

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

In the Matter of Ayyakkannu Manivannan)
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Filing Date: July 10, 2017) Case No.: FIA-17-0020
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Issued: August 7, 2017

Decision and Order

On July 10, 2017, Dr. Ayyakkannu Manivannan (Appellant) appealed a determination issued to him from the Department of Energy’s (DOE) National Energy Technology Laboratory (NETL) (Request Nos. HQ-2017-00833-F/NETL-2017-01017-F, HQ-2017-00890-F/NETL-2017-01016-F, HQ-2017-00946-F/NETL-2017-01081-F, HQ-2017-01069-F/NETL-2017-01141-F, HQ-2017-01070-F/NETL-2017-01080-F, HQ-2017-01268-F/NETL-2017-01260-F, HQ-2017-01284-F/NETL-2017-01308-F). In that determination, NETL informed the Appellant that it would be aggregating his seven requests filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. NETL additionally denied the Appellant’s request for a fee waiver in conjunction with the seven requests. The Appellant has appealed the denial of the fee waiver. As explained below, we conclude that the denial of the fee waiver was proper and that the Appellant was properly categorized as an “all others” requester. Further, we determine that the fee determination with regard to several of the requests was improper, but proper as to others. Therefore, the Appellant’s request for a fee waiver is denied, and the matter is remanded to NETL for issuance of a revised fee determination.

I. Background

From April 2017 to June 2017, the Appellant submitted seven FOIA requests seeking information pertaining to his employment with NETL and a subsequent investigation of his conduct. FOIA Requests of A. Manivannan. DOE received the requests on the following dates¹: (1) April 4, 2017, (2) April 12, 2017, (3) April 24, 2017, (4) May 11, 2017, (5) May 11, 2017, (6) June 15, 2017, and (7) June 19, 2017.² *Id.* In each of his requests, the Appellant requested a fee waiver. *Id.* NETL responded to the first, second, and third FOIA requests, on May 22, 2017, May 19, 2017, and May

¹ This Decision will refer to the numbered requests in the sequential order in which they were received, *i.e.*, “first” through “seventh.”

² DOE received both the fourth and fifth FOIA requests on May 11, 2017.

5, 2017, respectively. Determination Letters (May 22, 2017, May 19, 2017, May 5, 2017). The Appellant appealed each of these determinations to the DOE's Office of Hearings and Appeals (OHA), and NETL withdrew each Determination Letter, stating its intention to issue revised determinations on each request. Dismissal Letters from OHA to A. Manivannan (June 21, 2017, June 16, 2017, May 23, 2017). NETL responded to the fourth FOIA request on May 19, 2017, and with respect to the fifth, sixth, and seventh requests, NETL responded on June 26, 2017. Determination Letters (May 19, 2017, June 26, 2017). The final letter notified the Appellant that his seven requests were to be consolidated based upon the similarity of the requested records. Determination Letter at 1 (June 26, 2017). The letter categorized the Appellant as an "all others" requester and denied the requested fee waivers. *Id.* at 15. It also informed the Appellant that the estimated fees associated with the search for responsive records would be approximately \$7,000, and stated that the "processing of [his] request [would be] on hold" until the Appellant expressed his willingness to pay the fees. *Id.* On July 10, 2017, the Appellant appealed the fee waiver denial and challenged his categorization as an "all others" requester. Appeal at 1 (July 10, 2017); Email from A. Manivannan to OHA (July 14, 2017).

II. Analysis

A. Fee Waiver

The FOIA generally requires that requesters pay fees associated with processing their requests. 5 U.S.C. § 552(a)(4)(A)(i); *see also* 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 disclosure of the information: (1) 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). Additionally, requesters must support their claims with reasonable specificity. *Cause of Action v. FTC*, 799 F.3d 1108, 1117 (D.C. Cir. 2015).

With respect to the public-interest prong in the above test, there are two factors to consider in determining whether the disclosure of the information is likely to contribute significantly to public understanding of government operations or activities:³

1. The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government;"
2. The informative value of the information to be disclosed: Whether disclosure is "likely to contribute significantly to a public understanding" of government operations or activities.

