

A Community Guide to

**USING THE
FREEDOM OF INFORMATION ACT
AT U.S. DEPARTMENT OF ENERGY
NUCLEAR WEAPONS SITES**



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“The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”

United States Supreme Court in NLRB v. Robbins Tire Co.
437 U.S. 214, 242 (1978)

Introduction to FOIA

The Freedom of Information Act (FOIA), codified at 5 U.S.C. § 552, makes almost every record possessed by a federal agency disclosable to the public unless it is specifically exempted from disclosure or excluded from the Act's coverage. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975). The Act provides that any person has a right which is enforceable in federal court, to maintain access to records of any federal agency, except for those documents which are exempt from disclosure by one of nine specific exemptions (covered later in this guide).

This guide sets forth the manner by which a person with no legal training may gain access to the workings of the agencies of the government of the United States, specifically the Department of Energy (DOE) and its sub-autonomous National Nuclear Security Administration (NNSA) by means of the mechanisms of FOIA. Member groups of the Alliance for Nuclear Accountability (ANA) have successfully used FOIA to challenge agency actions; expose agency waste; uncover details of agency accidents, spills, worker exposures, and cost cutting measures; and much more. ANA organizations have successfully sued the agencies for their failure to comply with FOIA and have established strong legal precedents for what the law requires.

A successful FOIA requester will always remember and incorporate the following simple rules:

- **Whenever you speak with agency personnel on the telephone, get their name and make sure that they know you are writing it down (e.g. ask for proper spellings, etc.)**
- **Whenever you speak with agency personnel on the telephone, send them a quick letter memorializing the points covered and request that they immediately inform you in writing if your recollection of the conversation is incorrect, and**
- **Make, and hang on to, copies of all correspondence involving your case.**

These surprisingly elementary points are fundamental to establishing the groundwork of a successful FOIA request but are often surprisingly overlooked by otherwise savvy activists. The result being that documents which should be disclosed are not, cases which should be won, are lost.

FOIA creates the presumption that records in the possession of agencies and departments of the executive branch of the U.S. Government are accessible. Before FOIA became law on July 4, 1966, the burden was on the requester to establish a right to examine government records. Moreover, there were no statutory guidelines or procedures in place to help a person seeking information as was there no provision for judicial review for those denied access. When FOIA was signed into law, the burden of proof shifted from the individual to the government. Those seeking information were no longer required to show a need for information. Instead, the "need to know" standard was replaced by a "right to know" doctrine. **The government now has the burden to justify a need for secrecy in order to withhold requested information.** FOIA sets standards for determining which records must be disclosed and which records may be withheld. The law also provides administrative and judicial remedies for those denied access to records. Above all, the law requires Federal agencies to provide the fullest possible disclosure of information to the public.

"The words of a statute [FOIA] are, of course, dead weights unless animated by the purpose of the statute. The purpose of this statute is to shed light "on an agency's performance of its statutory duties."

United States Department of Justice v. Reporters Committee For Freedom Of The Press, 489 U.S. 749, 772-73 (1989).

The crux of FOIA is to make Federal agencies accountable for information disclosure policies and practices. While the Act does not grant an absolute right to examine government documents, it does establish the right to request records and to receive a response to the request. **If a record cannot be released, the requester is entitled to be formally advised of the reason for the denial.** The requester also has a right to appeal the denial and, if necessary, to challenge it in court. Consequently, access to information of the Federal Government can no longer be controlled by arbitrary or unreviewable actions of a hidden bureaucracy.

It will serve you well to remember that should you be confronted by an obstructionist bureaucrat who is clearly not going to provide you with materials to which you feel you are lawfully entitled, do not argue. Rather, in such a situation the best retort (because it is the response most likely to ensure your ultimate access to the desired information) is to do everything you can to ensure that you have created an adequate record for review at the next level as afforded by FOIA. You are not likely to accomplish anything productive if you fall into an argumentative posture with the agency and you will probably tarnish the administrative record which you require to win on appeal or in court.

To be fair, the role of the agency FOIA staffer is not always as straightforward as one would hope. As accurately reflected in "FOIA Update," a publication of the U.S. Department of Justice:

Administering FOIA requires making determinations of fact, law, and policy. To do this adequately is sometimes a large or complex task, especially when requests are for records that may be numerous or sensitive. Difficulties are often magnified by new or conflicting court decisions; by gaps in an agency's knowledge, resources, organization, or training; by a need to involve other agencies; or by a need to reconcile divergent policies. FOIA Update, Vol. I, No. 1, Autumn 1979.

Correspondingly, it is usually appropriate to give the agency the benefit of the doubt the first time you encounter a problem in regard to your request. Usually, it will be a request from the agency to narrow the scope of your request, i.e. be more specific in what you are looking for. In that situation, its recommend that you do what you can to work with the agency to facilitate resolution of the problem. However, if you continue to encounter resistance, it is probably safe to assume that the real obstacle is intentional agency opposition to disclosure and you should then do everything you can to make a good record for review.

Uses of FOIA

One of the goals implemented by the passage of FOIA in 1966 was to ensure transparency in the governance of our country. The only mechanism by which we can assure governmental integrity is to have a clear understanding of what government is doing. Getting documents and other valuable information from the government is usually a crucial component in the resolution of any problem involving the operations or activities of the federal bureaucracy or those it does business with. FOIA is the best manner of access to significant resources of information which would not otherwise be available to the public.

The use of FOIA with which most people are aware is to apply it to obtain agency records for: investigative reporting; obtain records for historical or academic research; discover evidence for use in proceedings before an agency or to challenge agency rulemaking; determine if agency has obtained information through an investigation of requester; and, to use as an alternative, or supplement, to civil or criminal discovery. However, FOIA has many more subtle uses.

1. You can use the Act to illuminate, and to subject to public scrutiny, those records which concern controversial political and policy issues.

(a) *EPA v. Mink*, 410 U.S. 73, 75 (1973). Members of Congress sought public disclosure of documents transmitted to President relating to underground nuclear testing.

(b) *Center for National Security Studies v. CIA*, 711 F. 2d. 409, 410 (D.C. Cir. 1983). Public interest group uses FOIA to stimulate discussion of activities and functions of CIA.

2. You can use the Act to ensure agency performance of statutory responsibilities or expose governmental wrongdoing.

(a) *FBI v. Abramson*, 456 U.S. 615, 618 (1982). Journalist requested materials to disclose extent to which Nixon may have used the FBI to obtain derogatory information about political opponents of the White House.

(b) *Int'l B. Elec. Workers Local 41 v. HUD*, 763 F2d 435 (D.C. Cir. 1985). Union requested payroll reports submitted by nonunion contractor to protect its members from unfair and unlawful competition. Court stated, "the purpose of FOIA is to permit the public to decide *for itself* whether government action is proper."

(c) *Allen v. CIA*, 636 F.2d 1287, 1288-1300 (D.C. Cir. 1980). Request for CIA records to

determine extent to which agency may have had a role in either the assassination of President Kennedy or obstructed investigations into the assassination.

(d) *Miller v. Reilly*, Civ. No. 91-6357-JO (D. Or. 1991). Successful request for database maintained by EPA which documented agency's non-compliance with nondiscretionary duties imposed by each of the federal environmental statutes.

3. You can use the Act to invalidate agency action.

(a) Similar to Administrative Procedure Act, 5 U.S.C. § 553 *et seq.*, in that FOIA requires agency to follow specific procedures when performing rulemaking functions, in this instance, publication in Federal Register.

(b) Agency must publish in Federal Register "substantive rules of general applicability... statements of general policy or interpretations of general applicability formulated and adopted by the agency. . . . Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." 5 U.S.C. § 552(a)(1)(D).

(c) Examples of use of FOIA publishing requirement to invalidate agency action:

(1) *Morton v. Ruiz*, 415 U.S. 199, 232-235 (1974). BIA rules establishing standards of eligibility for general assistance to Native Americans struck down for failure to publish in Federal Register.

(2) *Anderson v. Butz*, 550 F. 2d. 459, 462 (9th. Cir. 1977). Secretary of Agriculture's directive amending eligibility standards for food stamp program struck for failure to publish in Federal Register.

4. You can use the Act in preparation of litigation.

Sometimes a "no record exists" response is the "smoking gun" you need if you are trying to prove that an agency acted arbitrarily in some objectionable decision. For example, if the law requires the government to have considered certain facts or undertaken a particular action which would necessarily have left a paper trail, the absence of such a trail can be used as evidence that the agency failed in the performance of its statutory duties. This tactic has been used very successfully to paint an agency into a corner from which they could not escape after litigation began.

How to Submit a FOIA Request

The first thing to do when making a request under the FOIA is to identify which agency (or branch of the agency) has the records you seek. A FOIA request must be addressed to a specific agency, there is no central government records office that services FOIA requests. Accordingly, take the time required to locate the office appropriate for your request. If you're not sure, you can consult a government directory such as the United States Government Manual. This manual has a complete list of all Federal agencies, a description of agency functions, and the address of each agency. An electronic version of the Manual may be found on the Office of the Federal Register website at <http://nara.gov/nara/fedreg/fedreg.html#ep>. If still not sure, you can always make FOIA requests to more than one agency.

Your FOIA request must be in writing. Keep in mind that your letter requesting information can be short and simple and in plain english; you don't need to have a lawyer to make a FOIA request. (Please refer to later sections for sample requests). The request letter should be addressed to the agency's FOIA officer or to the head of the agency (or to the local FOIA officer if you know the information is located in a particular place). The envelope containing the written request should be marked "Freedom of Information Act Request" in the lower left-hand corner.

The Act requires three basic elements in all request letters. First, the letter should **specifically state that it is being made under the Freedom of Information Act** (so it is properly routed to facilitate the fastest response time). Second, the request should **identify the records that are being sought as specifically as possible** (so that the agency need not guess what you are seeking or engage in a time consuming back and forth with you to figure out what you're looking for). Third, **your name and address must be included** (so the agency can respond to you, though not required by law, you should also include your phone number and email to ensure fastest possible communications with the agency).

FOIA requests to the NNSA/Office of the General Counsel may be submitted in writing, by fax, or e-mail. You may contact the Office of the General Counsel regarding the FOIA program at the following address:

FOIA/PA Officer
NNSA/Office of the General Counsel
P. O. Box 5400
Albuquerque, NM 87185-5400

You may also fax your **FOIA request** to **(505) 284-7512** or e-mail to FOIOfficer@nnsa.doe.gov. You can contact NNSA/Office of the General Counsel Staff **toll free at 866-747-5994**. To file a FOIA request, please include the following information:

"Knowledge will forever govern ignorance. And people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both."

James Madison, letter to W.T. Barry
(August 4, 1822), reprinted in G.P.
HUNT, ED., IX THE WRITINGS OF
JAMES MADISON 103 (1910).

The NNSA/Office of the General Counsel is responsible for processing all FOIA requests for the facilities listed above.

SITE OFFICE	PLANT OR LABORATORY
National Nuclear Security Administration	Headquarters, Washington, D.C.
Kansas City Site Office	Kansas City Plant, Kansas City, Missouri
Livermore Site Office	Lawrence Livermore National Laboratory, Livermore, California
Los Alamos Site Office	Los Alamos National Laboratory, Los Alamos, New Mexico
NNSA Production Office	Pantex Plant, Amarillo, Texas
	Y-12 National Security Complex, Oak Ridge, Tennessee
Sandia Site Office	Sandia National Laboratories/New Mexico Albuquerque, New Mexico
	Sandia National Laboratories/California Livermore, California
Savannah River Site Office	Savannah River, South Carolina
NNSA Albuquerque Complex	Albuquerque, New Mexico

FOIA Fee Waivers

For the purposes of an information request, FOIA does not require that you indicate the reasons you are seeking the information. However, the law allows agencies to charge fees in conjunction with the status or purpose of the requester. Different fees can be charged to commercial users, representatives of the news media, educational or noncommercial scientific institutions, and individuals. Additionally, you can seek a waiver or reduction of fees associated with your request, if you can demonstrate to the agency that the disclosure of the records you seek with substantially benefit the public interest. Consequently, a requester may be required to provide additional information to allow for agency determination the appropriate fees.

Often FOIA requesters assign their requests for fee waivers to a secondary status in the request letters, making it appear to be almost an afterthought. This may not be a problem if one is requesting a document of only a few pages. However, if you seek materials which run into thousands of pages in length-with associated search and/or duplication costs running into the thousands of dollars-a denial of a fee waiver request may be tantamount to a denial of access to the documents themselves. For this reason, it is crucial to put as much energy into your fee waiver requests as you put into the document request itself.

FOIA identifies three types of fees which may be charged. In the initial category, fees can be assessed to cover document duplication costs. All agencies have a fixed price for making copies using copying machines. You are supposed to be charged the actual cost of copying computer tapes, photographs, and other nonstandard documents.

In the second classification, fees may also be imposed to recover the costs of searching for documents. This includes the time spent looking for material responsive to a request. FOIA defines "search" as a "review, manually or by automated means," of "agency records for the purpose of locating those records responsive to a request." Under FOIA, an agency need not create documents that do not exist. Computer records found in a data base rather than a file cabinet may require the application of codes or some form of programming to retrieve the information. Under the definition of "search" in the amendments, the review of computerized records would not amount to the creation of records. Otherwise, it would be almost impossible to get records maintained completely in an electronic format, like computer data base information, because some manipulation of the information would likely be necessary to search the records. You can minimize search charges by making clear, narrow requests for identifiable documents whenever possible.

In the final category, fees can be charged to recover review costs. Review is the process of examining documents to determine whether any portion is exempt from disclosure. Review costs may be charged to commercial requesters only. Review charges only include costs incurred during the initial examination of a document. An agency may not charge for any costs incurred in resolving issues of law or policy which may arise while processing a request.

Different types of fees may be assessed against different categories of requesters. The Act stipulates that there be three categories of document requesters. The first includes representatives of the news media, and educational or noncommercial scientific institutions whose purpose is scholarly or scientific research. A requester in this category who is not seeking records for commercial use can only be billed for reasonable standard document duplication charges. So favored is this category that a request for information from a representative of the news media is

not considered to be for commercial use if the request is in support of a news gathering or dissemination function even though such activity may generate a financial benefit for the requesting party. Accordingly, it is always a good idea to attempt to coordinate your information gathering activities with the research efforts of a member of the news media.

The second category includes FOIA requesters seeking records for commercial use. Commercial use is not defined in the law, but it generally includes profitmaking activities. A commercial user can be charged reasonable standard charges for document duplication, search, and review.

The third category of FOIA requesters includes everyone not included in the first two categories. People seeking information for personal use, public interest groups, and nonprofit organizations are examples of requesters who fall into the third group. Charges for these requesters are limited to reasonable standard charges for document duplication and search.

Small requests are free for a requester in the first and third categories. **There is no charge for the first 2 hours of search time and for the first 100 pages of documents.** A noncommercial requester who limits a request to a small number of easily found records will not pay any fees at all. However, the Act also prohibits a requester from breaking a big request down into many small requests for the sole purpose of avoiding paying fees. In addition, the law also prevents agencies from charging fees if the cost of collecting the fee would exceed the amount collected. This limitation applies to all requests, including those seeking documents for commercial use. Thus, if the allowable charges for any FOIA request are small, no fees are imposed.

A requester can, and should, request a waiver of fees in their initial request. **Fees must be waived or reduced 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.** However, these amendments on fees and fee waivers created some confusion.

