

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

**CITIZEN ACTION, and
DAVID B. McCOY**

Plaintiffs,

Civil No.

v.

**NATIONAL NUCLEAR SECURITY
ADMINISTRATION SERVICE CENTER,
NATIONAL NUCLEAR SECURITY
ADMINISTRATION, and THE UNITED
STATES DEPARTMENT OF ENERGY**

Defendants.

COMPLAINT FOR INJUNCTIVE RELIEF

I. NATURE OF THE ACTION

1. COME NOW Plaintiffs Citizen Action and Dave McCoy (“Plaintiffs”), by and through their attorneys, The Law Offices of Nancy L. Simmons (Amanda R. Lavin, Esq.), and assert these civil causes of action.
2. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. 552, for injunctive and other appropriate relief, seeking the release of agency records requested by Plaintiffs from Defendants, the National Nuclear Security Administration Service Center, the National Nuclear Security Administration, and the United States Department of Energy. (“Defendants”).

II. JURISDICTION AND VENUE

3. This court has subject matter jurisdiction and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B), 552(a)(6)(E), and 28 U.S.C. § 1331.

4. Venue in this court is proper under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

III. PARTIES

5. Plaintiff Citizen Action is a non-profit public interest group whose mission is to protect the health and well-being of Albuquerque communities from the release of radioactive and hazardous contamination from nuclear facilities and radioactive and hazardous waste operations located at Sandia National Laboratories (“SNL”). Citizen Action accomplishes this goal through education; outreach to stakeholders; and advocacy for environmental and social justice. Citizen Action has grown to a coalition of seventeen groups and many private individuals advocating for clean up of the Mixed Waste Landfill at SNL. Citizen Action is a 501(c)(3) non-profit organization which operates under the fiscal auspices of the New Mexico Community Foundation of Santa Fe, New Mexico. Citizen Action disseminates information to the public: through its website (www.radfreenm.org) which receives an average of 8,000-10,000 visits per month; through an active member list serve of approximately 1,300 members; through public venues such as town hall meetings, hearings, and public forums; bulk mailings to its members and affiliated organizations; and through its contacts with the local media. Plaintiff David McCoy is the executive director of Citizen Action.
6. Defendant National Nuclear Security Administration Service Center, P.O. Box 5400, in Albuquerque, NM 87185–5400 (“NNSA Service Center”), is the Freedom of Information Officer designated to administer the FOIA on behalf of the National Nuclear Security Administration.
7. Defendant National Nuclear Security Administration (“NNSA”) is a separately organized agency within the U.S. Department of Energy, responsible for the management and security

of the nation's nuclear weapons, nuclear nonproliferation, and naval reactor programs. The NNSA is an agency within the meaning of 5 U.S.C. § 552 (f). The NNSA is responsible for overseeing the operations of SNL, a government-owned, contract-operated facility.

8. Defendant United States Department of Energy (DOE), through the NNSA, is responsible for overseeing the operations of SNL. DOE is an agency within the meaning of 5 U.S.C. § 552 (f).

IV. FACTUAL ALLEGATIONS PERTINENT TO ALL COUNTS

Plaintiffs' FOIA Requests and Requests for Expedited Processing

9. In September 2004, the Defense Nuclear Facilities Safety Board ("the Board") – the entity charged with oversight for defense related DOE nuclear facilities – found that inadequately examined dangers existed at SNL for fire hazards, airplane crashes, and equipment operations.
10. On March 3, 2010 Citizen Action presented to the Board that the radiological facilities at SNL still did not have adequate safety features to protect the public and workers from earthquakes and other accidents.
11. In response to Citizen Action's presentation, the Board planned to initiate a review of SNL. The findings from this review were eventually made public in 2012, and indicated that unsafe conditions continued to exist.
12. On March 16, 2011, Plaintiffs sent a FOIA request to Ms. Carolyn A. Becknell, a Freedom of Information Officer, at the NNSA Service Center, requesting documents relating to the safety of operations for the three nuclear facilities at SNL.
13. On April 29, 2011, Karen Laney, Information Programs Specialist at NNSA Service Center, acknowledged the receipt of the request for records about SNL. In the acknowledgment, Ms. Laney indicated that the estimated target date for when the processing of the request would be

complete and any and all responsive non-exempt records would be produced was September 30, 2012, nearly 19 months from the date of the March 16, 2011 request.

14. On April 29, 2011, Plaintiffs requested expedited processing for documents numbered 2, 3, 6, 11, 12, and 13.
15. Since the time Plaintiffs submitted their requests to the DOE's NNSA Albuquerque Service Center, they have regularly communicated by email and telephone with the FOIA Officers there in an effort to expedite DOE's required determination on his FOIA requests. As of today's date, however, Plaintiffs have not received notice of any determination on any of their outstanding FOIA requests, nor have they received any agency records sought in those requests.
16. At no point since the time of Plaintiffs' original requests have Defendants claimed that any of the requests were subject to an exemption pursuant to subsection (b) of 5 U.S.C. § 552, nor have Defendants offered any other reason as to why a determination cannot be made on Plaintiffs' FOIA requests.

