination Letter, NNSA simply refers the Appellant to its determination for his previous FOIA Request, stating that all releasable footage had been turned over to Appellant. Determination Letter from Jane Summerson, Authorizing Official, NNSA to Dan Zak (June 30, 2015). The March 20, 2014, Determination Letter, however, does not adhere to the statutory and regulatory requirements which govern withheld information. 5 U.S.C. § 552(a)(6); 10 C.F.R. § 1004.7(b). This determination letter failed to state what, if any, footage was being withheld, under which exemption it was being withheld, and why it was being withheld. Based on information gathered during the Appeal, there seems to be at least some footage that was withheld by NNSA. Although this footage may have been properly withheld, neither the June 30, 2015, Determination Letter nor the March 20, 2014, Determination Letter state this, as required by the statute and regulations. Accordingly we are remanding this matter to NNSA.

### **III. Conclusion**

For the reasons set forth above, we are remanding this matter to NNSA for a new determination which should identify what footage is being withheld, under what exemption it is being withheld, and the justification for the withholding.

It Is Therefore Ordered That:

- (1) The Appeal filed on July 28, 2015, by Dan Zak, Case No. FIA-15-0040, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.
- (2) This matter is hereby remanded to the Department of Energy's National Nuclear Security Administration, which shall issue a new determination in accordance with the instructions set forth in the above Decision.
- (3) 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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Poli A. Marmolejos  
Director  
Office of Hearings and Appeals

Date: August 7, 2015