Cause of Action v. FTC, 799 F.3d 1108, 1115. Within the second factor, there are two considerations: (a) the degree to which the "understanding of government activities will be advanced by seeing the information; and (b) the extent of the "public" that the information is likely

³ While DOE regulations set forth four factors, *see* 10 C.F.R. § 1004.9(a)(8)(i), the United States Court of Appeals for the District of Columbia has recently revised the factors to be used in determining whether a FOIA requestor is eligible for a fee waiver. *See Cause of Action v. FTC*, 799 F.3d 1108. We follow those factors herein.

to reach. *Id.* “The FOIA does not require the requestor to be able to reach a wide audience. Rather...the relevant inquiry is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.” *Id.* (internal quotation marks and citations omitted).

In this matter, NETL found that while the requested information pertains to the operations of the government, the Appellant did not demonstrate how the information would benefit the public. Determination Letter at 14 (June 26, 2017). NETL further determined that the Appellant failed to show his intent and ability to disseminate the requested information to the public, and that the public interest outweighs any commercial interest he may have. *Id.* at 15. Accordingly, it denied the fee waiver. *Id.*

We begin by examining the public interest prong of the test. With regard to the first factor, it is undisputed that the information the Appellant requested concerns “the operations or activities of the government.” Determination Letter at 14 (June 26, 2017).

Turning to the second factor, whether disclosure is “likely to contribute significantly to a public understanding” of government operations or activities, we examine the degree to which the “understanding of government activities will be advanced by seeing the information” and the extent of the public the information will likely reach. *Cause of Action*, 799 F.3d 1108, 1116. “In determining whether disclosure of records will contribute significantly to the public’s understanding of the operation or activities of the government, it is relevant to consider the subject matter of the requests and the ability of the requestor to disseminate information.” *Carney v. U.S. Dep’t of Justice*, 19 F.3d 807, 814 (2d Cir. 1994).

Here, the Appellant requested over 150 items falling generally into the following categories: his personal information, his employment with DOE, evidence gathered against him during an internal DOE investigation, and communications between DOE, a law enforcement agency, and the district attorney’s office investigating and prosecuting him in a separate criminal matter. Determination Letter at 1-14 (June 26, 2017). Throughout his FOIA requests, the Appellant repeatedly states that the release of this information will show that: (1) government procedures are not followed; (2) taxpayer money is being misused; (3) cases should be handled differently in the future; and (4) the Appellant was falsely convicted. FOIA Requests. The Appellant echoes this reasoning in his Appeal, asserting that the release of these records “will help to demonstrate NETL’s system, operation, and procedures to the public and improve future operations,” and it is necessary “to prove his innocence” in the separate criminal matter and demonstrate that a “government agency such as NETL...can make mistakes.” FOIA Appeal at 2-3. In an attempt to provide the Appellant another opportunity to explain his reasoning, OHA reached out to the Appellant, and the Appellant stated that he sought “to inspire improvement in government processes,” and that the information “will help government agencies to find the opportunity to operate more effectively.” Email from A. Manivannan to OHA (July 14, 2017).

At the outset, we note that while the requested records pertain solely to the Appellant, it is irrelevant whether the Appellant made the request for his purposes alone. *Cause of Action*, 799 F.3d 1108, 1117. However, he is ineligible for a fee waiver if the information will be to his benefit alone. *Id.* Thus, we focus on the “likely effect of the information disclosure.” *Id.*

While the Appellant makes broad assertions that the requested information would help to demonstrate government systems, operations, and procedures to the public, he does not explain how the requested records would add anything new to the public's understanding of the operations of the federal government. *See id.* at 1117 (articulating that requesters must state their claims with reasonable specificity). We cannot discern on the face of the request how records related to the Appellant's employment, personal information, the internal investigation against him, or the DOE's communication with law enforcement regarding his criminal matter would advance the public's understanding of government operations and activities. Without any detail or specificity from the Appellant on this matter, we cannot conclude that the information requested would substantially contribute to the public's understanding of government operations or activities. *See Monroe-Bey v. F.B.I.*, 890 F.Supp.2d 92, 97 (D.D.C. 2012) ("An agency may infer a lack of substantial public interest when a public interest is asserted but not identified with reasonable specificity, and circumstances do not clarify the point of the requests.").