Typically, only after a requester has been categorized to determine the applicable fees does the issue of a fee waiver arise. A requester who seeks a fee waiver should always ask for a waiver in the original request letter. Although a request for a waiver can be made at a later time during the administrative phase of your requests, it is always the best practice to request it early; why delay the final resolution of your requests unnecessarily? You should always describe how disclosure will contribute to public understanding of the operations or activities of the government. The attached sample request letters demonstrate fee waiver language for your review.

The eligibility of other requesters will vary. A crucial aspect of qualifying for a fee waiver is the relationship of the information to public understanding of the operations or activities of government. Another important factor is the ability of the requester to convey that information to other interested members of the public. Also note that requester is not eligible for a fee waiver solely because of indigence, nor are you qualified merely because your group has been certified as "non-profit" by the IRS. You will also not qualify for a fee waiver simply because you've been granted one in the past.

How to request FOIA fee waivers

FOIA's fee standard mandates a waiver or reduction of fees associated with a request 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). Remember, this mandatory provision only applies upon a showing by a requester that disclosure of the desired records will, in fact, further the "public interest." **The initial burden is always upon the requester to make this showing.**

- A. Describe in a clear and concise manner, with as much specificity as possible, those ways in which you or your group is qualified to *digest* (fully comprehend and analyze) and *disseminate* (distribute to a larger audience) the requested information to the public's benefit. Areas of unique expertise and experience, past actions undertaken relevant to the subject matter of the requested material (e.g. publicity campaigns, direct actions, administrative involvement, litigation, etc.), these are the things which should be noted in laying a foundation for a successful fee waiver request.
- B. Describe in a clear and concise manner, with as much specificity as possible, those ways in which you or your group intend to benefit the public by use of the material requested. If you intend to use the information as the basis for litigation, say so, don't be afraid to cite to prior suits filed by you or your group as evidence of the ability to do so, this cannot be used as a basis for denial. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n. 10 (1975). If you are working on a campaign to ban sport fishing, say so. Likewise for publication of analysis in a newsletter or single-issue publication. Always look for ways to distinguish the benefit accruing to the public interest from the free disclosure of the materials to you, from the situation which exists in the status quo.
- C. The Ninth Circuit has recently-and neatly-summarized what it takes to make a prima facie case for fee waiver:

"[plaintiffs] identified why they wanted the administrative record, what they intended to do with it, [and] to whom they planned on distributing it. . . ." *Friends of the Coast Fork v. U.S. Dept. of Interior*, 110 F.3d. 53, 55 (9th Cir. 1997).

Once this initial case is made, the burden then shifts to the agency to justify its denial. Further, the agency must stick to the reasons given at the administrative level to prove their case, they cannot later employ post hoc rationales.

"True, requesters bear the initial burden of satisfying the statutory and regulatory standards for a fee waiver, *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284-85 (9th Cir. 1987) (MESS), but the government's denial letter must be reasonably calculated to put the requester on notice as to the deficiencies in the requester's case. On judicial review, we cannot consider new reasons offered by the agency not raised in the denial letter. *Independence Mining Co., Inc. v. Babbitt*, No. 95-16112, slip op. 649, 668 (9th Cir. Jan. 23, 1997) (citing *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 631 n. 31 (1980)). Taken together, these principles lead us to the following conclusion: on judicial review, the agency must stand on whatever reasons for denial it gave in the administrative

proceeding. If those reasons are inadequate, and if the requesters meet their burden, then a full fee waiver is in order." *Friends of the Coast Fork v. U.S. Dept. of Interior*, 110 F.3d. at 55.

D. As noted above, in 1986, Congress amended the criterion of judicial review of FOIA's fee waiver section, replacing the restrictive "arbitrary and capricious" threshold of review, by which courts are required to grant agencies great deference, with the more liberal de novo review standard. By thus enacting the fee waiver provision of FOIA, "Congress explicitly recognized the importance and the difficulty of access to governmental documents for under-funded organizations and individuals." *Coalition for Safe Power v. U.S. Dep't of Energy*, Civ. No. 87-1380PA, slip op. at 7 (D.Or. July 22, 1988) (citing *Better Gov't Ass'n v. Department of State*, 780 F.2d 86, 94 (D.C. Cir. 1986)).

1. Congress was particularly concerned that agencies were using search and copying costs to prevent critical monitoring of their activities:

"Indeed, experience suggests that agencies are most resistant to granting fee waivers when they suspect that the information sought may cast them in a less than flattering light or may lead to proposals to reform their practices. Yet that is precisely the type of information which the FOIA is supposed to disclose, and agencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information..." 132 Cong. Rec. S14298 (Sen. Leahy).

2. Addressing this concern, FOIA's newly expanded fee waiver provision was intended specifically to facilitate access to agency records by citizen "watchdog" organizations, which utilize FOIA to monitor and mount challenges to governmental activities. See *Better Gov't Ass'n v. Department of State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986)(fee waiver intended to benefit public interest watchdogs). Fee waivers are essential to such groups, which:

"rely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities - publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions....

"The waiver provision was added to FOIA "in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests," in a clear reference to requests from journalists, scholars and, most importantly for our purposes, nonprofit public interest groups." *Better Gov't Ass'n*, 780 F.2d at 93-94.

3. One of the favored goals of FOIA is to promote the active oversight roles of watchdog public advocacy groups, organizations which actively challenge agency actions and policies, especially in the courts:

"A requester is likely to contribute significantly to public understanding if the information disclosed is new; supports public oversight of agency operations; or otherwise confirms or clarifies data on past or present operations of the government." 132 Cong. Rec. H9464 (Reps. English and Kindness).

"The waiver provision was added to FOIA 'in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,' in a clear reference to requests from journalists, scholars and, most importantly for our purposes, nonprofit public interest groups." *Better Gov't Ass'n*, 780 F.2d at 94 (emphasis added).

- E. Courts have noted approvingly the legislative history of the Act to find that a fee waiver request is likely to pass muster "if the information disclosed is new; supports public oversight of agency operations, including the quality of agency activities and the effects of agency policy or regulations on public health or safety; or, otherwise confirms or clarifies data on past or present operations of the government." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284-1286 (9th. Cir. 1987). Frame your fee waiver request accordingly.
- F. However, merely establishing a public interest in the subject matter of the requested materials is not enough to qualify for a fee waiver, indeed, "inability to disseminate the information to the public . . . alone is a sufficient basis for denying the fee waiver request." *Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988). Likewise, the mere recitation that a requesting party is a non-profit group in the eyes of the IRS, or that it has been granted public interest fee waivers in the past will carry no dispositive weight in fee waiver analysis. Do **not** rely upon such assertions alone to qualify your request for a fee waiver; you will lose.
- G. Any reviewing court is limited in its fee waiver deliberations to considering only those facts contained in the administrative record. 5 U.S.C. § 552(a)(4)(vii). Thus, it is of paramount importance to get all facts which you feel support your waiver request into the agency record, everything; if it's not before the agency decision-maker, the judge can not consider it.

The government is currently fighting fee waiver requests with vigor. For you to prevail, you must lay out a very good basis for the granting of the waiver. Too often, it appears that groups add their waiver requests as an afterthought, devoting a few cursory sentences to this component of their request. Such requests are almost always denied. Do not let this happen to you. Fee waiver request should be viewed as a significant part of a FOIA request. It will provide you or your group little benefit for an agency to agree to disclose the requested records, but to charge a fee so high that you cannot afford access to the records you have fought so hard to review.

FOIA Exemptions

FOIA maintains nine exemptions to the general presumption of mandatory disclosure. 5 U.S.C. § 552(b)(1)-(9). Generally, Congress intended the exemptions to protect against disclosure of information which would substantially harm national defense or foreign policy, individual privacy interests, business proprietary interests, and the efficient operation of governmental functions. An agency has the authority to construe the exemptions as discretionary rather than mandatory when no harm would result from disclosure of the requested information. *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979). Consequently, even if a requested document falls within one of the nine exemptions, the agency should be asked to release it anyway as an exercise of its discretionary powers. Moreover, "[t]hese exemptions are specifically made exclusive . . . and must be narrowly construed." *Dept. of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). Additionally, remember that a request for a document which does not qualify as an **"agency record"** may be denied because only agency records are available under the FOIA.

When a requested document contains some information which falls under one of the exemptions, the FOIA requires that all non-exempt portions of the record must still be released. **The Act expressly mandates that any "reasonably segregable portion" of a record must be disclosed to a requester after the redaction** (the deletion of part of a document to prevent disclosure of material covered by an exemption) of the parts which are exempt. 5 U.S.C. § 552(b). This is a very important aspect of FOIA because it prohibits an agency from withholding an entire document merely because one line, one page or one picture are exempt.

The ease with which records in electronic format can be redacted makes impossible the determination of whether only a few words or many pages have been withheld by an agency. This problem was addressed by the 1996 amendments to the FOIA which mandate that agencies identify the location of deletions in the released portion of the record and-where technologically feasible-to show the deletion at the place on the record where the deletion was made, unless including that indication would harm an interest protected by an exemption.

THE NINE FOIA DISCLOSURE EXEMPTIONS ARE AS FOLLOWS:

1. National defense or foreign policy information properly classified pursuant an Executive Order. 5 U.S.C. § 552(b)(1).

This exemption allows the withholding of properly classified documents. The basis for classification is expressly limited to protecting an interest of national defense or foreign policy. The rules for classification are established and periodically updated by the President. They are not a product of the FOIA or other law. Under exemption one, if a document has been properly classified under a Presidential Executive order, the document can be withheld from disclosure.

However, classified documents may still be requested under the FOIA. An agency may then review the document to determine if it still requires protection. The Executive order on security classification establishes a special procedure for requesting the declassification of documents.

Remember that even if a requested document is declassified, it still may be exempt under other FOIA exemptions.

2. Documents "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2).

Exemption 2 permits an agency to withhold from mandatory disclosure records “related solely to the internal personnel rules and practices of an agency.” The exact scope of what is covered under Exemption 2 was the subject of much legal debate after a controversial appeals court decision from 1981 that recognized an expansive reading of Exemption 2. This court’s interpretation, which recognized what was referred to as the “High 2” exemption, was ultimately rejected in 2011 by the U.S. Supreme Court in *Milner v. Department of Navy*.

In *Milner*, the U.S. Supreme Court resolved a significant split among federal circuit courts of appeal as to the scope of Exemption 2, and limited the types of records for which agencies may now invoke Exemption 2.

Prior to *Milner*, three federal appeals courts interpreted Exemption 2 strictly, holding it applied to records “related solely to the internal personnel rules and practices of an agency” — a category of Exemption 2 materials commonly referred to as “Low 2.” For example, a court ruled that the Department of Justice could withhold under “Low 2” those portions of a Drug Enforcement Administration Agents’ manual that addressed “mere ‘housekeeping’ matters, such as instructions on filling out forms” and “procedures for requisitioning cars from the car pool.”

However, four other federal appellate courts ruled that Exemption 2 included — in addition to “Low 2” materials — “predominant[ly] internal[]” materials, the disclosure of which would “significantly risk[] circumvention of federal statutes or regulations.” This category of materials became known as “High 2.” Agencies relied on this “High 2” interpretation to withhold, for example, portions of an agency manual that referred to investigative techniques, as well as FBI symbols related to informants.

The government aggressively relied on “High 2” following the September 11, 2001, terrorist attacks. Citing the need to “safeguard sensitive but unclassified information related to America’s homeland security,” then-White House Chief of Staff Andrew Card in 2002 instructed executive agency and department heads to withhold “sensitive critical infrastructure information” under Exemption 2. Similarly, the Department of Justice issued guidance in 2001 stating that “[a]gencies should be sure to avail themselves of the full measure of Exemption 2’s protection,” and specifically noted that “High 2” could be used to withhold “a wide range of information.”

In *Milner*, the U.S. Supreme Court clarified that “Low 2 is all of [Exemption] 2 (and that High 2 is not 2 at all).” The Court held that the U.S. Navy could not rely on Exemption 2 to withhold data and maps that calculate and depict hypothetical munition detonation blast ranges, as the materials related to “the physical rules governing explosives” and “the handling of dangerous materials,” rather than “the workplace rules governing sailors” or “the treatment of employees.”

In *Milner* the Court stated that “[t]he key word” in this exemption is “personnel,” which “refers to human resources matters.” It interpreted “personnel” in *Milner* by referring to its dictionary definition: “the selection, placement, and training of employees and . . . the formulation of policies, procedures, and relations with [or involving] employees or their representatives.” Further, the Court clarified that an agency cannot withhold a record such as a “file or department or

practice/rule” under Exemption 2 on the basis that it “is *for* personnel” use. Instead, it must be “*about* personnel — *i.e.*, that it relates to employee relations or human resources.”

With respect to the “rules and practices” covered by Exemption 2, the Court explained that they “share a critical feature: They concern the conditions of employment in federal agencies — such matters as hiring and firing, work rules and discipline, compensation and benefits.” For example, information about the “use of parking facilities or regulations of lunch hours, statements of policy as to sick leave, and the like” would fall within this exemption, as would “matters relating to pay, pensions, vacations, [and] hours of work.”

The *Milner* Court did not elaborate on the requirement that the information be solely “internal,” but did say that it means that “the agency must typically keep the records to itself for its own use.” The Court cited the definition of “internal” as it appeared in a dictionary: “existing or situated within the limits . . . of something.” It noted that agencies’ “human resources documents will often meet” this requirement, as well as the next — that the records relate “solely” to internal personnel rules and practices.

Even where the records are arguably internal and relate to personnel rules and practices, Exemption 2 may not apply where there is a public interest in them. If a requester demonstrates that the records relate to a matter that is the legitimate subject of public interest, then the records arguably cannot be “solely” — defined as “exclusively or only” — matters “with merely internal significance.” Exemption 2 was designed to “relieve agencies of the burden of assembling and maintaining for public inspection matter[s] in which the public could not reasonably be expected to have an interest,” and therefore does not apply to matters that are of “a genuine and significant public interest.”

For example, in a 1976 U.S. Supreme Court case, the Court ruled that case summaries of hearings conducted by the U.S. Air Force Academy Honor Board were matters of “genuine and significant public interest,” rather than of “merely internal significance,” because the way in which the Ethics Code was administered would impact who would be selected to serve as Air Force officers. The Court explained that “[t]he implication for the general public of the Academy’s administration of discipline is obvious, particularly so in light of the unique role of the military,” as the Honor Code is “a separate discipline from that of the civilian” and its administration is tied to “the maintenance of a force able and ready to fight effectively.” The requester demonstrated government, professional, and academic interest in the fairness in the Honor Code’s administration by identifying news excerpts, an official press conference, and a White House press release related to the issue, as well as a study the requester was then conducting on the topic. You should likewise be prepared to provide the agency with similar evidence to demonstrate public and government interest in the subject of the records.

If the agency claims that a requester has not proven that there is a public interest in disclosure, they can point out that “it is the agency’s burden to establish that the information withheld is too trivial to warrant disclosure.”

In one case, a court found that an agency failed to meet this burden where it provided only one sentence to explain its withholding under Exemption 2 in a court document: “There is no public interest in the disclosure of such internal procedures and clerical information that would justify the administrative burden that would be placed upon” the agency. In that case, the court explained that the requester “need not produce dispositive evidence that there is a public interest in this information,” and remanded the case to allow the agency to explain why Exemption 2 would apply

to the records. While not necessarily the requester's burden, in order to try to convince an agency that the information is not too trivial to be released, a requester should provide it with evidence of demonstrated public interest in the subject of the records.

