

United States Department of Energy  
Office of Hearings and Appeals

In the Matter of Martin Pfeiffer )  
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Filing Date: July 26, 2019 ) Case No.: FIA-19-0027  
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Issued: July 31, 2019

**Decision and Order**

On July 26, 2019, Mr. Martin Pfeiffer (Appellant) appealed a determination letter issued by the United States Department of Energy’s (DOE) National Nuclear Security Administration (NNSA) categorizing him as a commercial use requester for the purpose of assessing fees associated with processing Freedom of Information (FOIA) request number 19-00232-EW, and denying his request for categorization as a news media, educational, or noncommercial scientific requester. According to the NNSA, Appellant intended to post the requested records on a website and charge a fee to view or access the records. In his appeal, Appellant asserted that the NNSA had mischaracterized his intentions with respect to the requested records, he intended to disseminate the materials free of charge, and he intended to use the requested materials as part of his Ph.D. research. As explained below, we deny the appeal.

**I. Background**

Appellant is a Ph.D. student in the Anthropology Department of the University of New Mexico. Appeal Ex. 13 at 1. Appellant’s areas of study include “anthropology and history of nuclear weapons.” *Id.* The NNSA categorized Appellant as an educational or noncommercial scientific requester in connection with numerous FOIA requests until June 2019, when the NNSA informed Appellant that it had categorized him as a commercial use requester for the purposes of processing his latest four (4) FOIA requests, including the FOIA request at issue in this appeal. *Martin Pfeiffer*, OHA Case No. FIA-19-0020-23 (2019).<sup>1</sup>

Appellant appealed that determination, asserting that the NNSA had not adequately explained its reasoning for categorizing him as a commercial use requester when he had always been categorized as an educational or noncommercial scientific requester in the past, that he was an educational or noncommercial scientific requester because he made the requests in connection with his Ph.D. research, and that, alternatively, he was a member of the news media based upon his “making records [] publicly accessible; conducting public analysis on social media; and in [] writing for news, journalistic, scientific, and research outlets.” *Id.* at 1. After Appellant appealed the NNSA’s determination, the NNSA explained that it had categorized Appellant as a commercial use

<sup>1</sup> Decisions issued by OHA are available on the OHA web site located at <http://www.energy.gov/oha>.

requester because it had learned that he was posting records provided to him in response to FOIA requests on an online account and charging users for access to the documents. *See id.* at 2. OHA determined that the NNSA had not provided Appellant with the opportunity to clarify his intended use of the requested records pursuant to 10 C.F.R. § 1004.2(c), and therefore granted Appellant's appeal and remanded the matter to the NNSA to obtain the required clarification of Appellant's intended use of the requested records. *Id.* at 2.

The NNSA subsequently sent Appellant an e-mail in which it requested that Appellant "clearly identify [his] intended use for the requested records in this FOIA matter." Appeal Ex. 6. In his response to the NNSA, Appellant stated that he would use the requested records "as part of [his] Ph.D. research and for analysis and dissemination through [his] social media, scholarly writing, journalistic writing, and inclusion in [his] free, publicly accessible archive of research materials." Appeal Ex. 7. Appellant also referred the NNSA to a document he submitted to OHA asserting that the NNSA was not making a good-faith effort to clarify his intended use of the requested records and requesting that OHA enjoin the NNSA from seeking fees from Appellant in connection with his four (4) outstanding FOIA requests to the NNSA. Appeal Ex. 10; *see also* Appeal Ex. 8 (requesting that OHA grant him his requested fee categorization and enjoin the NNSA from seeking fees in connection with processing the requests). On July 24, 2019, the NNSA issued Appellant a letter indicating that it had determined that he was a commercial use requester in connection with FOIA request number 19-00232-EW. Appeal Ex. 3. Appellant submitted the present appeal of that decision on July 26, 2019.

Appellant created accounts on two websites to disseminate the records he obtained through FOIA requests. One of the accounts is located on the Open Science Foundation (OSF) website. OSF describes itself as a "free, open platform to support [] research and enable collaboration." OSF Home Page, <https://osf.io/> (last visited July 26, 2019). According to Appellant, "virtually all records released to [him] by [the] NNSA through FOIA requests . . . are currently available to the public, for free, at [his] online research collection hosted by the [OSF] . . ." Appeal at 3. Appellant's OSF account contains voluminous files indexed by topic, and includes the results of numerous FOIA requests Appellant made to the NNSA. Martin Pfeiffer, *Pfeiffer Nuclear Weapon and National Security Archive*, OSF (last visited July 26, 2019), <https://osf.io/46sfd/files/>.