Defendant's Failure to Respond and Plaintiff's
Entitlement to Expedited Processing

17. On April 29, 2011 Plaintiff requested expedited processing of certain enumerated documents requested in their original FOIA requests, dated March 1, 2011.
18. To date, Defendants have not responded to Plaintiffs' requests for expedited processing of their FOIA requests, nor have they provided any responsive documents. Plaintiffs have exhausted the applicable administrative remedies.
19. Plaintiffs are entitled to expedited processing of their FOIA requests.
20. Defendants have wrongfully withheld the requested records from Plaintiffs.

V. COUNT I

Violation of the Freedom of Information Act for Failure to Timely Respond

21. Plaintiffs incorporate by reference, all preceding allegations as if fully set forth.
22. FOIA, 5 U.S.C. § 552(a)(6)(A)(i) requires any agency to which a FOIA request has been made to make a determination on the request within twenty working days, and to immediately notify the person making the request of the determination and the agency's reasons for the determination.
23. Under FOIA, Defendant was required to provide the records that Plaintiffs requested.
24. Defendant has failed to provide the requested records as required by FOIA.
25. Under FOIA, Defendant was required to make a determination on Plaintiffs' requests within twenty working days.
26. Defendant failed to make a determination on Plaintiffs' requests, and over three years have passed since Plaintiff submitted their FOIA requests to Defendant.

VI. COUNT II

Violation of the Freedom of Information Act for
Failure to Timely Respond to Requests for Expedited Processing

27. Plaintiffs incorporate by reference, all preceding allegations as if fully set forth.
28. Defendants' failure to timely respond to Plaintiffs' request for expedited processing violates the FOIA, 5 U.S.C. § 552(a)(6)(E)(ii).

VI. CLAIM FOR RELIEF

29. In violation of FOIA, Defendant has improperly withheld agency records from Plaintiffs in violation within the meaning of 5 U.S.C. § 552(a)(4)(B), the Federal Records Act of 1950, as amended.
30. Plaintiffs are adversely affected by Defendants' failure to provide the required information under FOIA because without that information Plaintiffs cannot inform the public concerning

the subject of the request, which will contribute significantly to the public's understanding of the operations or activities of the government.

31. 5 U.S.C. § 552(a)(6)(C) states in relevant part that: “Any person making a request to any agency for records . . . shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph.”
32. FOIA gives this court jurisdiction to order Defendant to provide Plaintiffs with the records they requested pursuant to 5 U.S.C. § 552(a)(4)(B).
33. Defendant’s pattern and practice of unlawfully withholding agency records from Plaintiffs is a violation of the FOIA.
34. Furthermore, the U.S. District Court in *Citizen Action v. DOE, NNSA*, No. CIV 06-0726 RB/WDS (3/31/2008), cited NNSA for this type of ‘Kafkaesque’ delay in the review process as ‘a continuing pattern and practice of unlawful delay within the meaning of FOIA. And in *Nuclear Watch N.M. v. U.S. Dep’t of Energy*, CIV 06-221 BB/WPL, (Sept. 19, 2007), the U.S. District Court found that the Department of Energy’s withholding of documents for nine months after the initial FOIA requests “makes a mockery of the 20-day target set by [FOIA] and violates congressional intent.”
35. This court may assess costs of litigation, including reasonable attorneys fees, against the United States if Plaintiffs substantially prevail in this action pursuant to 5 U.S.C. § 552(a)(4)(E).

VII. REQUEST FOR RELIEF

36. FOR THESE REASONS, Plaintiffs respectfully request that this court enter judgment providing the following relief:

- a. Declare that Defendants have improperly withheld agency records from Plaintiffs by 1) failing to provide the requested information, and 2) failing to comply with the procedural time limits set forth by FOIA;
- b. Declare that Defendant has engaged in a pattern and practice of unlawfully withholding agency records from Plaintiffs in violation of the FOIA;
- c. Direct by injunction that the Defendant immediately provide Plaintiffs with the records they have requested;
- d. Grant Plaintiffs their costs of litigation, including reasonable attorneys fees as provided by the FOIA, 5 U.S.C. § 552(a)(4)(E); and
- e. Provide such further relief as the Court deems just and proper to avoid similar violations of the FOIA by Defendants in response to future FOIA requests for agency records submitted by Plaintiffs to DOE/NNSA.

Respectfully submitted,

THE LAW OFFICES OF NANCY L. SIMMONS, P.C.

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