

April 1, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Citizen Action

Date of Filing: January 15, 2003

Case Number: TFA-0016

On January 15, 2003, Citizen Action filed an Appeal from a determination issued to it by the Department of Energy's Albuquerque Operations Office (AO) on December 5, 2002. In that determination, AO denied a request for a waiver of fees in connection with a FOIA request filed by Citizen Action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. Instead, AO determined that Citizen Action qualified for a reduction in fees. In its Appeal, Citizen Action asks that we modify AO's determination and waive in full the fees associated with its request.

I. *Background*

In a submission dated August 29, 2002, Citizen Action filed a Request for Information under the Freedom of Information Act requesting from AO "documents with information regarding oxide nuclear reactor fuels shipped to Sandia National Laboratories." Letter from Carolyn Becknell, Freedom of Information Officer, AO, to Sue Dayton, Citizen Action (December 5, 2002) (Determination Letter) at 1. The organization believes that these documents would shed light on the nature of the known inventory of the Mixed Waste Landfill (MWL) located near Albuquerque, New Mexico, which was established in 1959 as a disposal area for radioactive and mixed wastes generated at research facilities of the DOE's Sandia National Laboratories. Letter from Sue Dayton, Citizen Action, to Steve Goering, Office of Hearings and Appeals (OHA) (February 25, 2003).

In its FOIA Request, Citizen Action also requested a fee waiver for the costs associated with processing its FOIA Request. In its December 5, 2002 determination letter, AO did not grant a fee waiver, but rather determined that Citizen Action "qualifies for a reduction of fees." Determination Letter at 2.

In its Appeal, Citizen Action states, "Previous requests for fee waivers regarding numerous FOIA requests filed by Citizen Action in 2001 have been granted by DOE. This is the first time we have been denied a fee waiver." Appeal at 1. The appellant contends that the "determination of a discounted fee waiver is both capricious and arbitrary, and inconsistent with the law regarding DOE's definition for a fee waiver granted to a special interest organization." *Id.* at 2.

II. Analysis

The FOIA generally requires that requesters pay fees for the processing of their requests. 5 U.S.C. § 552(a)(4)(A)(I); *see also* 10 C.F.R. § 1004.9(a). However, the Act provides:

Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

5 U.S.C. § 552(a)(4)(A)(iii) (1988 ed.). The burden of satisfying this two prong test is on the requester. *Larson v. Central Intelligence Agency*, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (per curiam) (*Larson*). The DOE has implemented the statutory standard for fee waiver in its FOIA regulations.

This fee waiver standard thus sets forth two basic requirements, both of which must be satisfied before fees will be waived or reduced. First, it must be established that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government. Second, it must be established that disclosure of the information is not primarily in the commercial interest of the requester. When these requirements are satisfied, based upon information supplied by a requester or otherwise made known to the DOE, the waiver or reduction of a FOIA fee will be granted.

10 C.F.R. § 1004.9(a)(8).

There is no dispute in the present case that the second requirement has been satisfied, i.e. that disclosure of the information requested would not be primarily in the commercial interest of Citizen Action. Regarding the first requirement, AO's determination letter states:

Your organization has demonstrated and established a record of providing documents and information to the public, as well as being able to interpret and effectively convey same, concerning the department's stewardship and environmental compliance issues involving the Mixed Waste Landfill that SNL maintains. Therefore, I have determined that your organization qualifies for a reduction of fees.

Determination Letter at 2. Thus, there is no dispute that Citizen Action met the two requirements set forth above, and are thereby entitled to a "waiver or reduction of a FOIA fee . . ." 10 C.F.R. § 1004.9(a)(8). The question before us is whether the circumstances of the present case warrant a full waiver or merely a reduction in fees. First, we note that there is nothing in AO's determination letter that explains why AO opted to reduce fees to Citizen Action rather than completely waive fees. We

therefore contacted AO, which described the following factors it took into account in reaching its decision:

- (1) the intent of Congress to recoup costs of processing FOIA requests;
- (2) the total estimated cost of processing the request (\$4,716.80);
- (3) “the taxpayers have already substantially funded a review of this issue, by virtue of the DOE grant to this organization of \$50,000 to review the waste issues at this same landfill;”
- (4) “the DOE has previously provided substantial documentation to this organization free of charge;”
- (5) “Citizen Action had not provided us with enough justification to show heightened public interest in the subject of the requested records. To give them the benefit of the doubt, however, we were aware of some media interest in the last year in the Mixed Waste Landfill, which we took into consideration as an indication of public interest in some aspects of this subject;”
- (6) “We had no independent indication of public interest in this subject other than the limited press releases provided to the local newspaper. For example, our own Public Affairs Office as well as SNL Public Affairs had not received any telephone calls or other indications of interest from the public concerning this issue or as a result of the articles;”
- (7) “Despite the fact that there is a great deal of material currently publicly available on this subject, no member of the public has ever gone to our Reading Room to request to see the substantial volume of publicly-available documents concerning the Mixed Waste Landfill;”
- (8) “no additional FOIA requests have been received on the subject;”
- (9) “the DOE has set up a public reading room with information concerning the landfill;”
- (10) “Citizen Action had not provided enough justification to show that members of that organization had sufficient expertise in the subject matter to demonstrate that they could synthesize the data requested into something that an interested public would benefit from;”
- (11) “Although we have provided free of charge a substantial number of documents to this group in the past concerning the Mixed Waste Landfill, nothing has actually

been actively presented to the public in the way of education on this subject. Citizen Action has only 'referred' to documents on their website, www.radfreenm.com, saying that whoever wants a copy of the document should go to the Reading Room."

Electronic mail from Terry Apodaca, AO, to Steve Goering, OHA (January 24, 2003); Electronic mail from Terry Apodaca, AO, to Steve Goering, OHA (January 16, 2003).

First, we reiterate that the DOE FOIA regulations set forth only two requirements that a requester must meet in order to qualify for a waiver or reduction of fees. The requester must establish that disclosure of the requested information is likely to contribute significantly to public understanding of the operations or activities of the Government, and that disclosure is not primarily in the commercial interest of the requester.

With that in mind, we note that the first eight reasons cited by AO do not address either of the two relevant requirements, and therefore do not provide a legitimate basis for granting or denying any form of relief from fees.¹ The last three reasons (numbers 9 through 11) appear to address the likelihood that the requested information is likely to contribute significantly to public understanding of the operations or activities of the Government, an issue that we address in more detail below.

Whether the Requested Information is Likely to Contribute Significantly to Public Understanding of the Operations or Activities of the Government

The regulations set forth the following four factors which must be considered by the agency in order to determine whether the first statutory fee waiver condition has been met, i.e., whether disclosure of the requested information is in the public interest² because it is likely to contribute significantly to public understanding of government operations or activities:

¹ With reference to the first reason cited by AO, we agree that Congress generally intended for agencies to recoup the costs of processing FOIA requests. Nonetheless, Congress also expressly provided for the waiver or reduction of fees where the requester can meet the two requirements discussed above. Thus, citing Congress' intent merely begs the ultimate question, i.e., has the requester shown that it is entitled to an exception to the general requirement that requesters bear the costs associated with a request? Moreover, taking Congress' intent into account in no way helps us answer that question in a given case, since it provides no basis for distinguishing the merits of one fee waiver request from another.

² Several of the reasons cited by AO (specifically 5 through 8) refer to a lack of "public interest" in the subject matter of the request. However, this use of the term "public interest," i.e. a desire by the public to know more about a given subject, is not helpful in applying the different meaning of "public interest" in the DOE FOIA regulations, which ask whether release of the information would be "in the public interest," i.e. of benefit to the public. Compare Cambridge International Dictionary of English (Online Edition 2003) (definition of interest as "the feeling of having your attention held and your mind excited by something or of wanting to be involved with and to discover more about something") with Cambridge International Dictionary of English (Online Edition 2003) (definition of interest as "an advantage; something that will provide you with something or help you in some way"); see Freedom of Information Act Guide, <http://www.usdoj.gov/oip/fees.htm#waiver> (U.S. Department of Justice 2002) ("proper focus must be on the benefit to be derived by the public").

(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.

Factor A

Factor A asks us to determine whether the subject of the requested documents concerns the operations or activities of the government. A fee waiver is only appropriate where the subject matter of the requested documents specifically concerns identifiable "operations or activities of the government." See *Department of Justice v. Reporters Comm. for Freedom of the Press*, 109 S. Ct. 1468, 1481-83 (1989); *U.A. Plumbers and Pipefitters Local 36*, 24 DOE ¶ 80,148 at 80,621 (1994) (*Local 36*). In the present case, there appears to be no dispute that the subject of requested records, "oxide nuclear reactor fuels shipped to Sandia National Laboratories," a government-owned contractor-operated facility, concerns operations or activities of the government.