Further, the Appellant fails to explain how the requested records would benefit anyone but himself and his attempt to prove his innocence. While the Appellant stated that he plans to publish two "journal articles" and one "journal review article" and create an "open web site," Email from A. Manivannan to OHA (July 13, 2017), he provides no detail regarding who, aside from himself, would have interest in this information. *See Carney*, 19 F.3d at 816 (noting that the denial of a fee waiver is appropriate where a requester seeks records to further its own litigation). As such, we cannot conclude that the Appellant "will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject." *Cause of Action*, 799 F.3d 1108, 1116.

As the Appellant has not shown that the disclosure of the requested records is "likely to contribute significantly to a public understanding" of government operations or activities and that there is a segment of the public interested in the information, the Appellant has failed to satisfy the public interest prong of the fee waiver analysis. Because the Appellant must satisfy the two prongs in order to qualify for a fee waiver, we will not reach the commercial interest prong. Accordingly, NETL acted properly in denying the fee waiver.

B. Fee Categorization

In addition to challenging the denial of the fee waiver, the Appellant challenges NETL's determination that he is categorized as an "all others" requester. Email from A. Manivannan to OHA (July 13, 2017). On Appeal, the Appellant asserts that he is an "educational or non-commercial scientific institution" requester. *Id.* To support this assertion, the Appellant contends that he is an adjunct professor with a university, and other professors are "supporting his efforts." *Id.*

The FOIA provides for three categories of requesters: 1) commercial use requesters; (2) educational institutions, non-commercial scientific institutions, and representatives of the news media; and 3) all requesters who do not fall within either of the preceding two categories (all others). *See* 5 U.S.C. § 552(a)(4)(A)(ii). An "educational institution" is defined as a "preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education and an

institution of vocational education, which operates a program or programs of scholarly research.” Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10,014 (Mar. 27, 1987). A “non-commercial scientific institution” refers to a “non-commercial” institution that is “operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry.” *Id.* at 10,018. In order to qualify for the educational or non-commercial scientific institution category, a requester must be able to show that the request serves a scholarly research goal of the institution, rather than the requester’s individual or personal goal. *Id.*

In each of his seven FOIA requests, the Appellant indicated that he was an “individual seeking information for personal use and not for commercial use.” FOIA Requests. In his Appeal, the Appellant stated that he sought the records as a “private citizen” and required the records “to prove [his] innocence.” FOIA Appeal. It was not until OHA sought additional clarification about his Appeal that the Appellant asserted that he should have been categorized as an “educational or non-commercial scientific institution” requester. Email from A. Manivannan to OHA (July 13, 2017).

While the Appellant may work for or be involved with a qualifying educational or non-commercial scientific institution, there is nothing in the record to indicate that the Appellant seeks the requested records to serve a “scholarly research goal of the institution.” 52 Fed. Reg. at 10,014. Accordingly, we determine that the Appellant cannot be categorized as an educational or non-commercial scientific institution. As such, we conclude that he was properly categorized by NETL as an “all others” requester.

Finding that the Appellant does not qualify for a fee waiver and was properly categorized as an “all others” requester, we turn to the propriety of the fee determination.