In appealing denials under the "personal rules and practices" portion of Exemption 2, a requester can argue that the records you seek do not pertain to rules or practices *about* human resources matters. For example, the Court held in *Milner* that while the requested records — explosives-related maps and data showing the travel distances of potential blasts — may “no doubt assist[] Navy personnel in storing munitions,” they did not “relate to ‘personnel rules and practices.’” Similarly, one court following *Milner* explained that “personnel rules and practices” records would include “workplace rules governing prison employees or the treatment of prison employees.” However, the court found the exemption inapplicable with respect to records related to “tracking and monitoring inmates,” “supervising problem inmates,” “reviewing and reporting inmate deaths,” and “responding to major incidents within prisons.”

Both before and after *Milner*, the U.S. Department of Justice's Office of Information Policy advised federal agencies to grant **discretionary releases** of “Low 2” materials in cases where no reasonably foreseeable harm would result. For example, before *Milner*, the Office stated that “[i]nformation covered by ‘Low 2’ is, by definition, trivial to begin with, thus there would be no reasonably foreseeable harm from release, and discretionary release should be the general rule.” Likewise, following *Milner*, the agency noted that “Exemption 2 has always held great potential for discretionary releases,” and “[i]ndeed, it is often more burdensome to withhold information than it is to release it.” Therefore, arguing for a discretionary release can be an additional basis for disclosure in the event an agency maintains it has authority to withhold under Exemption 2.

3. Documents "specifically exempted from disclosure by statute" other than FOIA, but only if the other statute's disclosure prohibition is absolute. 5 U.S.C. § 552(b)(3).

This exemption simply incorporates into FOIA other laws which restrict the availability of information. Exemption 3 allows the withholding of information prohibited from disclosure by another statute only if one of two disjunctive requirements are met: the statute in question either "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." A statute thus falls within the exemption's coverage if it satisfies any one of its disjunctive requirements. *See Long v. IRS*, 742 F.2d 1173, 1178 (9th Cir. 1984. *See generally* 5 U.S.C. § 552(e)(1)(A)(ii) (provision of Electronic Freedom of Information Act Amendments of 1996 requiring agencies to list Exemption 3 statutes upon which they rely each year in their annual FOIA reports, beginning with reports for Fiscal Year 1998). One example of a qualifying statute is the provision of the Code prohibiting the public disclosure of tax returns and tax return information. *See*, 26 U.S.C. Sec. 6103. Another qualifying exemption 3 statute is the law designating identifiable census data as confidential. *See*, 13 U.S.C. Sec. 9.

4. Documents which would reveal "[t]rade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4).

Exemption 4 protects from public disclosure two types of information: (1) trade secrets; and (2) information that is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential. Congress intended this exemption to protect the interests of both the government and submitters of information. Its existence encourages submitters to voluntarily furnish useful commercial or financial information to the government and it correspondingly provides the government with an assurance that such information will be reliable.

A trade secret is a commercially valuable plan, formula, process, or device. This is a narrow and relatively easily recognized category of information. It is "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). An example of a trade secret might be the formula of a gasoline additive. The second form of protected data is "commercial or financial information obtained from a person and privileged or confidential." Courts have held that data qualifies for withholding if disclosure by the government would be likely to harm the competitive position of the person who submitted the information. Detailed information on a company's marketing plans, profits, or costs can qualify as confidential business information. Information may also be withheld if disclosure would be likely to impair the government's ability to obtain similar information in the future.

Generally, the commercial/financial nature of a document is not difficult to ascertain, consequently, the main issue in contest is whether the information is privileged or confidential.

A leading case on this aspect of Exemption 4 sets out the test for exempting commercial information from FOIA disclosure as follows:

"Commercial or financial matter is "confidential" for purposes of [Exemption 4] if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C.Cir. 1974); see also *Frasee v. U.S. Forest Service*, 97 F.3d 367, 371 (9th Cir. 1996).

This review has been further bifurcated in the analysis set forth in *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C.Cir. 1992) (en banc). In Critical Mass:

"the D.C. Circuit reaffirmed the two-prong National Parks confidentiality test, holding that the substantial competitive harm test was to be applied to information *mandatorily* provided to the government. The court then established a separate test to be applied to information *voluntarily* submitted to the government. The court concluded that information that is voluntarily provided to the Government is 'confidential' for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the

public by the person from whom it was obtained." *Frasee v. U.S. Forest Service*, 97 F.3d at 372.

However, the Ninth Circuit has expressly refused to incorporate this two level test as precedent. *Id.* Consequently, the more difficult to satisfy (for the agency) "substantial competitive harm" test remains the law applicable to this Circuit.

5. Documents which are "inter-agency or intra-agency memorandum or letters" which would be privileged in civil litigation. 5 U.S.C. § 552(b)(5).

Exemption 5 is an exemption very frequently invoked against public interest requesters because the nature of such party's intended uses are usually to get information regarding the agency's processes and conclusions. The exemption was intended to incorporate common-law privileges against discovery. Of all such privileges, the one most frequently encountered by public interest requesters is based on the concept of "executive" privilege which protects recommendations and advice which are part of the "deliberative process" involved in governmental decision-making. The rationale being to protect the integrity of agency decision-making by encouraging both full and frank discussions of policy proposals and to prevent premature disclosure of policies under review.

The exemption also incorporates other of privileges which would apply in litigation involving the government. For example, papers prepared by the government's lawyers can be withheld in the same way that papers prepared by private lawyers for clients are not available through discovery in civil litigation. However, this incorporation of discovery privileges requires that a privilege be applied in the FOIA context as it exists in the discovery context. See *United States Dep't of Justice v. Julian*, 486 U.S. 1, 13 (1988) (holding that presentence report privilege, designed to protect report subjects, cannot be invoked against them as first-party requesters). Thus, the precise contours of a privilege, with regard to applicable parties or types of information which are protectible, are also incorporated into the FOIA. *Id.*

Courts have resolved to distinguish "pre-decisional" documents, which fall within the protections of Exemption 5, and "post-decisional" documents, which must be disclosed. *F.T.C. v. Warner Comm. Inc.*, 742 F.2d 1156, 1161 (9th. Cir. 1984); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151-153 (1975) (memos directing agency counsel criteria and actions involved in decision to file complaints are not final dispositions of issue, and are thus protected, while final opinions or dispositions can never be protected by Exemption 5).

However, even if a document is pre-decisional, some courts have upheld a distinction between "materials reflecting deliberative or policy-making process on the one hand, and purely factual, investigative matters on the other," the exemption protects the former, not the latter. *EPA v. Mink*, 410 U.S. 73, 89 (1973). Those portions of a document which are not exempt must be disclosed unless they are "inextricably intertwined" with the exempt portions. *Ryan v. Dept. of Justice*, 617 F. 2d 781, 790-91 (D.C. Cir. 1980).

The Ninth Circuit has rejected a major component of the fact/opinion distinction by embracing a "process-oriented" rule that "to the extent that they reveal the mental process of decisionmakers," factual materials are not automatically outside the ambit of exemption 5. *National Wildlife Federation v. U.S. Forest Service*, 861 F.2d 1114, 1119 (9th. Cir. 1988); see also *Assembly of the State of California v. U.S. Dept. of Comm.*, 968 F.2d. 916, 921 (9th. Cir. 1992). As almost all agency fact-finding may be construed in some manner to reveal aspects of the decision-making process, this fuzzy rationale creates an exception which threatens to swallow the rule.

6. Documents which are "personnel and medical and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).

This exemption protects the privacy interests of individuals by allowing an agency to withhold personal data kept in government files. Keep in mind that by the plain terms of the statute, only individuals can have privacy interests. By definition, corporations and other "legal persons" can have no privacy rights under the Exemption 6 because there can be no objective expectation attaching against an "unwarranted invasion of personal privacy." Occasionally, agencies or business submitters of information will assert Exemption 6 when, in fact, the proper analysis should sound under Exemption 4.

(a) The Supreme Court has reviewed the application of this exemption. It noted: First, in evaluating whether a request for information lies within the scope of a FOIA exemption, such as Exemption 6, that bars disclosure when it would amount to an invasion of privacy that is to some degree 'unwarranted, 'a court must balance the public interest in disclosure against the interest Congress intended the [e]xemption to protect." *Department of Defense v. F.L.R.A.*, 114 S.Ct. 1006, 1012 (1994).

(b) The Court continued:

Second, the only relevant "public interest in disclosure" to be weighed in this balance is the extent to which disclosure would serve the "core purpose of the FOIA," which is "contribut[ing] significantly to public understanding of the operations or activities of the government. *Id.*

In other words, the requested materials must in some way illuminate "what the government is 'up to'" in order to justify disclosure. A request for information from the government which illustrates what you neighbor, or business competitor, is "up to" will not meet the public interest balancing test under exemption 6. The exemption requires agencies to strike a balance between an individual's privacy interest and the public's right to know. However, since only a clearly unwarranted invasion of privacy is a basis for withholding, there is a perceptible tilt in favor of disclosure in the exemption. "In the Act generally, and particularly under Exemption (6), there is a strong presumption in favor of disclosure." *Local 598 v. Department of Army Corps of Engineers*, 841 F.2d 1459, 1463 (9th. Cir. 1988) (emphasis added). In that case, the Ninth Circuit reviewed the context of applicable Exemption 6 case law:

The Freedom of Information Act embodies a strong policy of disclosure and places a duty to disclose on federal agencies. As the district court recognized, 'disclosure, not secrecy, is the dominant objective of the Act.' *Department of the Air Force v. Rose*, 425 U.S. 352, 361, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11 (1976). 'As a final and overriding guideline courts should always keep in mind the basic policy of the FOIA to encourage the maximum feasible public access to government information....' *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704, 715 (D.C.Cir.1977). As a consequence, the listed exemptions to the normal disclosure rule are to be construed narrowly. See *Rose*, 425 U.S. at 361, 96 S.Ct. at 1599. *This is particularly true of Exemption (6). Exemption (6) protects only against disclosure which amounts to a 'clearly unwarranted invasion of personal privacy.' That strong language 'instructs us to 'tilt the balance [of disclosure interests against privacy interests] in favor of disclosure.'*"

Id. (emphasis added), citing *Washington Post Co. v. Department of Health and Human Servs.*, 690 F.2d 252, 261 (D.C.Cir.1982) (quoting *Ditlow v. Shultz*, 517 F.2d 166, 169 (D.C. Cir.1975)).

Moreover, the Privacy Act of 1974 regulates the disclosure of personal information about an individual. The FOIA and the Privacy Act partially overlap in this regard, but there is no real inconsistency. An individual seeking records about herself should cite both laws when making a request. This will ensure that the maximum amount of disclosable information will be released. Also remember that records which can be denied to an individual under the Privacy Act are not necessarily exempt under the FOIA.

7. Documents which are "records or information compiled for law enforcement purposes," but only if one or more of six specified types of harm would result. 5 U.S.C. § 552(b)(7).

Congress intended for Exemption 7 to allow agencies to withhold law enforcement records in order to protect the law enforcement process from interference. The exemption was amended slightly in 1986, but it still retains six specific subexemptions.

Exemption (7)(A) provides for the withholding of a law enforcement record the disclosure of which would reasonably be expected to interfere with enforcement proceedings. This exemption protects an active law enforcement investigation from interference through premature disclosure. Therefore, determining the applicability of this Exemption 7(A) requires a two-step analysis focusing on (1) whether a law enforcement proceeding is pending or prospective and (2) whether release of information about it could reasonably be expected to cause some articulable harm. See, e.g., *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978) (holding that government must show how records "would interfere with a pending enforcement proceeding").

Exemption (7)(B) allows the withholding of information that would deprive a person of a right to a fair trial or an impartial adjudication. It is aimed at preventing prejudicial pretrial publicity that could impair a court proceeding. A reviewing court established a two part test of the applicability of this rarely used exemption: "(1) that a trial or adjudication is pending or truly imminent; and (2)

that it is more probable than not that disclosure of the material sought would seriously interfere with the fairness of those proceedings." *Washington Post Co. v. United States Department of Justice*. 863 F.2d 96, 101-02 (D.C. Cir. 1988).

Exemption (7)(C) recognizes that individuals have a privacy interest in information maintained in law enforcement files. It is the law enforcement counterpart to Exemption 6, providing protection for law enforcement information the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." If the disclosure of information could reasonably be expected to constitute an unwarranted invasion of personal privacy, the information is exempt from disclosure. The standards for privacy protection in exemption 6 and exemption (7)(C) differ slightly. Exemption (7)(C) protects against an "unwarranted invasion of personal privacy" while exemption 6 protects against a "clearly unwarranted invasion." Also, exemption (7)(C) allows the withholding of information that "could reasonably be expected to" invade someone's privacy. Under exemption 6, information can be withheld only if disclosure "would" invade someone's privacy. The D.C. Court of Appeals held in *SafeCard Services v. SEC*, 926 F.2d 1197 (D.C. Cir. 1991), that, based upon the traditional recognition of the strong privacy interests inherent in law enforcement records and the logical ramifications of *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) the "categorical withholding" of information that identifies third parties in law enforcement records will ordinarily be appropriate under Exemption 7(C).

Exemption (7)(D) protects the identity of confidential sources. Information which could reasonably be expected to reveal the identity of a confidential source is exempt from disclosure. It has historically been recognized that Exemption 7(D) provides the most comprehensive protection of all of FOIA's law enforcement exemptions. The courts have repeatedly indicated their appreciation that a "robust" Exemption 7(D) is important to ensure that "confidential sources are not lost through retaliation against the sources for past disclosure or because of the sources' fear of future disclosure." *Brant Constr. Co. v. EPA*, 778 F.2d 1258, 1262 (7th Cir. 1985; see, also., *Ortiz v. HHS*, 70 F.3d 729, 732 (2d Cir. 1995) Additionally, the Exemption 7(D) protects information furnished by a confidential source if the data was compiled by a criminal law enforcement authority during a criminal investigation or by an agency conducting a lawful national security intelligence investigation.

Exemption (7)(E) protects from disclosure information which would reveal techniques and procedures for law enforcement investigations or prosecutions or that would disclose guidelines for law enforcement investigations or prosecutions if disclosure of the information could reasonably be expected to risk circumvention of the law.

Exemption (7)(F) protects law enforcement information which could reasonably be expected to endanger the life or physical safety of any individual. Courts have interpreted Exemption 7(F) as affording protection of the "names and identifying information of . . . federal employees, and third persons who may be unknown" to the requester in connection with particular law enforcement matters. *Luther v. IRS*, No. 5-86-130, slip op. at 6 (D. Minn. Aug. 13, 1987). Significantly, Exemption 7(F) protection has been held to remain applicable even after a law enforcement officer subsequently retired. *Moody v. DEA*, 592 F. Supp. 556, 559 (D.D.C. 1984).

8. Documents which are related to specified reports prepared by, on behalf of, or for the use of agencies which regulate financial institutions. 5 U.S.C. § 552(b)(8).

Exemption 8 protects information that is contained in or related to examination, operating, or condition reports prepared by or for a bank supervisory agency such as the Federal Deposit Insurance Corporation, the Federal Reserve, or similar agencies.

9. Documents which would reveal oil well data. 5 U.S.C. § 552(b)(9).

The ninth FOIA exemption covers geological and geophysical information, data, and maps about wells. It is rarely used.

FOIA Amendments

It is important to note, that FOIA is “amended” by Congress every couple of years. It is becoming a trend for every President to support “improvements” to the law. It is unknown whether or how the Trump Administration might seek to amend the act, but it is something to be aware of and to potentially comment on if amendments are proposed that are not friendly to requestors.