Appellant's second account is located on the Patreon website. Patreon describes itself as a way for users to "[s]tart a membership business to develop a direct relationship with your biggest fans and generate predictable, recurring revenue from your creative work." Patreon Home Page, <https://www.patreon.com/> (last visited July 26, 2019). Appellant's Patreon account charges subscribers fees ranging from \$2 per month to \$150 per month, with subscriber benefits ranging from a minimum of access to "exclusive content [], sneak peeks of upcoming blog posts and data dumps, file and document downloads, and the opportunity to help save the world by enabling [Appellant] to conduct and share [his] work," to pieces of artifacts, mentions in Appellant's dissertation, and research services for higher-tier subscribers. Martin Pfeiffer, *Martin Pfeiffer is creating Anthropologically informed nuclear weapons research and fun!*, PATREON (last visited July 26, 2019), <https://www.patreon.com/nuclearanthro>. As of July 26, 2019, Appellant was generating \$1,734 per month in user fees for access to the account. *Id.* The homepage of the account indicates that Appellant collects fees so as to reach his "break even point for being able to devote the necessary attention to creating, maintaining, and curating the publicly accessible digital collection of documents, photographs, and records that [he has] taken, scanned, and acquired through FOIA." *Id.*

Appellant's appeal asserted that the NNSA misrepresented his use of the records that he had previously obtained through FOIA requests, noting the voluminous records he had posted to his OSF account and his practice of using his Twitter account to disseminate information related to his FOIA requests. Appeal at 3–4. Moreover, Appellant reiterated the positions that he took in his prior appeal that he was entitled to categorization as an educational requester because the “requests [were] made as part of [his] Ph.D. research as an enrolled student at the University of New Mexico and not primarily for commercial or profit reasons,” and that he was entitled to categorization as a representative of the news media because he had “previously written about the United States government and its activities for outlets such as Playboy UK and the Deep Sea Mining Observer in addition to publishing analysis of [his] research results - including [] FOIA requests - on [his] Twitter account which has over 14,000 followers and averages over 3 million impressions a month.” Appeal Ex. 4 at 2–3.

## **II. Analysis**

The FOIA generally allows agencies to assess “reasonable standard charges for document search, duplication, and review.” 5 U.S.C. § 552(a)(4)(A)(ii)(I). However, the FOIA provides that agencies may charge only duplication fees “when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media.” 5 U.S.C. § 552(a)(4)(A)(ii)(II). As explained below, we agree with the NNSA that Appellant is a commercial use requester.

### **A. Appellant is a Commercial Use Requester**

A commercial use requester is “one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester.” 10 C.F.R. § 1004.2(c). Appellant's posting of records obtained through FOIA requests to his Patreon account is obviously commercial in nature; Patreon markets itself as a means for account holders to “start a membership business,” Appellant generates substantial fees from subscribers, and the primary benefit of a subscription to Appellant's Patreon account is access to the content that he markets to subscribers as exclusive to the account.

Appellant asserts in his appeal that “virtually all records released to [him] by [the] NNSA . . . are currently available to the public, for free, at . . . [his OSF account].” Appeal at 3. OHA has no way of verifying this claim, and in any case Appellant's assertion in his appeal is inconsistent with the representations on his Patreon account that subscribers receive exclusive content. Whether or not Appellant posts information obtained from the NNSA on his OSF account as well as on his Patreon account, his practice of charging fees through his Patreon account for subscribers to view records he obtained through the FOIA is commercial in nature.