C. Fee Determination

The FOIA generally requires that requesters pay fees associated with the processing of their requests. 5 U.S.C. § 552(a)(4)(A)(i); *see also* 10 C.F.R. § 1004.9(a). However, an agency cannot assess any search fees if it has failed to make a determination on a request within twenty (20) working days, except under particular circumstances articulated within the FOIA.⁴ 5 U.S.C. § 552(a)(4)(A)(viii); 5 U.S.C. § 552(a)(6)(A)(i)(I). Where an agency has determined that unusual circumstances apply, and the agency has provided timely written notice to the requester, the agency is granted an additional ten (10) days to comply. *See* 5 U.S.C. § 552(a)(4)(A)(viii)(II)(aa). Additionally, where an agency has determined that unusual circumstances apply and more than 5,000 pages are necessary to respond to the request, an agency may charge search fees if the agency has provided timely notice to the requester and the agency has discussed, or made three good-faith attempts to discuss, how the requester could effectively limit the scope of the request. *See* 5 U.S.C. § 552(a)(4)(A)(viii)(II)(bb).

Based upon the 20-day deadline prescribed by the FOIA, NETL was required to make a determination on the seven FOIA requests by the following dates: (1) May 2, 2017; (2) May 10, 2017; (3) May 22, 2017; (4) June 9, 2017; (5) June 9, 2017; (6) July 14, 2017; and (7) July 18,

⁴ The term “working days” as used in this Decision does not include weekends or legal public holidays. *See* 5 U.S.C. § 552(a)(4)(A)(viii).

2017.⁵ With regard to the first and second FOIA requests, NETL missed the deadline by fourteen and seven working days, respectively. Determination Letters (May 22, 2017, May 19, 2017). While the initial Determination Letter for the third FOIA request was issued by the May 22, 2017, deadline, NETL withdrew this determination, deciding instead to issue a revised determination, which did not occur until June 26, 2017. Determination Letters (May 5, 2017, June 26, 2017); Dismissal Letter from OHA to A. Manivannan (May 23, 2017). Accordingly, we must conclude that NETL missed the 20-day deadline with regard to the third FOIA request. The determination for the fourth FOIA request was timely issued. Determination Letter (May 19, 2017). However, with regard to the fifth request, NETL missed the deadline by eleven working days. Determination Letter (June 26, 2017). Determinations for the sixth and seventh FOIA requests were timely issue prior to the 20-day deadline. *Id.*

There is nothing in the record to indicate that NETL made a determination that unusual circumstances existed in this case. Determination Letter (June 26, 2017). Further, it did not contact the Appellant regarding the necessity of an extension of time. *See* Email from NETL to OHA (July 18, 2017). There is nothing to indicate that NETL made a determination that more than 5,000 pages would be required to respond to the request or that written notice of such was provided to the Appellant. Determination Letter (June 26, 2017). Therefore, due to the untimeliness of the determinations with regard to the first, second, third, and fifth FOIA requests, and the lack of a determination and notice to the Appellant regarding the existence of unusual circumstances, NETL cannot charge search fees for these FOIA requests. *See* 5 U.S.C. § 552(a)(4)(A)(viii); 5 U.S.C. §552(a)(4)(A)(viii)(II)(aa); 5 U.S.C. § 552(a)(4)(A)(viii)(II)(bb). However, as the determinations for the fourth, sixth, and seventh FOIA requests were timely issued, NETL may charge reasonable fees as described in 5 U.S.C. § 552(a)(4)(A)(i).

III. Conclusion

Based on the foregoing, we determine that NETL properly denied the Appellant's request for a fee waiver and properly categorized him as an "all others" requester. However, we conclude that NETL cannot assess search fees for the first, second, third, or fifth FOIA requests, and it must issue a revised search fee estimate based solely upon the fourth, sixth, and seventh requests.

It Is Therefore Ordered That:

- (1) The Appeal filed on July 10, 2017, by Ayyakkannu Manivannan, Case No. FIA-17-0020, is hereby denied with regard to the fee waiver; however, the Appeal is granted to the extent set forth in paragraph (2) below.
- (2) The June 26, 2017, fee determination provided to the Appellant is remanded to NETL and is to be revised to reflect search fees based solely upon the Appellant's fourth (May 11, 2017), sixth (June 15, 2017), and seventh (June 19, 2017) FOIA requests.

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

⁵ The numbered dates correspond to the sequential order in which the Appellant submitted the FOIA requests, *i.e.*, the first FOIA request through the seventh request.

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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