The last couple FOIA amendments sought to force agencies to open a great majority of their records to automated access via the Internet. Congress found that "Government agencies increasingly use computers to conduct agency business and to store publicly valuable agency records and information; and . . . Government agencies should use new technology to enhance public access to agency records and information." See P.L. No. 104-231, 101 Stat. 2422, Sec. 2(a)(1996). Accordingly, you may now get information from an agency's site on the Internet which previously required the time and difficulty of submitting a written FOIA request. However, the DOE and NNSA have been slow to comply with all of the mandates set forth in recent amendments.

The FOIA amendment of 1996 was the first to address how FOIA should work in the digital age, among other clarifications...

A. FOIA, 5 U.S.C. § 552, et seq., enacted on July 4, 1966, the Act established for the first time, a statutory right of access to almost all federal agency records.

1. FOIA is unique in the world for effectuating the concept of public disclosure of internal governmental operations.
2. FOIA allows "any person" to request materials. 5 U.S.C. § 552(a)(3). "Person" includes any "individual, partnership, corporation, association, or public or private organization other than an agency." 5 U.S.C. § 551(2).
3. FOIA applies to any "agency records" which are documents which are (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request. U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989). The 1996 amendments to FOIA explicitly indicate that the term "record" and any other term used in FOIA in reference to information, should "include any information that would be an

agency record subject to the requirements of this section when maintained by an agency in any format, **including an electronic format.**" 5 U.S.C. § 552(f)(2).

(a) Note that the second prong of this analysis means that the agency is not required to affirmatively produce documents which do not exist at the time of the FOIA request, e.g., an agency is not required to draft a summary of data which it may possess, even though the data itself might be disclosable under FOIA.

(b) The recent expansion of the use of computer technology has prompted courts to explore the inclusion of computer software, as opposed to the data stored and organized by the software, within the definition of "agency records." *Cleary, Gottlieb, Steen & Hamilton v. HHS*, 844 F. Supp. 770, 782 (D.D.C. 1993)

The 1996 FOIA Amendments broke down into three general categories. One, the Amendments imposed a number of mandates to enhance public access to agency records by requiring that agencies provide indexes to help requesters best craft their requests and to ensure that previously requested records are available without the filing of a request. Two, the Amendments enhanced the public's ability to obtain records in electronic format by confirming that records in electronic form are subject to FOIA. Accordingly, agencies were required to honor requesters' preference for special format-if reasonably feasible-and agencies were required to make more information available on the internet. And three, the Amendments slightly extended the deadlines in which to respond to an initial FOIA request while modifying the procedures for reviewing FOIA requests to allow for faster processing while requiring agencies to reduce backlogs and delays.

A summary of the major components of the Amendments is set out below:

- A. **Electronic Records** -5 U.S.C.§ 552(a)(2)(D)-Records which are subject to FOIA shall be made available under the Act when the records are maintained in electronic format. This clarifies existing practice by making the statute explicit on this point.
- B. **Format Requests** -5 U.S.C.§ 552(a)(3)(B)-(D)-Requesters may ask for data in any form or format in which the agency maintains those records. Agencies must make a "reasonable effort" to comply with requests to furnish records in other formats.
- C. **Redaction** -5 U.S.C.§ 552(b)-Agencies redacting electronic records (deleting part of a record to prevent disclosure of material covered by an exemption) must note the location and the extent of any deletions made on a record.
- D. **Expedited Processing** -5 U.S.C.§ 552(a)(6)(E)-Certain categories of requesters would receive priority treatment of their requests if failure to obtain information in a timely manner would pose a significant harm. The first category of requesters entitled to this special processing includes those who could reasonable expect that delay could pose an imminent threat to the life or physical safety of an individual. The second category includes requests made by a person primarily engaged in the dissemination of information to the public, and involving compelling urgency to inform the public. The term "primarily engaged" requires that information dissemination be the main activity of the requester, though it need not be their sole occupation. The specified categories for compelling need are to be narrowly applied.
- E. **Multitrack Processing** -5 U.S.C.§ 552(a)(6)(D)-Agencies will be able to establish procedures for processing requests of various sizes on different tracks. Because of this

procedure, larger numbers of requests for smaller amounts of material will be completed more quickly. Requesters will also have an incentive to frame narrower requests.

- F. **Deadlines** -5 U.S.C. § 552(a)(6)(A)-The deadline for responding to a FOIA request is extended to 20 working days from the current 10 working day requirement for initial determinations.
- G. **Agency Backlogs** -5 U.S.C. § 552(a)(6)(B)-(C)-Agencies can no longer delay responding to FOIA requests because of "exceptional circumstances" simply as a result of predictable request workload. This strengthens the requirement that agencies respond to requests on time. This single provision has the potential to have the greatest impact upon FOIA requests and litigation. Of a total of 75 agencies responding to a Department of Justice request for backlog information in February 1994, only 28 agencies could report that they had no backlog. Agencies have consistently failed to comply with FOIA's response deadline, and courts have allowed this. Congress has seemingly tried to put some teeth into the newly expanded 20 day response deadline by explicitly limiting the basis by which an agency can excuse a delay in the processing of a FOIA request.
- H. **Reporting Requirements**-5 U.S.C. § 552(e)-The amendments expands certain reporting requirements, e.g. agency reports to Congress regarding their levels of FOIA compliance, and requires agencies to make more information available through electronic means.

In 2007 President Bush signed the Openness Promotes Effectiveness in our National Government Act. This law, also known as the "OPEN Government Act of 2007", amended the federal FOIA statute in several ways:

1. It established a definition of "a representative of the news media;"
2. It directed that required attorney fees be paid from an agency's own appropriation rather than from the Judgment Fund;
3. It prohibited an agency from assessing certain fees if it fails to comply with FOIA deadlines; and
4. It established an Office of Government Information Services (OGIS) in the National Archives and Records Administration to review agency compliance with FOIA.

Changes include the following:

- it recognizes electronic media specifically and defines "News Media" as "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."
- it extends the 20-day deadline by allowing for up to 10 days between the FOIA office of the agency and the component of the agency holding the records and specifically allows for clarification of requests by the FOIA office.
- it calls for each agency to designate a FOIA Public Liaison, "who shall assist in the resolution of any disputes".
- it requires agencies to assign tracking numbers to FOIA requests that take longer than 10 days, and to provide systems determining the status of a request.
- it codifies and defines annual reporting requirements for each agency's FOIA program.
- it specifically addresses data sources used to generate reports; "shall make the raw statistical data used in its reports available electronically ..."

- it redefines the definition of an agency "record" to include information held for an agency by a government contractor.
- it establishes an Office of Government Information Services (OGIS) which will offer mediation services to resolve disputes as non-exclusive alternative to litigation.
- it requires agencies to make recommendations personnel matters related to FOIA such as whether FOIA performance should be used as a merit factor.
- it requires agencies to specify the specific exemption for each deletion or redaction in disclosed documents.

In 2009, President Barack Obama issued Executive Order 13526, which allows the government to classify certain specific types of information relevant to national security after it has been requested. That is, a request for information that meets the criteria for availability under FOIA can still be denied if the government determines that the information should have been classified, and unavailable. It also sets a timeline for automatic declassification of old information that is not specifically identified as requiring continued secrecy (generally 25 years).

Another important development was Obama's Open Government Directive which required agencies to provide requestors with an **estimated date of release** if exceptional circumstances have been claimed.

The most recent FOIA amendment occurred in 2016. The following is from the DOJ's website regarding the new requirements of the 2016 amendment, most of which has not been tested by the courts yet:

Proactive Disclosures:

The "Rule of 3" is Codified for Frequently Requested Records:

- Agencies are now required to "make available for public inspection in an electronic format," records "that have been requested 3 or more times."

Disclosure Requirements:

Codification of Department of Justice's Foreseeable Harm Standard:

- Agencies "shall withhold information" under the FOIA "only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption" or "disclosure is prohibited by law."
- Agencies shall "consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible."
- Agencies shall "take reasonable steps necessary to segregate and release nonexempt information."
- This provision does not require disclosure of information "that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under [Exemption] 3."

Sunset on Deliberative Process Privilege:

- Exemption 5 of the FOIA is amended to provide that "the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested."

Changes in Procedures When Processing Requests:

Extending Time Limits - New Requirement when extending deadline beyond an additional ten days:

- Whenever agencies extend the time limits by more than ten additional working days, in the written notice to the requester they “must notify the requester of right to seek dispute resolution services from the Office of Government Information Services.”

Fees - Further limitation on Assessing Search Fees (or, for requesters with preferred fee status, duplication fees) if Response time is delayed:

- When agencies determine that “unusual” circumstances apply to the processing of a request, and they have provided “timely written notice to the requester,” the delay is “excused for an additional 10 days.” “If the agency fails to comply with the extended time limit,” it may not charge search fees (or for requesters with preferred fee status, may not charge duplication fees).

Exception: If unusual circumstances apply and “more than 5000 pages are necessary to respond to the request,” agencies may charge search fees (or, for requesters in preferred fee status, may charge duplication fees) if timely written notice has been made to the requester and “the agency has discussed with the requester via written mail, electronic mail, or telephone (or made not less than 3 good-faith attempts to do so) how the requester could effectively limit the scope of the request.”

Court Determination that "exceptional circumstances" exist: If a court determines that “exceptional circumstances exist,” the agency’s failure to comply with a time limit “shall be excused for the length of time provided by the court order.”

Response Letters - New Required Elements for Response Letters

When agencies make their determinations on requests they must offer the services of their FOIA Public Liaison and must notify requesters of their services provided by the Office of Government Information Services (OGIS). They must also allow requesters a period of at least 90 days within which to file an administrative appeal. Specifically, agencies must include in their notification to the requester:

- “the right of such person to seek assistance from the FOIA Public Liaison of the agency,” and, in the case of an adverse determination:
- the right to appeal within a period of time “that is not less than 90 days after the date of such adverse determination,” and
- “the right of such person to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services.”

New Duties for Chief FOIA Officers

There are now additional duties and responsibilities assigned to agency Chief FOIA Officers.

These officials are now required to:

- “offer training to agency staff regarding their [FOIA] responsibilities,” and
- “serve as the primary liaison with the Office of Government Information Services and the Office of Information Policy.”

Chief FOIA Officers are also now required to “review, not less frequently than annually, all aspects” of their agency’s administration of the FOIA “to ensure compliance” with the FOIA’s requirements. The following topics are to be included in the review:

- Agency regulations,

- Disclosure of records under paragraphs (a)(2)[proactive disclosure provision] and (a)(8) [foreseeable harm standard],
- Assessment of fees and fee waivers,
- Timely processing of requests,
- Use of exemptions, and
- Dispute resolution services with the Office of Government Information Services or the FOIA Public Liaison.

Creation of "Chief FOIA Officer Council"

The *FOIA Improvement Act of 2016* creates a new Chief FOIA Officer Council within the Executive Branch which will serve as a forum for collaboration across agencies and with the requester community to explore innovative ways to improve FOIA administration.

- The Directors of the Office of Information Policy and the Office of Government Information Services are to serve as co-chairs of the newly created Chief FOIA Officer Council.
- Membership of the Council is composed of:
 1. The Deputy Director for Management of OMB,
 2. The Chief FOIA Officer for each agency, and
 3. Any other officers as designated by the co-chairs.
- GSA is to provide administrative support to the Council.
- The duties of the Council shall include the following:
 1. Develop recommendations for increasing compliance & efficiency under the FOIA.
 2. Disseminate agency experiences, ideas, best practices, and innovative approaches related to the FOIA.
 3. Identify, develop and coordinate initiatives to increase transparency and compliance with the FOIA.
 4. Promote development and use of “common performance measures for agency compliance” with the FOIA.
- The Council shall “consult on a regular basis” with requesters. It shall “meet regularly and such meetings shall be open to the public” and at least annually the Council must have an open meeting that permits interested members of the public to appear and present statements.

Additions to Annual Reports

There are additions to agency reporting requirements for their Annual FOIA Reports.

- On or before February 1 of each year, agencies must submit their Annual FOIA Report to the Attorney General and to the Director of OGIS
- The Annual FOIA Report must include two new elements:
 1. The number of times “the agency denied a request for records under subsection (c)” of the FOIA, and
 2. The “number of records that were made available for public inspection in an electronic format under subsection (a)(2).”
- The raw, statistical data used in the agency’s Annual FOIA Report must be available without charge, in an aggregated, searchable format, that may be downloadable in bulk.
- The Attorney General must notify Congress that agency Annual FOIA Reports are posted by March 1st.

Agency Reference Guides

Agency FOIA Reference Guides must be made available in electronic format.

Department of Justice's Litigation & Compliance Report

There are changes made to the requirements for the Department of Justice's FOIA Litigation and Compliance Report.

- The Department's annual Litigation and Compliance Report detailing the Department's efforts to encourage government wide compliance with the FOIA is now due to Congress and the President on March 1st.
- The disposition for each case listed in this report must include "each subsection, and any exemption, if applicable," involved in each case.
- The raw statistical data used in the report must be available without charge, in a searchable format, that is downloadable in bulk.

Revised Duties for OGIS

The duties for OGIS have been revised and new reporting obligations are included.

- OGIS shall "identify procedures and methods for improving compliance" under the FOIA.
- In providing mediation services, OGIS may issue advisory opinions at its discretion or upon the request of any party to the dispute.
- Not less than annually OGIS shall submit to Congress and the President, and make available to the public electronically:
 1. A report on its findings from its reviews of agency policies, procedures, and compliance.
 2. A summary of its mediation services, including any advisory opinions issued and the number of times each agency engaged in dispute resolution with the assistance of OGIS or the FOIA Public Liaison.
 3. Any legislative and regulatory recommendations to improve FOIA.
- OGIS is not required to obtain prior approval of any officer or agency of the United States before submitting to Congress reports, recommendations, testimony, or comments, if such submissions include a statement indicating that the views expressed are those of the OGIS Director and not necessarily the views of the President.
- Not less than annually, OGIS shall hold a public meeting on its activities and "allow interested persons to appear and present oral or written statements."

Creation of Consolidated Online Request Portal

The *FOIA Improvement Act of 2016* requires that a new consolidated online request portal be built.

- The Director of OMB, in consultation with the Attorney General, shall ensure the operation of a consolidated online request portal that:
 1. Allows the public to submit a request to any agency from a single website, and
 2. May include additional tools that OMB finds will improve FOIA.
- Agencies may still create or maintain independent online portals for submission of requests.
- OMB shall establish standards for interoperability between the consolidated portal and agency case management systems.

Remember that you can cite passages from FOIA amendments to the government when you are confronted by a less than forthcoming agency response, they will always look good in the record you are making for review. Consequently, they can help to remind a reviewing judge -should you be required to file suit- that the agency is supposed to do more than merely tolerate your presence; your invoking of FOIA is an act which summons forth some of the most basic principles of our democratic society, Congress said so.

FOIA APPEALS

What do you do when, after all of your best efforts and after you've exhausted all of your administrative options, yet the agency refuses to release the information? You can then go to court. You may also contest the type or amount of fees which you were charged. Moreover, you can appeal any other type of adverse determination, including a rejection of a request for failure to describe adequately the documents being requested or a response indicating that no requested records were located. You can also appeal because the agency failed to conduct an adequate search for the documents that you requested. The filing of an appeal does not affect or delay the release of documents which the agency ruled should be disclosed in response to your initial FOIA request. In other words, a partial "win" at the first administrative level is not put at risk if you decide to appeal. There is no charge for filing an appeal.