### **B. Appellant Has Not Demonstrated that He is an Educational Institution Requester**

An educational institution is “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.” 10 C.F.R. § 1004.2(g).<sup>2</sup> A student who makes a FOIA request in furtherance of “coursework or other school-sponsored activities” is an educational institution requester. *Sack v. DOD*, 823 F.3d 687, 693 (D.C. Cir. 2016). However, a student is not entitled to categorization as an educational institution requester if he or she will use the requested records for a personal or commercial use. *Id.* In cases where a student’s intended use of requested records is in doubt, requesters may establish their intended use of the records through “a copy of a syllabus, a letter from a professor, or the like.” *Id.*

In this case, Appellant has repeatedly stated that he intends to use the requested records “as part of [his] Ph.D. research” without elaboration. *See* Appeal at 3; *see also* Appeal Ex. 4 at 2; Appeal Ex. 7; Appeal Ex. 10. Appellant has neither explained how the requested records relate to academic work in which he is presently engaged nor provided verification from a professor, advisor, or other university representative that the requested records relate to his academic activities. We find Appellant’s conclusory statements insufficient to outweigh the reasonable doubts expressed by the NNSA in light of Appellant’s demonstrated commercial use of records provided in response to his previous FOIA requests.

### **C. Appellant is Not a News Media Requester**

A representative of the news media is “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 10 C.F.R. § 1004.2(m). Generally, a requester must represent a *bona fide* news entity in order to meet this test. *See Liberman v. U.S. Dep’t of Transportation*, 227 F.Supp 3d 1, 11 (D.D.C. 2016) (explaining that “courts must consider the purported news-media entity’s past, present, and future work” to determine whether it is a news entity). A freelance journalist may demonstrate that he or she is a representative of a news entity, even though he or she is not an employee of that entity, “if the journalist can demonstrate a solid basis for expecting publication through that entity . . . .” 10 C.F.R. § 1004.2(m).

Appellant is not a journalist by trade, identified only two journalistic articles in his appeal as evidence of his news media credentials, and has not asserted that the records he sought from the NNSA in his FOIA request are in furtherance of any particular article which he intends to write. While “[a]n entity with an extensive record will ordinarily qualify with only a thin recital of its plans (or perhaps none at all) . . . an entity with little or no historical record of distributing its work . . . may make up for that absence by concretely setting out its plans to do so.” *Cause of Action v. FTC*, 799 F.3d 1108, 1124 (D.C. Cir. 2015). Absent any indication that Appellant has plans to use the requested records as part of an article for a news media entity, we find that he is not a representative of the news media.

Appellant’s appeal makes reference to his practice of disseminating information obtained through FOIA requests via his Twitter account in support of his claim that he is a representative of the news media. Appeal Ex. 4 at 3. Appellant’s Twitter account is plainly personal in nature, and not a news media entity primarily engaged in disseminating news. Martin “Doomsday” Pfeiffer (@nuclearanthro), Twitter (last visited July 29, 2019) [Twitter.com/nuclearanthro](https://twitter.com/nuclearanthro). Case law referenced by Appellant in his appeal in support of his claim that self-publication of the requested

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<sup>2</sup> Appellant’s appeal does not identify any non-commercial scientific institution with which he is associated, and therefore this decision does not consider whether Appellant is a non-commercial scientific requester.

records establishes him as a representative of the news media concerns eligibility for a fee waiver, not categorization as a representative of the news media. *E.g. Carney v. DOJ*, 19 F.3d 807, 814–16, n.3 (2d Cir. 1994) (indicating doubt that a graduate student was a representative of the news media, and remanding the matter to the district court to assess whether the student was eligible for a fee waiver). Therefore, we conclude that Appellant is not a representative of the news media.

#### **D. Appellant’s Procedural Arguments Are Unfounded**

Appellant’s appeal argues that the NNSA was required “to provide clarification of the information [it] wanted to make a decision regarding [his] fee status.” Appeal at 4. Appellant’s appeal does not identify any authority for this assertion, and we do not believe that the NNSA’s request for clarification impaired Appellant’s appeal rights. Although the NNSA initially failed to explain its reason for determining that Appellant was a commercial use requester, OHA’s decision in OHA case numbers FIA-19-0020-23 alerted Appellant that the NNSA had deemed his posting of records to his Patreon account to be commercial activity. Appellant’s appeal reflects that he is aware of the NNSA’s position regarding his Patreon account. We are not aware of any other basis upon which the NNSA made its decision, and we see no reason that the form of the NNSA’s request to Appellant for clarification of his intended use of the requested records prejudiced Appellant. Accordingly, we reject Appellant’s procedural claims.

### **III. Order**

It is hereby ordered that the appeal filed by Martin Pfeiffer on July 26, 2019, No. FIA-19-0027, 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](http://ogis.archives.gov) Email: [ogis@nara.gov](mailto:ogis@nara.gov)  
Telephone: 202-741-5770 Fax: 202-741-5769  
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