Factor B

The focus of this factor is on whether the information is already in the public domain or otherwise common knowledge among the general public. See *Roderick Ott*, 26 DOE ¶ 80,187 (1997); *Seehuus Associates*, 23 DOE ¶ 80,180 (1994) (*Seehuus*). As we stated in *Seehuus*, "[i]f the information is already publicly available, release to the requester would not contribute to public understanding and a fee waiver may not be appropriate." AO has informed us (as noted in the ninth of AO's reasons listed above) that "the DOE has set up a public reading room with information concerning the [mixed waste] landfill." However, AO does not indicate that documents responsive to the specific request in this case (i.e., those concerning shipment of oxide nuclear reactor fuels to SNL) have been placed in a DOE public reading room. We therefore find that Citizen Action's request satisfies Factor B.

Factor C

This test requires us to consider whether the requested documents would contribute to the understanding of the subject by the public. *Ott*, 26 DOE at 80,780. To satisfy this factor, the

requester must have the ability and intention to disseminate this information to the public. *Id.*; see also *Tod N. Rockefeller*, 27 DOE ¶ 80,184 (1999); *James L. Schwab*, 22 DOE ¶ 80,133 (1992).

In the present case, as set forth in the last two of AO's reasons listed above, AO appears to question both the ability and intention of Citizen Action to disseminate to the public the information it obtains. "Citizen Action had not provided enough justification to show that members of that organization had sufficient expertise in the subject matter to demonstrate that they could synthesize the data requested into something that an interested public would benefit from; . . ." Electronic mail from Terry Apodaca, AO, to Steve Goering, OHA (January 24, 2003). "Although we have provided free of charge a substantial number of documents to this group in the past concerning the Mixed Waste Landfill, nothing has actually been actively presented to the public in the way of education on this subject. Citizen Action has only 'referred' to documents on their website, www.radfreenm.com, saying that whoever wants a copy of the document should go to the Reading Room." *Id.*

Regarding whether members of Citizen Action has sufficient expertise to synthesize information it receives, the director of the organization states, "Citizen Action has worked hard to convey technical information to the public regarding documents obtained under the FOIA. Our members are respected members of the community and include physicians, university professors, attorneys, [Albuquerque Public School] teachers, health care workers, and many others who support our activities." Letter from Sue Dayton, Citizen Action, to Steve Goering, OHA (February 25, 2003) at 1. Citizen Action also submitted to our office several letters in support of its fee waiver request. One of them states,

I am one of the Technical Advisors to Citizen Action. I review and synthesize the data Citizen Action obtains. I have a PhD in high energy theoretical physics from the University of Michigan and have worked on radioactive waste issues since 1974. I probably have more experience on these issues than almost anyone presently working at Sandia.

Letter from Marvin Resnikoff, Radioactive Waste Management Associates, to Steve Goering, OHA (February 24, 2003) at 1. Another letter notes, "Citizen Action has among its active members several MDs (including a radiologist) as well as a professor of nuclear and chemical engineering. It has also demonstrated a willingness to hire outside experts to analyze data when needed." Letter from Steve Pilon, MD, to Steven Goering, OHA (February 24, 2003). To the extent AO has argued that Citizen Action lacks ability or expertise in the relevant subject matter, we reject that contention. We find the information submitted by Citizen Action and on its behalf sufficient to demonstrate that the organization has the expertise required to synthesize the information it receives in response to its FOIA request.

As far as the organization's intention to disseminate information to the public, Citizen Action disputes AO's contention that the group has only 'referred' to documents on its website. It directs our attention to a page on the site entitled "Freedom of Information Act Documents." This page (<http://www.radfreenm.org/pages/whatwhen.htm>) does not merely refer to documents obtained from

DOE, but marshals numerous quotations from those documents in support of its contention that there is a great deal of uncertainty regarding the inventory of the Mixed Waste Landfill. Certainly, Citizen Action does not have to demonstrate an ability or intention to disseminate raw documents in their entirety to the public in order to qualify for a fee waiver. Indeed, if the organization did only that, without distilling the information contained in the documents, we would question the group's ability to synthesize the information in a way that increases public understanding.

Moreover, in its submissions to our office, Citizen Action has demonstrated that it works to educate the public in many forums. According to its Director, the group's web site, which contains extensive information on the Mixed Waste Landfill, receives from 3,000 to 7,000 hits per month. Letter from Sue Dayton, Citizen Action, to Steve Goering, OHA (February 25, 2003) at 5. In addition,

[1]ocal groups that have contacted Citizen Action requesting a presentation on the Mixed Waste Landfill include: Albuquerque Humanist Society; Forest Guardians; Green Party of New Mexico; Albuquerque Chapter/Sierra Club; South Valley Coalition of Neighborhood Associations; Highland High School; South Valley Charter School; Robert F. Kennedy Charter School; Gray Panthers; Veterans for Peace; and others.

Id. at 6. The letters of support submitted on behalf of Citizen Action confirm the group's public education efforts. *E.g.*, Letter from Arjun Makhijani, Ph.D., President, Institute for Energy and Environmental Research, to Steve Goering, OHA (February 21, 2003) at 1 ("Citizen Action has done an extraordinary job in bringing awareness to legacy waste issues such as the Mixed Waste Landfill"); Letter from Steve Pilon, MD, to Steve Goering, OHA (February 24, 2003) at 1 ("Citizen Action has held many well attended public meetings"); Letter from Professor H. Eric Nuttall, Ph.D., to Steve Goering, OHA ("Citizen Action has hosted a number of public meetings in conjunction with the state and disseminated information about this waste site to the citizens of New Mexico").

Also submitted by Citizen Action were copies of articles, from a number of local newspapers, either authored by the organization's leaders or in which one of them is quoted. Some of the articles submitted appear to be from smaller or alternative publications that may or may not reach a wide audience. But two of these newspapers, the Albuquerque Journal and Albuquerque Tribune, are the two newspapers with the largest circulation in the state of New Mexico. One demonstration of Citizen Action's ability to get its message in the major media comes in the form of an Albuquerque Journal editorial of December 29, 2002. This editorial argues in favor of granting Citizen Action a full fee waiver in the present case, and among other things states, "Whether you agree with Citizen Action or not - the Journal often has not - the group, which focuses on Sandia National Laboratories' Mixed Waste Landfill, makes a contribution to the public discourse." *Free Information Should Be Cheaper*, Albuquerque Journal, December 29, 2002, at B2.

Based on the above, we have no doubt that Citizen Action has the ability and intention to disseminate the information it obtains to the public, and therefore its request satisfies Factor C.

Factor D

In order to satisfy the requirements of Factor D, the requested documents must contribute significantly to the public understanding of the operations and activities of the government. “To warrant a fee waiver or reduction of fees, the public’s understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be enhanced by the disclosure to a significant extent.” *Ott*, 26 DOE at 80,780 (quoting *1995 Justice Department Guide to the Freedom of Information Act* 381 (1995)); *see also Seehuus*.

One of the letters in support of Citizen Action’s appeal states, “The public’s understanding would be significantly improved with the requested information. [Citizen Action] is trying to better determine what is in the Mixed Waste Landfill (MWL), so that they can make informed judgments and proffer informed opinions before State agencies regarding the management and decommissioning of the MWL.” Letter from Marvin Resnikoff, Radioactive Waste Management Associates, to Steve Goering, OHA (February 24, 2003) at 1-2. We agree. Whatever may ultimately be found in the documents requested, the likely effect of the disclosure to Citizen Action would be to enhance public understanding by determining with greater certainty the inventory of the MWL. *See* Letter from Carleton S. White, Ph.D., to Steve Goering, OHA (undated) (“Knowing that the questioned values are NOT in the MWL will definitely increase public understanding and evaluation of the potential threat, in any, posed by the MWL.”). We therefore find that Citizen Action’s fee waiver request meets Factor D.

III. Conclusion

After considering the bases cited by AO for not granting Citizen Action a full fee waiver, we find that a number of them (the first eight listed above) do not provide a legitimate basis for granting or denying either a waiver or reduction in fees. Although the remaining three reasons consider the appropriate issues, we do not believe that an analysis of those issues supports only a fee reduction, particularly in light of the information submitted on appeal by Citizen Action and on its behalf. We therefore conclude that Citizen Action should be granted a full fee waiver in this case. This does not mean that fee reduction, rather than waiver, is never appropriate. For example, we have approved a 75 percent reduction in fees where the disclosure of information requested was in the commercial interest of the requester, but where such disclosure would “primarily benefit the general public.” *U.A. Plumbers and Pipefitter Local 36*, 24 DOE ¶ 80,148 at 80,622-23 (1994). However, this is not such a case.³ Accordingly, we will grant the present appeal.

³ AO states that “Department of Justice attorneys we dealt with in [a prior case] suggested we use this approach for cases where we could not make a clear determination and referred us to the court case of *McClellan Ecological Seepage Situation v. Carlucci*.” Electronic mail from Terry Apodaca, AO, to Steve Goering, OHA (January 24, 2003). In that case, a federal appeals court approved a 25% reduction “on a record consisting of conclusory statements of public interest, . . . and circumstances suggesting at least a partial motive of obtaining information to advance private lawsuits.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987). This case is vastly different. We have much more than mere conclusory statements in

(continued...)

It Is Therefore Ordered That:

- (1) The Appeal filed by the Citizen Action on January 15, 2003, is hereby granted as set forth in Paragraph (2) below.
- (2) The fees assessed for complying with the August 29, 2002 Citizen Action FOIA Request shall be waived in full.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 1, 2003