

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

In the Matter of Mensur Omerbashich)	
)	
Filing Date: October 16, 2020)	Case No.: FIA-21-0001
)	
_____)	

Issued: October 23, 2020

Decision and Order

On October 16, 2020, Mensur Omerbashich (Appellant), Editor-in-Chief of the Journal of Geophysics, filed an appeal from a letter issued by the National Nuclear Security Administration (NNSA) regarding Request No. FOIA 21-00017-M. The letter acknowledged the receipt of the Appellant’s Freedom of Information Act (FOIA) request and denied his request for expedited processing for information under 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in regulations codified at 10 C.F.R. Part 1004. The Appellant challenged the decision denying his request for expedited processing. In this decision, we deny the appeal.

I. Background

On October 14, 2020, the Appellant filed a request with the NNSA seeking the following:

Vacancy Announcement: VirtualJF801-1301-STDEN4

Position Title: General Engineer/Physical Scientist

Series: 1301B

Grade: 04

Request Records: any information I am entitled to that concerns the “Referred, not selected” decision, including the scoresheet as well as any other relevant information and documentation used in support of the decision to not select the obviously best candidate for job interview for an exempt position at the NNSA.

FOIA Request from Mensur Omerbashich at 1 (October 14, 2020).

The Appellant also made a request for expedited processing, stating that the NNSA has a paucity of employees in the fields of engineering and science, and as a result, the NNSA’s refusal to hire

the “best candidates” for such positions threatens the lives of millions of people within and without the United States by jeopardizing the national security of the country. *Id.* at 2.

On October 16, 2020, the NNSA issued a letter, explaining that in order to qualify for expedited processing, the Appellant must show a “‘compelling need’ for the [requested] information.” Receipt of Freedom of Information Act Request from Christina H. Hamblen to Mensur Omerbashich at 1. After providing a brief definition of “compelling need,” the letter went on to state that the Appellant’s request failed to meet the compelling need standard, as the “document(s) [the Appellant] requested do not have a particular value that will be lost if the information is not disseminated quickly.” *Id.* at 1-2.

On October 16, 2020, the Appellant submitted an Appeal to the DOE’s Office of Hearings and Appeals (OHA). In his appeal, the Appellant argued that his request was misunderstood by the FOIA officer, in that the failure to hire the “obviously best candidates” for the advertised position would result in posing an imminent threat to “hundreds of millions of people,” and accordingly, the harm would not be particular to just one individual. Appeal Letter Email from Mensur Omerbashich to OHA Filings at 1 (October 16, 2020). The Individual goes on to state that “[a]pplications for critical positions should under no circumstances (including pandemics, if any) be receiving the same type of treatment as non-critical positions.” *Id.*

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Accordingly, agencies largely process FOIA requests in the order in which they are received, on a “first in, first out” basis. However, FOIA provides for expedited processing only when a requester either successfully demonstrates a compelling need, or when otherwise determined by the agency. 5 U.S.C. § 552(a)(6)(E)(i). The term compelling need has been defined in two ways under FOIA. First, compelling need means that a failure to expedite the production of the requested documents “could reasonably be expected to pose an imminent threat to the life or physical safety of an individual.” 5 U.S.C. § 552(a)(6)(E)(v)(I). Further, compelling need, for those individuals whose primary business is the dissemination of information, is the “urgency to inform the public concerning actual or alleged Federal Government Activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II).

Courts must consider three factors when determining whether a requester has demonstrated an urgency to inform:

- (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;
- (3) whether the request concerns federal government activity.

Al-Fayed v. CIA, 254 F.3d 300, 310 (D.C. Cir. 2001).

While there is no question that the hiring of personnel is an activity of the federal government, we cannot agree with the Appellant's argument that his FOIA request concerns an exigent matter that would be of concern to either the people of the United States or the rest of the world. As an initial matter, the Appellant's argument is largely theoretical, and accordingly, it fails to establish an exigent circumstance. The link between the grave harm that the Appellant argues will be visited upon "hundreds of millions" of individuals due to the rejection of one applicant for a General Engineer/Physical Scientist position is tenuous, at best. The Appellant's argument fails to effectively draw a concrete and objective link between the ultimate status of a job application and a specific threat to which millions of people in the world would be subjected.

Additionally, the question is not whether the public has a general interest in national security, but rather, whether the public has an interest in the specific subject of the Appellant's FOIA request. *See Elec. Privacy Info. Ctr. v. DOD*, 355 F. Supp. 2d 98, 101-02 (D.D.C. 2004). The Appellant has failed to demonstrate that there is any current public interest in the fact that an applicant was referred, but not selected, for the position of General Engineer/Physical Scientist, as the Appellant has not provided any objective information by which one can reasonably reach such a conclusion. Moreover, with regard to the second factor of the "urgency to inform" test, the Appellant has failed to show that "delaying a response would compromise a significant recognized interest." In an effort to illustrate why the documents should be produced in an expeditious manner, the Appellant states that applicants for critical positions should not be subject to the same treatment as applicants for non-critical positions. Appeal at 1. Not only does the job posting, as it was provided in the initial FOIA request, fail to indicate whether this position is in fact a "critical position," but assuming it is, this explanation does not articulate why or how the consequences of failing to expedite the processing of the Appellant's FOIA request would implicate a significant recognized interest. As we are not aware of and the Appellant has not cited to any agency policy or logic behind the necessarily disparate treatment of applicants to critical and non-critical positions, the Appellant's statement is not so much an articulation of a significant interest, but rather, the articulation of his belief that applicants to critical positions should be treated more favorably. Simply, the Appellant has not provided sufficient evidence for OHA to conclude that any interest, let alone a significant one, would be furthered by the expedited processing of the Appellant's FOIA request.

Although the Appellant's request concerns the activities of the federal government, the hiring of federal employees, the Appellant has not satisfied the first two factors of the aforementioned "urgency to inform" test. Consequently, we must deny the Appellant's appeal.*

ORDER

It is hereby Ordered that the Appeal filed on October 16, 2020, by Mensur Omerbashich, FIA-21-0001, is denied.

* We note that the request to expedite the processing of documents pursuant to FOIA must "be sparingly granted because granting one request effectively forces other FOIA requestors further down the queue[.]" 355 F. Supp.2d at 104.

This is a final order of the Department of Energy from which an 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 one's right to pursue litigation. OIGS 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: <https://www.archives.gov/ogis> Email: ogis@nara.gov
Telephone: 202-741-5770 Fax: 202-741-5769 Toll-free: 1-877-684-6448

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