Practice Tips:

- A. If the agency rules against you at the administrative level-on either disclosure or fee waiver issues-the agency is bound to adhere to the reasons it provides at that stage; it cannot raise new issues later if litigation is required. "Taken together, these principles lead us to the following conclusion: on judicial review, the agency must stand on whatever reasons for denial it gave in the administrative proceeding." Friends of the Coast Fork v. U.S. Dept. of the Interior, 110 F.3d 53, 55 (9th. Cir 1997). The practical impact of this requires you to understand very early in your request process if you have a reasonable chance to get the requested materials at the administrative level, or if you are merely going through the motions to exhaust your administrative remedies in order to get into court. If you are in the former context; go ahead and make your best argument. Try to work with the agency to best inform it of your needs and the correct application of the law to your request. If you are in the latter realm-for some reason you are sure that you are going to get hosed at the administrative level-it is important not to do anything to help the agency make its best arguments during the administrative phase. In this situation, you want the agency to ignore you, to make unreasonable and unlawful arguments; they will be stuck with them once you are in court. You will win.
- B. An administrative appeal may be undertaken upon either, the denial of an initial FOIA request, or an agency's failure to issue a determination within the statutory 20-day time deadline. 5 U.S.C. §§ 552(a)(6)(A)(i), 552(a)(6)(C).
- C. An appeal should outline all facts which you think are relevant to your request. Reviewing courts, while not limited to the record before the agency (except for fee waivers, for which they are limited to review on the administrative record), do tend to consider what a reasonable agency decision-maker would do when confronted with the facts before it. In other words, if you fail to mention an important fact at the administrative level, it will work against you when raising it at the litigation stage. This is a frequent problem we encounter which can severely limit one's options in court.
- D. Deadlines for the filing of an appeal are noted in each agency's FOIA regulations located in CFRs. They are often as short as 20 working days, so it is important to act promptly when a denial of your initial request is issued. Although, if you miss your appeal deadline

you could always refile your another FOIA request, it would just add to the delay in reaching the ultimate resolution of your information request.

- E. Appeals need not include reference to statutory, regulatory, or case law, but it helps. Even if you are not comfortable with legal research, simply citing the agency's rules which have been violated can make the appeal much more effective.
- F. An agency is required to make a "determination" on the merits of a FOIA appeal within **20 working days of receipt**. 5 U.S.C. § 552(a)(6)(A)(ii). The agency must "immediately notify the person making such request of the provisions for judicial review of that determination." Id.
 - 1. An agency may unilaterally extend the response deadline by up to 10 working days in "unusual circumstances," but only upon giving written notice to the requester. 5 U.S.C. § 552(a)(6)(B)(i). This right may not be exercised if the agency has already exceeded its 10 day response deadline for the initial request. Id.
 - 2. FOIA requires any denial of a request to list the "names and titles or positions of each person responsible for the denial." 5 U.S.C. § 552(a)(6)(C).
- G. Avoid impassioned prose, it may make you feel better, but it will not convince the reviewer that you are right and may cloud the issues.
- H. Remember that you are not only trying to convince the agency to release the requested materials, you are also creating a record for a judge to review should legal action be required. If you think of additional issues or arguments which have not been included in either the initial request or the appeal, draft a letter (not a phone call-you want a paper trail) which sets them.

FOIA Litigation

The Freedom of Information Act: 'a federal regulation obliging government agencies to release all information they had to anyone who made application for it, except information they had that they did not want to release. *Joseph Heller, "Closing Time" (1994)*

What do you do when after all of your best efforts, you have exhausted your administrative options yet the agency has proven Mr. Heller to be correct? You must seek judicial review. Litigating FOIA cases requires considerable knowledge of the Federal Court Rules Of Civil Procedure (FRCP) and other specific Federal Court rules, as well as strong legal research and writing skills. As one appellate court has frankly acknowledged: "Freedom of Information Act cases are peculiarly difficult." *Miscavige v. IRS*, 2 F.3d 366, 367 (11th Cir. 1993); *see also Summers v. Department of Justice*, 140 F.3d 1077, 1080 (D.C. Cir. 1998) (noting "peculiar nature of the FOIA"). Moreover, in order to actually file a case or appear in court on behalf of any party (other than as a pro se (for yourself) litigant), federal rules generally require admission by the Federal Court as an attorney authorized to practice in the specific federal district where the FOIA case is filed.

Thus, anyone interested in filing a FOIA lawsuit should carefully consider the benefits of obtaining legal counsel from an attorney who is familiar with both FOIA litigation and federal civil practice. If a lawsuit is filed on your behalf and you substantially prevail, you may be awarded reasonable attorney fees and litigation costs reasonably incurred.

This guide to FOIA litigation is designed to provide a very cursory over-view of litigation related issues pertaining to FOIA in order to assist you to best develop your case to ensure that if you are required to seek judicial review, you will have a winning case. However, this information should not be viewed as a substitute for obtaining legal counsel with an attorney qualified to evaluate the specific merits, issues or tactical considerations presented by your specific case.

Many attorneys provides free initial consultations on all FOIA and public record matters, and many ANA organizations have considerable experience litigating FOIA cases and appeals. What follows is a very brief overview of what you should expect if you retain an attorney to litigate a FOIA claim - and some of the pitfalls to avoid. Remember; the issue of whether you will win or lose your FOIA litigation will have been largely determined by the time you have exhausted the administrative phase of your case by the documentation which has been submitted to the agency's administrative record. This is particularly true regarding fee waiver issues because the court's review, while de novo, is limited to the administrative record. 5 U.S.C. § 552(a)(4)(vii).

- A. Remember the golden rule of FOIA: "**An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption.**" *GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1113 (9th Cir. 1994); *see also Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir.1987). This favorable burden of proof provides rarefied air indeed for a plaintiff's attorney to breathe.

- B. Federal courts have jurisdiction to "enjoin the agency from withholding agency records" 5 U.S.C. § 552(a)(4)(B). But before going to court, a **FOIA requester must "exhaust" their administrative remedies**, that is, they must use every option available at the agency level if they expect the court to review their case. 5 U.S.C. § 552(a)(6)(B). This can occur when the agency takes too long to respond to a request or appeal, or if the agency denies an appeal. If you file your suit before one of these things occurs, your case will be dismissed.
- C. The action may be filed in the federal district court in the district where the complainant resides, has a principal place of business, in which the agency records are located, or in the District of Columbia. 5 U.S.C. § 552(a)(4)(B).
- D. The court may review the case de novo, that is, the court may create its own record of events without depending on the agency's administrative record. 5 U.S.C. § 552(a)(4)(B). Thus, courts reviewing FOIA cases may grant somewhat less deference to an agency interpretation of the case than would normally be the case when a court reviews and administrative action.
- E. In almost all circumstances, a FOIA complaint should also plead an APA claim as a violation of the terms of FOIA can also usually be framed as either "arbitrary and capricious" or an "abuse of discretion."
- F. The complaint, in addition to demanding the release of the records at issue, and/or the granting of a fee waiver, could further seek:
1. A request for an order enjoining the agency from relying on an invalid regulation or practice in all future FOIA undertakings. *Cf. McGehee v. CIA*, 697 F.2d 1095 (D.C. Cir. 1983).
 2. An order declaring the agency's actions to be violative of FOIA.
 3. An award of attorney's fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E). Attorney fees may be awarded when the plaintiff has "substantially prevailed." Id.
 4. If the actions of the agency were so flagrant to be arbitrary and capricious, ask that the court make a specific finding of that fact and refer the matter to the Merit System Protection Board for investigation. 5 U.S.C. § 552(a)(4)(F).
- G. Consider the active use of requests for admission (RFA's) as a discovery tool. Outline the elements of your claim in your RFA's. If not admitted or denied by the government within 30 days from service of the RFA's, they will be deemed admitted pursuant to the Federal Rules of Civil Procedure. FRCP 36(a).
- H. Generally, FOIA cases are well suited for resolution by summary judgment pursuant to Federal Rule of Civil Procedure 56. There are usually few material facts in dispute and the conflict is often based on divergent interpretations of the relevant law. Thus FOIA cases may often be litigated relatively cheaply (in comparison to other types of federal litigation).

Sample FOIA log

Memorandum of Agreement Between DOD & DOE Concerning Modernization of the US Nuclear Infrastructure (DOE)

- a. DOE
- b. Control No: HQ -2012 -00816-F
- c. February 17, 2012
- d. Responses:
 - i. March 6, 2012: TVC received response from DOE acknowledging its receipt of TVC's FOIA request and that the request has been forwarded to NNSA, as they have jurisdiction over documents. Any questions regarding the request should be sent to Mr. Ben Jaramello, NNSA Service Center, P.O. Boc 5400, Albuquerque, NM 87185-5400, phone number (505) 845-4869.
 - ii. June 6, 2012: TVC sent offer to assist
 - iii. June 19, 2012: TVC received email from Chris Morris at DOE. The letter stated the FOIA request was originally transferred to the NNSA in March but they have not yet received the transfer, and they have re-opened the case. The document is currently under review, and upon completion of review a response will be provided.
 - iv. July 10, 2012: TVC sent request for estimated date of response
 - v. July 24: Call from Todd Burns at DOE headquarters. He said that he HAS the responsive documents, but is unable to release them until he hears from someone from the Department of Defense. He is trying to contact them now, but cannot say when they will hear back from them (however he is ready to release the documents whenever he does). If we have questions, or have not heard back from them by around one month from the call (around August 24, 2012), call or email him at Todd.Burns@hq.doe.gov, (202) 586-4958.
 - vi. September 5, 2012: Email from T. Burns requesting a phone conversation
 - vii. September 11, 2012: Scott Y. Called T. Burns and left a message
 - viii. September 12, 2012: T. Burns returned call. He said that another identical request from a colleague organization had been withdrawn because "the requestor received the document via other means" and he was wondering if we had also obtained the document and if we could also retrieve it via other means. I told him we did not want to withdraw, but would see if we could retrieve it from our colleagues. We then contacted Union of Concerned Scientists who forwarded us the memorandum.
 - ix. September 12, 2012, I called Todd Burnes and informed him that we were willing to close the FOIA request. He sent an email confirming the withdrawal of our request.
 - x. CLOSED

Centers for Disease Control and Animal and Plant Health Inspection Service Inspection Results for Building 365 and Building 368 Biological Facility at LLNL

- a. NNSA/SC

Sample FOIA log

- b. Control No: 12-00223-K
- c. June 5, 2012
- d. Responses:
- i. June 14, 2011: NNSA sent Scott Yundt email: Receipt of Freedom of Information Act Request. NNSA received our request on June 14, explained they will probably not be able to respond within the 20 day limit, and said our fee waiver request would be processed if it is later determined they will exceed \$15.00. Also assigned Control Number FOIA 12-00223-K
- ii. August 21, 2012: NNSA sent a Final Request with 4 responsive documents
- iii. CLOSED

Request for DPAG study from September 8, 2008 to the present

- a. NNSA
- b. Control No: 12-273-H
- c. July 24, 2012
- d. Responses:
 - a. August 2, 2012: Received Response from C. Hamblen assigning control number 12-273-H
 - b. August 14, 2012: Received Final Response from C. Hamblen stating that no responsive documents could be located
 - c. CLOSED

Memorandum of Agreement Between DOD & DOE Concerning Modernization of the US Nuclear Infrastructure (DOD)

- a. DOD
- b. Control No: 12-F-0575
- c. February 17, 2012
- d. Responses:
 - i. March 16, 2012: Department of Defense sent notice acknowledging receipt of FOIA request and assigned it case number: 12-F-0575. Also put our fee waiver request into the "other" category.
 - ii. June 6, 2012: TVC sent Notice of Statutory Violation/offer to assist
 - iii. June 19, 2012: TVC received letter from DoD, stating the estimated completion date for this request is October 12, 2012.
 - iv. July 10, 2012: TVC sent request for estimated date of response
 - v. July 24: Call from Todd Burns at DOE headquarters. He said that he HAS the responsive documents, but is unable to release them until he hears from someone from the Department of Defense. He is trying to contact them now, but cannot say when they will hear back from them (however he is ready to release the documents whenever he does). If we have questions, or have not heard back from them by around one month from the call (around August 24, 2012), call or email him at Todd.Burns@hq.doe.gov, (202) 586-4958.
 - vi. September 5, 2012: Email from T. Burns requesting a phone conversation
 - vii. September 11, 2012: Scott Y. Called T. Burns and left a message

Sample FOIA log

- viii. September 12, 2012: T. Burns returned call. He said that another identical request from a colleague organization had been withdrawn because “ the requestor received the document via other means” and he was wondering if we had also obtained the document and if we could also retrieve it via other means. I told him we did not want to withdraw, but would see if we could retrieve it from our colleagues. We then contacted Union of Concerned Scientists who forwarded us the memorandum.
- ix. September 12, 2012, I called Todd Burnes and informed him that we were willing to close the FOIA request. He sent an email confirming the withdrawal of our request and coordinated simultaneous withdrawal of our DoD request.
- ii. CLOSED

Request for IBC Minutes June 28, 2011 to the present

- a. NNSA
- b. Control No: 12-00274-K
- c. July 24, 2012
- d. Responses:
 - i. July 31: Karen Laney (NNSA) sent Scott Yundt an email confirming our FOIA request and providing the control number: FOIA 12-00274-K
 - ii. October 26, 2012: Received Final Response from Elizabeth Osheim with significant responsive documents, though many were heavily redacted.
 - iii. CLOSED

Request for Greenbook 2012 (stockpile stewardship and management plan)

- a. NNSA
- b. Control No: 12-00271-H
- c. July 24, 2012
- d. Responses:
 - a. August 2, 2012: Email Received from Christina Hamblen acknowledging receipt of request. Also stated, “the Plan includes two appendices that are classified” and would take “2-5 years to complete under FOIA.” She recommended requesting declassification through the Director of Declassification. She assigned the FOIA Control number.
 - b. August 7: Received letter in the mail from Christina Hamblen formally acknowledging receipt
 - c. August 30: Scott Yundt emailed Christina Hamblen and agreed to proceed with a request for declassification of the two appendices. But requesting that the search proceed for the rest of “the Plan.”
 - d. September 5, 2012: We received the 2012 SSMP.
 - e. CLOSED

Request for Greenbook 2013 (stockpile stewardship and management plan)

- a. NNSA
- b. Control No: 12-00272-K
- c. July 24, 2012

Sample FOIA log

- d. Responses
 - i. July 31: Karen Laney (NNSA) sent Scott Yundt an email acknowledging receipt of FOIA request and providing control number 12-00272-K
 - ii. August 3, 2012: Received Final Response Letter from Karen Laney at NNSA forwarding a single document “Supplement to the Stockpile Stewardship Plan, Fiscal Years 2010 – 2014” and stating that no “Plan” was available, though she mentioned that the estimated publication date was September 2012.
 - iii. CLOSED

Tri-Valley CAREs

Communities Against a Radioactive Environment

2582 Old First Street, Livermore, CA 94551 • (925) 443-7148 • www.trivalleycares.org



*Peace Justice Environment
since 1983*

August 18, 2009

Freedom of Information Act Officer
Office of Public Affairs/FOIA
NNSA/SC
P.O. Box 5400
Albuquerque, NM 87185-5400
Email: foiofficer@doeal.gov

via: electronic mail and U.S. mail

Re: Freedom of Information Act request for “Catastrophic Bioterrorism Scenarios: Response Architectures and Technology Implications”

To Whom It May Concern:

This is a request under the Freedom of Information Act (FOIA).

I would like to formally request a copy of the following record:

- Sandia National Laboratories (SNL) and Lawrence Livermore National Laboratory (LLNL), “Catastrophic Bioterrorism Scenarios: Response Architectures and Technology Implications,” March 2006.

This document is listed among the references in the Final Revised Environmental Assessment for the Proposed Construction and Operation of a Biosafety Level 3 Facility at Lawrence Livermore National Laboratory, Livermore, California.¹

Tri-Valley CAREs requests that the record it seeks be provided in hard copy and electronic formats. Tri-Valley CAREs would like to receive the requested record on a CD-ROM, provided this will not occasion a significant delay in the processing of this request.

In the event that access to the requested record is denied, please note that FOIA provides that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which

¹ See enclosure.

are exempt under [FOIA].” 5 U.S.C. § 552(b). Tri-Valley CAREs therefore requests that it be provided with all non-exempt portions of the requested record that are reasonably segregable. Tri-Valley CAREs further requests that you describe the deleted material in detail and specify the statutory basis for the denial, as well as your reasons for believing that the alleged statutory justification applies in each instance. Please separately state your reasons for not invoking your discretionary powers to release the requested documents in the public interest. Such statements will be helpful in deciding whether to appeal an adverse determination and in formulating arguments in case an appeal is taken. The agency’s written justification might also help to avoid unnecessary litigation. Of course, Tri-Valley CAREs reserves its right to appeal the withholding or deletion of any information.

Tri-Valley CAREs requests a waiver of all fees for this FOIA request. Disclosure of the requested information to Tri-Valley CAREs 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 our commercial interest. Tri-Valley CAREs meets the fee waiver criteria set forth in 10 C.F.R. § 1004.9:

1. Whether the subject of the requested records concerns the “operations or activities of the government.”

The Department of Energy’s (DOE) National Nuclear Security Administration (NNSA) and its operations and activities—including SNL and LLNL—are operations and activities of the government.

2. Whether the disclosure is “likely to contribute” to an understanding of government operations or activities.

As a result of litigation initiated by Tri-Valley CAREs, the Ninth Circuit Court of Appeals ordered DOE to consider whether the threat of terrorist activity necessitates the preparation of an Environmental Impact Statement (EIS) for the Biosafety Level 3 (BSL-3) facility at LLNL. In January 2008, DOE issued a Final Revised Environmental Assessment (FREA) for the BSL-3 facility, which included a section purporting to analyze the threat of terrorist activity. The requested record is among those that informed this analysis. Without reviewing this document, it is impossible to evaluate the adequacy of that analysis or determine whether the preparation of an EIS is warranted. Accordingly, disclosure of this document will contribute to an understanding of the process used by DOE to determine whether the preparation of an EIS was necessary, as well as the adequacy of the terrorism analysis in the FREA.

3. What contribution to an understanding by the general public will result from disclosure?

Tri-Valley CAREs uses information obtained through FOIA to help the general public and others understand the operations and activities of the government, specifically NNSA and its LLNL. Tri-Valley CAREs publishes a monthly newsletter,

circulated free of charge to interested parties. Information obtained from FOIA requests is used in the newsletter to increase public understanding of NNSA operations and activities, and it is expected that information obtained through this request will be used in our newsletter.

In addition, Tri-Valley CAREs uses information derived from FOIA in its fact sheets, reports, and other materials that are distributed, like our newsletter, to the media, elected officials, regulatory agencies, other organizations, and the general public. Information is also available on the organization's web site at <http://www.trivalleycares.org>. Moreover, information provided by Tri-Valley CAREs is used regularly by local, regional, and national media.

Tri-Valley CAREs seeks this record in order to inform the public about an important government activity. LLNL is operating a BSL-3 facility at the laboratory's main site. The types of biological agents (bioagents) that are typically handled in BSL-3 facilities include anthrax, West Nile Virus, Q fever, tularemia, and avian flu. In the unfortunate event of a terrorist attack at the facility, these potentially fatal bioagents could be released, resulting in the exposure of laboratory workers and the public, in addition to significant environmental impacts. As such, disclosure of this document will contribute to an understanding by the general public of the threat posed by terrorist activity at the LLNL BSL-3 facility.

By obtaining these records, Tri-Valley CAREs will benefit the public and contribute to its understanding of our government's nuclear weapons operations and activities. This is the organization's mission, as laid out in its articles of incorporation and reflected by its status as a 501(c)(3) nonprofit organization.

4. Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

As specified above, a terrorist attack on the BSL-3 facility at LLNL could result in the exposure of laboratory workers and the public to potentially fatal bioagents, as well as significant environmental impacts. Helping the public assess the nature of that threat and its analysis by DOE will contribute significantly to public understanding of government operations and activities.

Additionally, Tri-Valley CAREs has the means (see #3 above) and the track record to be "likely to contribute 'significantly' to public understanding."

5. Whether the requester has a commercial interest that would be furthered by the requested disclosure.

This is not applicable in the case of Tri-Valley CAREs. As mentioned, Tri-Valley CAREs is a 501(c)(3) public benefit organization. We provide information to the public free of charge.

6. Whether a commercial interest is "primary."

This is not applicable to Tri-Valley CAREs. We have no profit motive.

In light of the above, Tri-Valley CAREs requests a fee waiver for the disclosure of this information.

Access to the requested record should be granted within twenty (20) working days from the date of your receipt. Failure to respond in a timely manner shall be viewed as a denial of this request and Tri-Valley CAREs may immediately file an administrative appeal or seek judicial relief. Thank you in advance for your prompt reply.

Sincerely,

Robert Schwartz
Staff Attorney
Tri-Valley CAREs
2582 Old First Street
Livermore, CA 94551
Phone: (925) 443-7148
Fax: (925) 443-0177
rob@trivalleycares.org

Enclosure

Tri-Valley CAREs

Communities Against a Radioactive Environment

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June 26, 2014

Christina H. Hamblen
Freedom of Information Act Officer
Office of Public Affairs/FOIA
NNSA
P.O. Box 5400
Albuquerque, New Mexico 87185-5400

Re: Freedom of Information Act request regarding information concerning the Revised (and/or Alternative) Plutonium Strategy

Dear Ms. Hamblen:

This is a request under the Freedom of Information Act (FOIA).

Tri-Valley CAREs would like to formally request a copy of all documents containing information pertaining to the National Nuclear Security Administration's Revised Plutonium Strategy and/or the Alternative Plutonium Strategy from July 11, 2012 to the date of this request.¹ On November 20, 2013, Tri-Valley CAREs mailed this a request for this information to the National Nuclear Security Administration (attached for reference). Tri-Valley CAREs received no acknowledgment of receipt of this request. If NNSA received the November request and is already in process of responding, please let us know and disregard this letter. This request includes but is not limited to:

- All notes pertaining to the Revised (and/or Alternative) Plutonium Strategy,
- All decisional documents pertaining to the Revised (and/or Alternative) Plutonium Strategy
- Electronic Communications concerning the Revised (and/or Alternative) Plutonium Strategy
- All information pertaining to the Revised (and/or Alternative) Plutonium Strategy,
- All information pertaining to the consideration for sharing material characterization workload between PF-4 at Los Alamos National Laboratory (LANL) and facilities at Lawrence Livermore National Laboratory (LLNL)
- All Laboratory correspondence, reports, meeting minutes, and memorandums regarding the Revised (and/or Alternative) Plutonium Strategy
- All interagency correspondence regarding the Revised (and/or Alternative) Plutonium Strategy
- Any other significant information regarding the Revised (and/or Alternative) Plutonium Strategy

¹ This request is an update to a previously made request, 12-00258-K, which is currently the subject of litigation between Tri-Valley CAREs and NNSA. This request in no way interferes with that ongoing litigation or the open FOIA request, but is simply intended to obtain documents created since our previous request on the subject.

In the event that access to the requested record is denied, please note that FOIA provides that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under [FOIA].” 5 U.S.C. § 552(b). Tri-Valley CAREs therefore requests that it be provided with all non-exempt portions of the requested record that are reasonably segregable. Tri-Valley CAREs further requests that you describe the deleted material in detail and specify the statutory basis for denial, as well as your reasons for believing that the alleged statutory justification applies in each instance. Please separately state your reasons for not invoking your discretionary powers to release the requested documents in the public interest. Such statements will be helpful in deciding whether to appeal an adverse determination and in formulating arguments in case an appeal is taken. The agency’s written justification might also help to avoid unnecessary litigation. Of course, Tri-Valley CAREs reserves its right to appeal the withholding or deletion of any information.

Tri-Valley CAREs requests a waiver of all fees for this FOIA request. Disclosure of the requested information to Tri-Valley CAREs 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 our commercial interest. Tri-Valley CAREs meets the fee waiver criteria set forth in 10 C.F.R. § 1004.9:

1. Whether the subject of the requested records concerns the “operations or activities of the government.”

The Department of Energy’s (DOE) and its operations and activities—including the Lawrence Livermore National Laboratory (LLNL) and Los Alamos National Laboratory (LANL)—are operations and activities of the government.

2. Whether the disclosure is “likely to contribute” to an understanding of government operations or activities.

Disclosure of the requested documents will contribute to an understanding of government operations and activities. Specifically, response to this request will illuminate the NNSA’s process of attempting to maintain the current level of plutonium storage capabilities. Disclosure of the requested records will contribute to a public understanding of the precise goings on at LANL and LLNL, and the subsequent concerns of the surrounding community.

3. What contribution to an understanding by the general public will result from disclosure?

Tri-Valley CAREs uses information obtained through FOIA requests and FOIA litigation to help the general public and others understand the operations and activities of the government, specifically the NNSA and its LLNL. Tri-Valley CAREs publishes a monthly newsletter, circulated free of charge to interested parties. Information obtained from FOIA requests is used in the newsletter to increase public understanding of NNSA operations and activities, and it is expected that information obtained through this request will be used in our newsletter.

In addition, Tri-Valley CAREs uses information derived from FOIA requests and litigation in its fact sheets, reports, and other materials that are distributed, like our newsletter, to the media, elected officials, regulatory agencies, other organizations, and the general public. Information is also available on the organization’s website at <http://www.trivalleycares.org>. Moreover, Tri-Valley CAREs provides information, which is used regularly by local, regional, and the national media.

Tri-Valley CAREs may further use the requested records in meetings with elected officials and with regulatory agencies.

Tri-Valley CAREs seeks this record in order to inform the public about an important government activity. This information concerns possible security changes at LLNL and LANL. The disclosure of the requested records will promote the understanding of any changing security at LLNL, and of any changes to plutonium storage capabilities at both LLNL and LANL.

By obtaining these records, Tri-Valley CAREs will benefit the public and contribute to its understanding of our government's nuclear weapons operations and activities. This is the organization's mission, as laid out in its articles of incorporation and reflected by its status as a 501(c)(3) nonprofit organization.

4. Whether the disclosure is likely to contribute "significantly" to public understanding of the government operations or activities.

The disclosure of these records will contribute significantly to public understanding of government operations and activities. As stated above, disclosure is expected to contribute greatly to the public's understanding of changing plutonium storage capabilities at LLNL and LANL, and of any changing security categories at both facilities.

5. Whether the requester has a commercial interest that would be furthered by the requested disclosure.

This is not applicable in the case of Tri-Valley CAREs. As mentioned, Tri-Valley CAREs is a 501(c)(3) public benefit organization. We provide information to the public free of charge.

6. Whether a commercial interest is "primary."

This is not applicable to Tri-Valley CAREs. We have no profit motive.

In light of the above, Tri-Valley CAREs requests a fee waiver for the disclosure of this information.

Access to the requested record should be granted within twenty (20) working days from the date of your receipt. Pursuant to 5 U.S.C. § 552 (a)(6)(B), if this office delays its response in light of "unusual circumstances," it must also provide a date on which a determination is expected to be dispatched. Failure to respond in a timely manner shall be viewed as a denial of this request and Tri-Valley CAREs may immediately file an administrative appeal or seek judicial relief. Thank you in advance for your prompt reply.

Sincerely,

Scott Yundt
Tri-Valley CAREs
2582 Old First Street
Livermore, California 94550

Tri-Valley CAREs

Communities Against a Radioactive Environment

2582 Old First Street, Livermore, CA 94551 • (925) 443-7148 • www.trivalleycares.org



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July 10, 2012

Ben C. Jaramillo
Office of General Counsel
NNSA
P.O. Box 5400
Albuquerque, New Mexico 87185-5400

Re: Third Notice of Statutory Violation/Notice that issue is ripe for litigation: FOIA 11-389-J

Dear Mr. Jaramillo,

On June 27, 2011, Tri-Valley CAREs mailed this office a request under the Freedom of Information Act (FOIA) for a copy of all documents, from June 26, 2007, to the date of the request (June 27, 2011), that concern the use of plutonium, other fissile and/or fissionable materials used at the National Ignition Facility (NIF). Any records/documents on the use of fissionable and fissile material at the NIF are part of this request, including but not limited to:

- Status
- Schedule for use of these materials in experiments
- Scope and purpose of experiments
- Planned use of fusion fuel with fissile or fissionable materials in the same experiment
- Environmental questions and reviews
- Technical issues
- Equipment needs and issues, including but not limited to distinguishing between fission-generated and fusion-generated neutrons
- Cost questions and reviews
- Treaty compliance reviews (e.g. Partial Test Ban Treaty, CTBT, NPT)

On July 12, 2011, Tri-Valley CAREs was sent a letter acknowledging the receipt of this and providing the control number: 11-389-J. On June 5, 2012, almost a year later, Tri-Valley CAREs sent the NNSA a notice of statutory violation/offer to assist letter. On June 26, 2012, we sent the NNSA a second notice of statutory violation/offer to assist letter.

Despite this effort, we still have not received any notification of the NNSA's determination to either release or withhold records. FOIA requires this office to determine whether to comply with a request within twenty (20) business days from the date of receipt of such a request. This deadline has long since elapsed without any formal determination by this office. Tri-Valley CAREs hereby requests that NNSA respond to this FOIA request as soon as possible.

If full response continues to be delayed due to “unusual circumstances,” please respond to this letter with, “the date on which a determination is expected to be dispatched,” in accordance with 5 U.S.C.A. § 552 (a)(6)(B).

While Tri-Valley CAREs will not resort to litigation at this time, this issue is now ripe for litigation (you could also put here “...we will consider ongoing lack of response as a constructive denial) and legal action may become necessary if disclosure is not promptly forthcoming.

Sincerely,

Tri-Valley CAREs
2582 Old First Street
Livermore, CA 94551

Tri-Valley CAREs

Communities Against a Radioactive Environment

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*Peace Justice Environment
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June 19, 2015

Christina H. Hamblen
Freedom of Information Act Officer
Office of General Counsel
NNSA/SC
P.O. Box 5400
Albuquerque, New Mexico 87185-5400

Re: Notice of Statutory Violation/offer to assist: FOIA 12-00257-H

Dear Ms. Hamblen,

On July 17, 2012, Tri-Valley CAREs mailed this office a request under the Freedom of Information Act (FOIA) for a copy of all documents that pertain to the Chemistry and Metallurgy Research Replacement Nuclear Facility (CMRR-NF). Specifically, we requested any information pertaining to findings that the National Nuclear Security Administration (NNSA) may meet its plutonium pit mission needs without CMRR-NF, and any determinations by the agency that the CMRR-NF may not be necessary to the nation's security. The request includes but is not limited to:

1. All information concerning the 60-day study produced by the Los Alamos National Laboratory (LANL) that determined that the Agency can maintain its plutonium pit manufacturing and sustainment needs without CMRR-NF.
2. All notes pertaining to determinations that the CMRR-NF may not be necessary.
3. All notes pertaining to findings the NNSA may meet its plutonium pit mission needs without CMRR-NF.
4. All decisional documents pertaining to the 60-day study by LANL that determined that the Agency can maintain its plutonium pit manufacturing and sustainment needs without CMRR-NF.
5. Electronic communications concerning the 60-day study by LANL that determined that the Agency can maintain its plutonium pit manufacturing and sustainment needs without CMRR-NF.
6. All Laboratory correspondence, reports, meeting minutes, and memorandums regarding the 60-day study by LANL that determined that the Agency can maintain its plutonium pit manufacturing and sustainment needs without CMRR-NF.
7. Any other significant information regarding the 60-day study by LANL that determined that the Agency can maintain its plutonium pit manufacturing and sustainment needs without CMRR-NF.

On April 3, 2013, we received a partial response email from Ms. Elizabeth Osheim at the NNSA. The NNSA disclosed two documents in their entirety. The NNSA stated that it would continue to work on the request and that the NNSA had contacted the Los Alamos Field Office (LAFO) in regards to the LANL's search for responsive documents. A status update request was emailed to you on July 16, 2014. No response was given. It has been over two years since the last correspondence. Tri-Valley CAREs is still interested in any responsive documents to this request despite the excessive amount of time that has passed without agency notifications. Please respond with the documents or with an estimated time for production.

Tri-Valley CAREs acknowledges and understands that the NNSA must process FOIA requests in the approximate order of the date received by the office. Pursuant to 5 U.S.C.A. § 552 (a)(6)(B) we request that the NNSA provide Tri-Valley CAREs with the status of FOIA 12-00257-H. Please let me know if I can help this office in its efforts to disclose the important information contained in the requested documents.

Sincerely,

Scott Yundt
Staff Attorney
Tri-Valley CAREs
2582 Old First Street
Livermore, CA 94551
(925) 443-7148

Nuclear Watch New Mexico

Freedom Of Information Request

January 12, 2012

Freedom of Information Officer
NNSA Service Center
Office of Public Affairs
P.O. Box 5400
Albuquerque, NM 87185-5400

Via e-mail to FOIOfficer@nnsa.doe.gov, foiofficer@doeal.gov & cbecknell@doeal.gov

Dear FOIA Officer,

This is a request under the Freedom of Information Act (FOIA), 5 U.S.C. Section 552, as amended. Nuclear Watch of New Mexico (NWNM) requests the following:

National Nuclear Security Administration's (NNSA's) FY2011 Performance Evaluation Reviews for the Management And Operation Contracts of the NNSA sites -

Kansas City Plant, Kansas City, Missouri
Lawrence Livermore National Laboratory, Livermore, California
Los Alamos National Laboratory, Los Alamos, New Mexico
Nevada National Security Site, Nevada
Pantex Plant, Amarillo, Texas
Sandia National Laboratories/New Mexico, Albuquerque, New Mexico
Sandia National Laboratories/California, Livermore, California
Savannah River, South Carolina
Y-12 National Security Complex, Oak Ridge, Tennessee

These Performance Evaluation Reviews are the basis upon which NNSA makes its decision concerning award fees and additional years for the site management and operations contracts. We are requesting the full line item Performance Evaluation Reviews for each site. These full line item reviews will give the amounts and percentages in the most detailed category level known. A summary will not be sufficient. Any redactions or exceptions must be applied individually with the exception number given for each.

As a reminder President Obama's Freedom of Information Act Memorandum For The Heads Of Executive Departments And Agencies states, "All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all

decisions involving FOIA.”

(http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/)

We request an unlocked electronic format (e.g. PDF or Word) of this document, as provided for by 5 U.S.C. § 552, (a)(3), which states:

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

In the event that an electronic version(s) is not available, we then request paper copy(ies) of this document(s). However, we consider that event unlikely since a document will almost always first be created electronically to begin with..

If you regard this information as exempt from required disclosure under the Act, NWNM requests that you exercise your discretion to disclose them nevertheless. If the document(s) includes classified or otherwise restricted information and the volume of this material makes a lengthy declassification review necessary, NWNM requests the prompt release of all elements of the document portions marked 'Unclassified,' 'For Official Use Only,' or 'Declassified.' Additionally, NWNM requests that the remaining classified portions undergo a careful review for the purpose of declassification, in whole or in part, and that you release to NWNM all reasonably segregated portions of the classified record, except those portions which damage national security.

NWNM further requests that you disclose these materials as they become available to you without waiting until all the documents have been assembled.

As you know, an agency cannot rely simply on the markings of a document to deny its release. In order that a document be withheld under Exemption 1 of FOIA, it must be reviewed and found to be properly classified pursuant to both procedural and substantive criteria found in the governing Executive Order, E.O. 12356. See Conf. Rep., H.R. Rep. No. 1380 (Freedom of Information Act Amendments), 93rd Cong., 2d Sess. 6 (1974); see also Lesar v. Department of Justice, 636 F. 2d 472, 483 (D.C. Cir. 1980); Allen v. CIA, 636 F. 2d 1287, 1291 (D.C. Cir. 1980). This requires an actual, substantive review of the materials and their classification markings. E.O. 12356, Section 3.4, Mandatory Review for Declassification.

Should you elect to invoke an exemption to the FOIA, NWNM will require in your full or partial denial letter sufficient information to appeal the denial. In accordance with the minimum requirements for administrative due process, this information should include:

1. Basic factual material, including the originator, date, length, and addresses of the withheld items.

2. Explanations and justifications for denial, including the identification of the procedural category of E.O. 12356 under which the withheld document or portions of the document was found to be subject to classification, at what level the entire document was ultimately classified and the nature and variety of the document's portion-marking and, most importantly, explanations of how each exemption fits the withheld material.

NWNM is a non-profit, tax-exempt, public policy research and information environmental organization. NWNM makes information available to thousands of citizens by means of its numerous and varied publications, educational programs, and public-interest litigation. The information disclosed pursuant to the request will be made directly available to the public and others engaged in policy analysis and research, including historians, area specialists, and journalists.

In the recent past, the Department of Energy has, as a matter of course, sent a letter asking for clarification of the following:

1. Whether the subject of the requested record(s) concerns "the operations or activities of the government;"
2. Whether the disclosure is "likely to contribute" to an understanding of government operations or activities;
3. The contribution to an understanding by the general public of the subject likely to result from disclosure, taking into account one's ability and intent to disseminate the information to the public in a form that can further understanding of the subject matter;
4. Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities;
5. Whether the requester has a commercial interest that would be furthered by the requested disclosure; and if so
6. The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in the disclosure, that disclosure is "primarily in the commercial interest of the requester."

In order to save time and help expedite our request, NWNM herein responds to the above questions in sequential order. This will also help your office clarify any questions you may have regarding NWNM's eligibility for FOIA fee waivers or reductions under 10 CFR 1004.9(a)(8). Furthermore, it should assist your office in speedy compliance and consideration of this FOIA request, as required by 5 U.S.C. Section 552, as amended.

NWNM's answers are as follows:

1) All information requested in this FOIA is for information directly related to federal Department of Energy (DOE) activities. Therefore, our request indisputably concerns "the operations or activities of the government." Further, documents generated by DOE management contractors are "owned" by the federal government and therefore fall under this request (e.g., see LANL management contract #W-7405-ENG-36/Mod M440/M507, §I.067 and NM CIVIL NO.

97-1412 DJS/WWD “Los Alamos Study Group vs. Dept. of Energy”). Additionally, the fact that a requested document may have been generated by a contractor, rather than the federal government itself, does not excuse any delay to the fulfillment of our request.

2) DOE activities in are of concern to many citizens, yet it is an area where public information is often lacking or inadequate. This FOIA request will enable the public and their advocates to better understand DOE activities .

3) Nuclear Watch of New Mexico (NWNM) is in an excellent position to aid the public in its understanding of government activities, particularly with respect to DOE facilities in New Mexico. Our most effective means of information dissemination is through our web site (www.nukewatch.org) that receives 1,000,000+ visits a year. In order to better inform the public, NWNM posts fact sheets analyzing federal and state policies on its web site. We also publish and distribute newsletters to the public. Additionally, we often work closely with regional and national journalists so that they can inform the public through their publications. The information received under this FOIA will be reviewed and presented to the public through any or all of these means.

4) The requested material in this FOIA is likely to contribute "significantly" to public understanding of government operations or activities because it will provide NWNM with important information that will help clarify DOE activities. In turn, NWNM will convey the information to the public so that the general citizenry can be better informed.

5) NWNM has no commercial interest in this FOIA request. NWNM operates under the fiscal agency of the Southwest Research and Information Center, Albuquerque, NM, a 501(c)3 non-profit organization. As a result, NWNM cannot in any way make a profit from its activities, whether from this FOIA request, or any other endeavor.

6) The response to question 5 satisfies question 6.

As per 10 CFR 1004.4 (e), NWNM assures our willingness to pay fees, unless a waiver is granted. Beyond the required first 100 pages of duplication and the first two hours of search time without charge (10 CFR 1004.9 (a)(6), NWNM is prepared to pay normal search and copying fees up to \$50.00. If fees exceed \$50.00, please advise. However, the FOIA provides that you may waive fees “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. Section 552(a)(4)(A)(iii) and 10 CFR 1004.9(a)(8)) This request clearly meets these requirements. Therefore, I request that you waive all fees in connection with this request. I further ask, in the event that fees are not waived, that you inform me of the specific basis for such a decision.

We appreciate your help in obtaining this information. Should you need further information concerning NWNM or this request, we would appreciate your immediate attempts to contact us in order to expedite this request. We expect a definitive determination of NNSA’s intent to release within 20 working days, as 5 U.S.C. Section 552, (a)(6)(A) stipulates:

Each agency... shall - - (i) determine within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefore, and of the right of such person to appeal to the head of the agency any adverse determination.

In your determination, we also expect a stated date when this document will be released to us, or, alternatively, any reason for denial.

Sincerely,

Jay Coghlan, Executive Director
Scott Kovac, Operations and Research Director

Contact information:
505 989.7342
jay@nukewatch.org
scott@nukewatch.org
Nuclear Watch of New Mexico
551 .W. Cordova Rd., #808
Santa Fe, NM 87505

Los Alamos National Security, LLC's Management And Operation Of The Los Alamos National Laboratory, Contract.



November 16, 2005

Director
Office of Hearings and Appeals
Department of Energy
1000 Independence Ave SW
Washington D.C. 20585

VIA CERTIFIED MAIL (with Exhibits)
E-mail to FOIAAppeals@doe.gov (without Exhibits)

Re: Freedom of Information Act Appeal of FOIA Control No. 04-140-A

Dear Director:

Nuclear Watch of New Mexico (NWNM) hereby appeals:

- 1) The decision made by the National Nuclear Security Administration (NNSA) to redact more than 40 percent of the Fiscal Year (FY) 2004 Ten-Year Comprehensive Site Plan for the Los Alamos National Laboratory (hereinafter "LANL TYCSP").
- 2) The delay to releases of the FY 2003 and 2005 LANL TYCSPs. These were requested nearly eleven months ago under the same FOIA request, and their continuing delay constitutes constructive denial.

NWNM received the FY 2004 LANL TYCSP pursuant to our December 22, 2004, request under the Freedom of Information Act (FOIA), 5 U.S.C. §552, and Department of Energy FOIA Implementation Regulations 10 CFR 1004. Rather than receiving a letter of determination for the redactions, on October 25, 2005, we received a simple cover letter from the NNSA Albuquerque Service Center FOIA Office informing us of a partial response to our FOIA request for the FY02, FY03, FY04 and FY05 LANL TYCSPs. That partial response was to provide the FY04 TYCSP, while the FY03 and FY05 remain outstanding (we have subsequently notified the NNSA that we are dropping our request for the FY02 TYCSP).

We assert that the NNSA improperly redacted information because no exemptions for nondisclosure were cited, no explanation of applicability of exemptions was given, and there was no statement of why discretionary release is not appropriate, all of which are required by 10 CFR §1004.7(b)(1). Additionally, the person responsible for the redactions was not named, as required by 10 CFR §1004.7(b)(2). Finally, the NNSA partial response is in violation of 5 U.S.C. §552(a)(2) which states "in each case the justification for the deletion shall be fully explained in writing....."

The relevant part of our December 22, 2004 FOIA request asked for:

2. Los Alamos National Laboratory (LANL) Ten Year Comprehensive Site Plans (TYCSPs) for the years 2002, 2003, 2004 and 2005. We specifically request that your office inform us if the 2005 TYCSP has been completed, and if not when completion is expected and not to delay release of the other years.

551 West Cordova Road #808 Santa Fe, New Mexico 87505 505.989.7342 Fax 505.989.7352
info@nukewatch.org www.nukewatch.org

[NWNM's full request as Exhibit 1.]

The relevant parts of the responsive NNSA Albuquerque Service Center cover letter are:

In reference to Item 2, and as [DOE AL FOIA Officer] Ms. Terry Apodoca stated in her E-mail to both you and [NWNM staff member] Scott Kovac on October 14, 2005, we are providing you a copy of 2004 with this partial response. We are awaiting a copy of 2002 from the laboratory as well as an estimate of time to complete reviews of 2003, 2005, and 2006.

The remaining portions of your request are the 2002, 2003, 2005, and 2006 LANL Ten Year Comprehensive Site Plans (TYCSPs) that are responsive to Item 2. As soon as we receive these reports, we will provide them to you. [NNSA's partial response cover letter as Exhibit 2.]

On October 14, 2005, NWNM filed via e-mail a FOIA request for the FY06 LANL TYCSP. On that same day the DOE AL FOIA Officer replied by e-mail that, "Your new request will be added to the scope of this request" (i.e., the original request with FOIA control #04-140-A). [Exhibit 3.]

NWNM is a public interest nonprofit organization with specific interests in virtually all issues pertaining to the Los Alamos National Laboratory, Sandia National Laboratory and the Waste Isolation Pilot Project, and generally for the nuclear weapons complex as well. Full disclosure of the LANL TYCSPs is clearly in the public's interest. According to the NNSA:

"The site TYCSPs are the foundation for the strategic planning for the physical complex, incorporating the programs' technical requirements, performance measures, budget and cost projections within the funding constraints of the approved Future-Years Nuclear Security Program (FYNSP)."

"Uses of the TYCSP.... 7. Facilitates assessment of the current status of the facilities and infrastructure within the NNSA complex to support the Nuclear Posture Review (NPR)'s focus on Responsive Infrastructure;... 9. Establishes realistic planning for, and execution toward, the intended NNSA complex of the future;... 13. Defines the high-level linkages among weapons workload and production capability with facility requirements;... 14. Provides the foundation for development of an Integrated Site Plan/ Enterprise Plan for the NNSA nuclear weapons complex..." (NNSA FY06 TYCSP Guidance," December 2004, p. 1 and pp. 3 - 4.)

The "intended NNSA [nuclear weapons] complex of the future" is the subject of much public and Congressional debate, as well as the implementation of the 2002 Nuclear Posture Review. Moreover, the northern New Mexican population is intensely interested in the future missions, strategies, facilities and production rates of the Los Alamos National Laboratory. Yet it appears to be precisely those future elements that have been redacted from the FY04 LANL TYCSP.

Procedural Background

On January 27, 2004, NWNM filed a request to LANL under the California Public Records Act (CPRA) for the FY04 LANL TYCSP, which was then given control number CPRA 04-021-C. Other than acknowledgement of receipt of our request, NWNM received absolutely no other responses from the LANL CPRA Officer until November 4, 2005. On that day she e-mailed that she was closing out our CPRA request because the NNSA had finally responded to our 12/23/04 FOIA request. [NWNM/LANL CPRA communications enclosed as Exhibit 4.]

NWNM made its initial FOIA request to the NNSA on December 22, 2004, which included the FY02, FY 03, FY04, and FY05 LANL TYCSPs. On October 14, 2005, NWNM added a request for the FY06 LANL TYCSP, which the NNSA Albuquerque Service Center FOIA Officer incorporated into our original request. We also dropped our request for the FY02 LANL TYCSP.

A full 10 ten months after our original FOIA request, and after repeated inquires into the status of our request, NNSA provided a partial response on October 20, 2005. That partial response consisted of a three-ring binder, approximately 350 pages long (not including dividers), entitled LANL Ten-Year Comprehensive Site Plan FY04-FY13, LA-UR-04-7750, dated September 1, 2003. As previously stated, in terms of the physical spatial parameters of text and tables, that plan is more than 40% redacted without the justifications required by statute. Additionally, requests are still outstanding for the FY03, FY05 and FY06 LANL TYCSPs under FOIA control number 04-140-A.

Argument

The FOIA provides that “each agency, upon request for records which (A)(i) reasonably describes such records and (B)(ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.” U.S.C. §522(a)(3)(A). NWNM contends it properly followed the FOIA request procedures. However, the NNSA has failed to promptly respond given that it took ten months to fulfill the request for one LANL TYCSP and still hasn’t supplied the others. Further, even when it supplied that one partial response, the NNSA acted in gross violation of FOIA requirements.

The Act allows for federal agencies to withhold records if they fit within one or more of nine specified exemptions. 5 U.S.C. §552 (b). Since the government agency has sole access to the relevant information it therefore bears the burden of justifying its disclosure decisions in “as detailed a description as possible.” *Ogelsby v. US Dept. of Army*, 79 F.3d 1172 (C.A.D.C. 1996). When exemptions are invoked, agencies are required to specify in detail which portions of a document are disclosable and which are allegedly exempt. 5 U.S.C § 552(a) and *Vaughn v. Rosen*, 484 F.2d at 827. Despite the above requirements and case law, the NNSA supplied NWNM with a LANL FY04 TYCSP that is approximately 40% redacted without explanation.

NWNM argues that the TYCSP should not be redacted to begin with. We have four bases for this:

1. The FY 2000 and 2001 LANL TYCSPs in our possession are completely without redaction (the former was even available on the world wide web). NWNM is aware, of course, of heightened security concerns following the September 11, 2001 attacks, especially related to facility maps and locations and quantities of sensitive materials.

Concerning facility maps, unredacted portions of the LANL FY04 TYCSP have maps of “Facility Status, 2004, with Currently Funded Construction,” generalized to the point where presumably there are no associated security concerns since they were released. However, in each case, “Facility Status, 2013, with Proposed Future Construction,” juxtaposed side-by-side with “Facility Status, 2004,” is redacted in full. Logically, TYCSP maps of future construction also would or could be generalized to the point where there would be no related security concerns. In effect, the NNSA appears more concerned about protecting from public disclosure speculative plans that may or may not happen, rather than sensitive facilities that actually exist on the ground. This leads us to question NNSA motives while redacting.

Concerning locations and quantities of sensitive materials, the FY 2000 and 2001 LANL TYCSPs in our possession do not even broach the subjects. Neither do the unredacted portions of the FY04 LANL TYCSP. We therefore find it highly unlikely that the redacted portions contain reference to sensitive materials, again leading us to question NNSA motives while redacting.

2. The Lab designated the FY04 LANL TYCSP as a “LA-UR” document, that is “Los Alamos – Unlimited Release,” without any further designation. The FY04 LANL TYCSP did not even rise to the level of “Official Use Only.” There are no classification markings in the body of the TYCSP, which in other documents that we have FOIAed for are struck through after release. In short, the need for redaction due to classification requirements does not exist for the FY04 LANL TYCSP.

3. Large portions of the redactions are available elsewhere. One example is “Future Land Use,” which is redacted in full, whereas “Existing Land Use” is provided. However, the contemporary November 2003 “Proposed Risk-Based End States for Completion of the EM Cleanup Mission at LANL,” supplied to us by the Lab without a FOIA request despite its Official Use Only designation, has numerous future land use maps. Additionally, since the TYCSPs have a 10-year planning horizon from year to year, much of the redacted material in the FY04 LANL TYCSP will be available in the FY 2000 and 2001 TYCSPs. The 2001 Plan, for example, has a planning horizon to 2010, whereas the 2004 Plan has a planning horizon to 2013. Therefore, across the board in all planning categories, the 2001 Plan contains the same information (unless where changed) as the 2004 Plan does up to the year 2010. In the event that information for up to 2010 has changed, that should also be disclosed pursuant to FOIA for all the other reasons given in this appeal.

4. FOIA has an exemption from disclosure when agencies claim that requested documents are predecisional. NMNM asserts that the TYCSPs are not predecisional, and are in fact the final planning document on the site level that feed directly into the NNSA’s Congressional Budget Request for the following fiscal year. The fact that “the site TYCSPs are the foundation for the strategic planning for the physical complex” has already been quoted. Some other relevant quotes are:

The FY 2006 site TYCSPs will support the FY 2007 - 2011 PPBE [Planning, Programming, Budgeting and Evaluation process] and development of the FY 2007 Budget Request, and will clearly demonstrate the results that will be accomplished for the resources expended... The September 2005, Site’s Final FY 2006 TYCSP submissions will be their comprehensive annual Plan and will reflect data to be reported in support of the FY 2006 Budget. (NNSA FY06 TYCSP Guidance,” December 2004, pp. 1 and 11.)

Therefore, the TYCSPs are clearly not predecisional documents.

In sum, NMNM argues for the prompt, unredacted release of the FY04 LANL TYCSP, and the other years’ TYCSPs still not released under FOIA Control No. 04-140-A.

Relief Requested

Nuclear Watch New Mexico respectfully requests the Director to grant this appeal and order the NNSA to release an unredacted FY04 LANL TYCSP, in both hard copy and electronic form. Similarly, we request the Director to order the prompt release of unredacted FY03, ’05 and ’06 LANL TYCSPs, in both hard copy and electronic form, all as part of FOIA Request Control No. 04-140-A.

Sincerely,

Jay Coghlan,
Executive Director

FOIA Order 9-19-07

The Court finds Plaintiff's motion to be supported by law and it will be Granted, making Defendant's motion [to dismiss] Moot. (Pg. 1)

The purpose of FOIA is to allow citizens to learn what their government is doing and how it is being done. (Pg. 4)

Not only is FOIA designed to foster transparency, it is intended to allow any citizen or group to receive government information "promptly." (Pg. 5)

A bona fide request for production of documents under FOIA must be honored in a timely fashion or the purpose of the Act is vitiated. (Pg. 5)

Congress amended FOIA specifically to address "substantial 'foot-dragging' on the part of administrative officials who invoked every conceivable delaying technique and forced citizens requesting information under the FOIA to resort to expensive litigation for vindication of their rights. Information is often useful only if it is timely. Thus, excessive delay by the agency in its response is often tantamount to denial. (Pg. 5)

FOIA is intended to ensure the prompt disclosure of information, not its suppression (Pg. 9)

NNSA headquarters decided an extensive multi-tiered review process was appropriate. Defendant describes the cantilevered winnowing process it devised...Given this convoluted process, it is not surprising that Plaintiff received its first response more than 17 months after the initial FOIA request. This makes a mockery of the 20-day target set by the Act and violates congressional intent. (Pg. 6)

[citing another case]...delays under the 'request-and-wait' system can be useful to the government to dissuade requests or to postpone unwelcome disclosures when journalists or others seek records on a suspected or emerging scandal. (Pg. 7)

While the cases cited by Defendant admittedly deal with published procedures, the fact that a citizen's FOIA request is not dealt with in a timely fashion based on an unpublished process of multiple layers of bureaucracy does not insulate it from judicial scrutiny. Indeed, the argument is contrary to both logic and law. (Pg. 7)

A pattern of delays which violates FOIA can be found outside published guidelines based on a bureaucratic practice of timeless indecision or paper shuffling even when such practices are not officially codified into regulations. (Pg. 8)

This order does not close the case, however, as further hearings will be scheduled on Defendant's and Plaintiff's Motions for Summary Judgment on the redactions as well as remedies for this violation of FOIA. (Pg. 10)



VIA E-MAIL – Delivery and Read Receipt Requested

September 29, 2016

U.S. Department of Energy
Richland Operations Office FOIA Office
ATTN: Dorothy Riehle
P. O. Box 550
Richland, WA 99352
Email: dorothy.riehle@rl.doe.gov

RE: Freedom of Information Act Request - Legal Fees

Dear FOIA Officer:

Pursuant to the Freedom of Information Act (5 U.S.C. § 552) ("FOIA"), Hanford Challenge respectfully requests copies of any and all records related to—or generated in connection with—all claims and/or requests for reimbursements, whether paid or not, of legal costs and fees related to—or generated in connection with—whistleblower discrimination claims at the Hanford Site, including but not limited to its contractors and subcontractors, from January 1, 2012 to the present. More specifically, Hanford Challenge requests:

1. Any and all records related to all claims for payment, including reimbursements, for any and all costs associated with the litigation involving **any and all whistleblower discrimination claims filed against any Hanford contractor, and/or subcontractor, and/or the Department of Energy.**

This request is intended to included, but not be limited to the following --

- a. Any and all records related to all claims for payment, including reimbursements, for any and all costs associated with the litigation involving **Dr. Walter Tamosaitis**, as plaintiff, and contractors Bechtel National, Inc., URS Inc., URS Energy & Construction, Inc., individual defendants Frank Russo, Gregory Ashley, William Gay, Dennis Hayes, and Cammi Krumm, and the Department of Energy.
- b. Any and all records related to all claims for payment, including reimbursements, for any and all costs associated with the litigation involving **Donna Busche**, as plaintiff, and contractors Bechtel National, Inc., URS Inc., and URS Energy & Construction, Inc.
- c. Any and all records related to all claims for payment, including reimbursements, for any and all costs associated with the litigation involving **Shelly Doss**, as plaintiff, and contractor Washington River Protection Solutions, LLC.
- d. Any and all records related to all claims for payment, including reimbursements, for any and all costs associated with the litigation involving **Matthew Spencer** and **Kirtley Clem**, as complainants, and contractor Computer Sciences Corporation.
- e. Any and all records related to all claims for payment, including reimbursements, for any and all costs associated with the litigation involving **Walter Ford**, as complainant, and contractors Bechtel National, Inc. and URS Energy & Construction, Inc.

- f. Any and all records related to all claims for payment, including reimbursements, for any and all costs associated with the litigation involving **David Lee**, as complainant, and contractor Washington River Protection Solutions, Inc.

The phrase "whistleblower discrimination claims" includes, but is not limited to, claims brought under the anti-retaliation provisions of the Energy Reorganization Act (42 USC 5851), Clean Water Act (33 USC 1367), (CWA), Clean Air Act (42 USC 7622), Toxic Substances Control Act, (15 USC 2622), Safe Drinking Water Act (42 USC 300(f)-(j)), Whistleblower Pilot Program (41 USC 4712), False Claims Act (31 USC 3729-2732), DOE Contractor Employee Protection Program (10 CFR 708), and any other federal or state law claims.

The term "records" as used in this request is intended to cover documents and data whether maintained in paper, digital or electronic formats and stored on media such as hard drives, smart phones, tape drives, or other such formats.

This request is intended to include, but not be limited to:

1. any and all contracts, subcontracts, service requests, agreements and/or other procurement related records related to or generated in connection with the request for reimbursements, and/or claims for payment related to the litigation;
2. any and all financial records, such as invoices, invoice detail reports, orders and receipts related to or generated in connection with the request for reimbursements, and/or claims for payment related to the litigation;
3. any and all correspondence and/or memoranda related to or generated in connection with the request for reimbursements and/or claims for payment related to the litigation; and
4. any and all emails related to or generated in connection with the request for reimbursements and/or claims for payment related to the litigation.

Hanford Challenge specifically requests that you undertake a search of all offices that may be in possession or control of these records at any location where responsive records might reasonably be found.

If any records covered by this request have been destroyed and/or removed, or are destroyed and/or removed after receipt of this request, please provide all surrounding records, including but not limited to a list of all records which have been destroyed and/or removed, a description of the actions taken, relevant dates, and individual, office and/or agency-wide policies, and/or justifications for the action(s).

Fee Waiver Request

Fees for FOIA requests are waived when a requester satisfies the burden of showing that disclosure of the information is (1) 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. 5 U.S.C. § 552(a)(4)(A)(iii); See also, Judicial Watch, Inc. v. Rossotti, 326 F.3d 1309 (D.C.C. 2003). "The Department of Energy will furnish documents without charge or at reduced charges 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 disclosure is not primarily in the commercial interest of the requester." 10 CFR § 104.9(a)(8).

“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 CFR § 1004.9(a)(8).

Pursuant to 10 CFR § 1009.4(a)(8), in determining when fees should be waived or reduced the appropriate FOIA Officer should address the following two criteria:

(i) That 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.” Factors to be considered in applying this criteria include but are not limited to:

(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.

(ii) If Disclosure of the Information “is Not Primarily in the Commercial Interest of the Requester.” Factors to be considered in applying this criteria include but are not limited to:

(A) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

(B) The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is “primarily in the commercial interest of the requester.” 10 CFR § 1009.4(a)(8).

“Congress intended independent researchers, journalists, and *public interest watchdog groups* to have inexpensive access to government records in order to provide the type of public disclosure believed essential to our society . . . Congress ensured that when such requesters demonstrated a *minimal showing* of their legitimate intention to use the requested information in a way that contributes to public understanding of the operations of government agencies, no fee attached to their request.” Inst. for Wildlife Prot. v. United States Fish & Wildlife Serv., (290 F. Supp. 2d 1226, 1232 (D. Or. 2003) (emphasis added). “Congress amended FOIA to ensure that it is ‘*liberally construed in favor of waivers for noncommercial requesters.*’” Judicial Watch, Inc., at 1312 (quoting McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 CONG. REC. 27,190 (1986) (Sen. Leahy)) (emphasis added). The fee waiver provision of FOIA “should not be interpreted to allow federal agencies to set up roadblocks to prevent noncommercial entities from receiving a fee waiver. W. Watersheds Project v. Brown, 318 F. Supp. 2d 1036, 1039 (D. Id. 2004) (citing McClellan Ecological Seepage Situation, at 1284).

First Fee Waiver Requirement (Public Understanding):

Factor A: The requested records concern the operations and activities of the federal government.

1. This criteria is clearly met. We seek records in the possession and control of the Department of Energy (DOE) relating to the Department's support of contractors in a claim related to alleged whistleblower reprisals at the Department's Hanford Site. The Department of Energy, the owner and manager of the Hanford Site, has conducted surveillances and investigations of contractor activities at the site, making this function an identifiable operation of the government.
2. The act of a federal government agency (here, the U.S. DOE) paying and/or reimbursing a private contractor for legal fees and/or costs for fighting legal battles is clearly an operation/activity of the federal government.
3. The act of DOE using taxpayer money to pay/reimburse government contractors is an operation/activity of the government.
4. The operation or activity of the federal government (DOE) is not limited to the payments/reimbursements themselves, but also includes the supporting documentation, communications, invoices, etc in relation to the payments/reimbursements.

Factor B: The disclosure of the requested records is likely to contribute to a public understanding of government operations and activities of the federal government.

1. The records requested in this FOIA request are not currently in the public domain or otherwise common knowledge among the general public.
2. