

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

In the Matter of Michael Cole)
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Filing Date: July 31, 2024)
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_____)

Case No.: FIA-24-0042

Issued: August 2, 2024

Decision and Order

Michael Cole (Appellant) appealed an interim response email dated July 30, 2024, issued to him by the Department of Energy’s (DOE) Office of Science-Consolidated Service Center, Chicago/Lemont location (SC CSC-CH), concerning a request (Request No. CH-2024-02549-F) that he 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. In the interim response email, SC CSC-CH denied the Appellant’s request for a waiver of fees associated with the processing of his FOIA request. In this Decision, we deny the appeal.

I. Background

On July 28, 2024, the Appellant submitted a FOIA request seeking:

1. All requests for legal advice by Princeton Plasma Physics Laboratory (PPPL) relating to its contractual obligations to the US Department of Energy and/or reporting obligations, that were made between October 1[,] 2023 and the date of response to this FOIA request.
2. All such advice received by PPPL.

FOIA Request from Michael Cole at 1 (July 28, 2024). The Appellant additionally stated that:

This request qualifies for a full fee waiver, which is requested. It provides information on the organizational governance of the Department of Energy and/or its contractors. This information will be used to compose an open letter to concerned persons in the US Government (e.g. members of the US Congress) describing institutional governance at PPPL and making recommendations for improvement in the public interest. It is thus likely to contribute significantly to public understanding of the operations or activities of the government. There is no envisioned commercial interest or benefit to the requester.

Id. at 1–2.

On July 30, 2024, SC CSC-CH, issued an interim response email to the Appellant denying his request for a waiver of fees.¹ Interim Response Email at 2–4 (July 30, 2024). SC CSC-CH asserted that the Appellant did not “describe[] [his] expertise in the subject matter of the requested information, [his] ability and/or qualifications to extract, synthesize and effectively convey the information, and the specific method which will be utilized by [the Appellant] to disseminate the information to the general public.” *Id.* at 2. SC CSC-CH noted that the Appellant “stated that [he] will compose an open letter to concerned persons in the government, not distribute the information to the general public.” *Id.* SC CSC-CH further stated that the Appellant failed to “indicate[] [his] ability to synthesize the documents requested (legal records) . . . [and] state[] with particularity how [the Appellant] will use the information, just the general assertion that [the Appellant] will ‘describe[] institutional governance’ and make recommendations ‘for improvement in the public interest.’” *Id.*

The Appellant timely appealed the interim response email on July 31, 2024.² Appeal Letter Email at 1–3. The Appellant stated that “DOE asserts that a FOIA requester must have legal or other credentials in order to claim a fee waiver[,]” however, “[t]hese are extralegal requirements that have no arguable basis in the [FOIA].” *Id.* at 2. The Appellant indicated that he “make[s] no comment on whether [he] in fact possess ‘expertise in the subject matter of the requested information[,]’ which is irrelevant.” *Id.* The Appellant argued that “DOE incorrectly asserts that [he] [has] not proposed to disseminate the information to ‘the general public,’” and noted that the Merriam-Webster dictionary defines “open letter” as one “intended for the general public.” *Id.* He further asserted that “[e]ven if [his] letter does not go further than [public officials], it will nonetheless ‘contribute significantly to public understanding of the operations or activities of the Government . . .’” *Id.* at 3.

II. Analysis

¹ In the interim response email, SC CSC-CH also found that the request did not “reasonably describe the records sought,” and stated that SC CSC-CH could not locate records with a reasonable amount of effort. Interim Response Email at 1–2 (citing 10 C.F.R. § 1004.4(b)–(c)). SC CSC-CH asked the Appellant to “reply and provide [his] clarification of the records sought” by September 11, 2024. *Id.* at 2, 4. The Appellant, however, did not respond to SC CSC-CH’s request before filing this appeal. *See* Email from SC CSC-CH FOIA Officer to OHA (July 31, 2024).

² In addition to appealing the fee waiver denial, the Appellant also stated that SC SCS-CH “rejected [his] request” by asserting that the request was not reasonably described and asking for clarifying information. Appeal Letter Email from Michael Cole to OHA at 1 (July 31, 2024). *Id.* Section 1004.8(a) of the DOE’s FOIA regulations provides that OHA may only consider appeals “when the Authorizing Official has denied a request in whole or in part or has responded that there are no documents responsive to the request . . . , or when the Freedom of Information Officer has denied a request for waiver of fees . . .” 10 C.F.R. § 1004.8(a). In this instance, because the interim response email requested further clarifying information from the Appellant, rather than denying his request in whole or in part, we find that SC SCS-CH has not yet made a determination – other than the fee waiver denial – that is ripe for appeal. *See Public Utility District #1*, OHA Case No. TFA-0089, at 5 (2005) (dismissing appeal without prejudice where interim response letter asked the appellant for “additional information” regarding fee waiver request because “the circumstances necessary for an Appeal d[id] not yet exist”). SC SCS-CH has not “rejected” the Appellant’s request, but rather, per the interim response email, has given the Appellant until September 11, 2024, to respond to SC CSC-CH’s request for clarification. *See* Interim Response Email at 4.

The FOIA generally requires that requesters pay fees associated with processing their requests. 5 U.S.C. § 552(a)(4)(A)(i). However, the FOIA provides for a reduction, or waiver, of fees if a requester can demonstrate that disclosure of the requested 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.³ *Id.* § 552(a)(4)(A)(iii).

In analyzing whether a FOIA request is in the public interest, DOE regulations set out several factors that should be considered to determine whether disclosure of the requested information is likely to contribute significantly to public understanding of government operations or activities:

- A. The subject of the request: Whether the subject of the requested records concerns “the operations or activities of the government”;
- B. The informative value of the information to be disclosed: Whether the disclosure is “likely to contribute” to an understanding of government operations or activities;
- C. The contribution to an understanding by the general public of the subject likely to result from disclosure; and
- D. The significance of the contribution to public understanding: Whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities.

10 C.F.R. § 1004.9(a)(8)(i). The burden of satisfying the public interest standard is on the requester, who must justify their entitlement to a waiver in “reasonably specific” and “non-conclusory” terms. *Nat’l Sec. Couns. v. U.S. Dep’t of Just.*, 848 F.3d 467, 473 (D.C. Cir. 2017) (internal quotation marks omitted).

A. Factor A

The first factor asks whether the Appellant’s FOIA request concerns “the operations or activities of government.” 10 C.F.R. § 1004.9(a)(8)(i)(A). Although SC CSC-CH’s interim response email did not address this factor, we find that the Appellant’s request, which seeks records regarding PPPL’s requests for legal advice “relating to its contractual obligations to [DOE],” concerns “the operations or activities of the government.” *See Soc’y of Pros., Scis. and Eng’rs*, OHA Case No. TFA-0310, at 3 (2009) (finding that Factor A weighed in favor of the appellant where the request sought “workforce-related” documents from a contractor operating one of DOE’s national labs); FOIA Request at 1.

B. Factor B

³ In his FOIA request, the Appellant represented that “[t]here is no envisioned commercial interest or benefit to [himself].” FOIA Request at 1. In the interim response email, SC CSC-CH did not dispute the Appellant’s lack of commercial interest in the disclosure of the requested information and categorized him as an “other” requester. *See* Interim Response Email at 3. Accordingly, because SC CSC-CH did not dispute the Appellant’s alleged lack of commercial interest, we will not address this prong of the fee waiver inquiry.

Factor B asks whether the disclosure is likely to contribute to an “understanding of government operations or activities” to be deemed in the public interest. 10 C.F.R. § 1004.9(a)(8)(i)(B). In analyzing this factor, “the subject matter” of the request, and whether the requested information is in the public domain and is otherwise common knowledge among the public, is important. *Carney v. U.S. Dep’t of Just.*, 19 F.3d 807, 814–15 (2d Cir. 1994). Although there is no indication whether the requested information is already in the public domain, considering the nature of the request, which seeks information regarding a DOE contractor’s requests for legal advice, we find it is unlikely that such information is publicly available. *See Soc’y of Pros., Scis. and Eng’rs*, at 4. Therefore, Factor B weighs in favor of the Appellant.

C. Factor C

Factor C asks whether the requested documents would contribute to the general public’s understanding of the subject matter. 10 C.F.R. § 1004.9(a)(8)(i)(C). To satisfy this factor, the requester must establish they have the intention and ability to “disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.” *Cause of Action v. F.T.C.*, 799 F.3d 1108, 1116 (D.C. Cir. 2015) (quoting *Carney*, 19 F.3d at 815); *Faye Vlieger*, OHA Case No. TFA-0250 (2008). In his appeal, the Appellant asserts that the requested information will be distributed in a “open letter” addressed to “public officials,” who “are part of the public, and by their further statements and actions[,] they broadly affect the wider public discourse and wider public understanding.” FOIA Request at 3.

As an initial matter, courts have recognized that “it is clear beyond cavil that [m]erely stating one’s intention to disseminate information does not satisfy this factor; instead, there must be some showing of one’s ability to actually disseminate the information.” FOIA Request at 2; *Donato v. Exec. Off. for U.S. Att’ys.*, 308 F. Supp. 3d 294, 311 (D.D.C. 2018); *see also Bernegger v. Exec. Off. for U.S. Att’ys.*, 2022 WL 579291, at *6 (D.D.C. Feb. 25, 2022) (“In this case, [the requester]’s failure to elaborate on his plans to disseminate the requested information further supports the [agency]’s decision denying his waiver request.”). Other than merely stating his intent to write an open letter to public officials, the Appellant has not provided any specific information about his ability to distribute the requested records. For example, the Appellant “does not indicate whether he intends to publish the information in a journal or on a website.” *Pual Bubbosh*, OHA Case No. FIA-23-0017, at 3 (2023). Nor has the Appellant’s “barebones” explanation demonstrated that there is a “reasonably broad audience of persons interested” in PPPL’s requests for legal advice related to its contractual obligations with DOE. *See Nat’l Sec. Couns.*, 848 F.3d at 474. Accordingly, the Appellant has not satisfied Factor C.

D. Factor D

Factor D asks whether the requested information would contribute “significantly” to public understanding of government operations or activities to support a finding that a request is in the public interest. 10 C.F.R. § 1004.9(a)(8)(i)(D). In evaluating this factor, courts have considered whether the FOIA requester seeks information primarily for their own benefit. *Cause of Action v. F.T.C.*, 961 F. Supp. 2d 145, 159 (D.D.C. 2013). As noted above, the Appellant argues that dissemination of the requested information in an open letter addressed to public officials would

contribute significantly to the public understanding of government operations or activities because public officials have the ability to “broadly affect the wider public disclosure and wider public understanding.” FOIA Request at 3. Just as with Factor C, the Appellant provides only a conclusory assertion that he intends to publish an open letter to public officials without providing any further information or context regarding how he would publish such information to a reasonably broad audience of interested persons. Given the Appellant’s lack of “reasonabl[e] specificity,” we are unable to determine whether he seeks information primarily for his own benefit or that of the public generally. Accordingly, the Appellant has fallen short of demonstrating that the requested information would contribute “significantly” to public understanding of government operations or activities. Therefore, we find the Appellant has not satisfied Factor D.

Based on our consideration of the foregoing factors, we find the Appellant has not demonstrated that he intends, and is able, to disseminate the information obtained from the records to a reasonably broad audience. We also find that the Appellant did not demonstrate that disclosure of the requested records would significantly contribute to the public’s understanding of government operations or activities. Therefore, we find he is not entitled to a waiver of fees associated with the processing of his FOIA request.

III. Order

It is hereby ordered that the appeal filed on July 31, 2024, by Michael Cole, FIA-24-0042, 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. § 522(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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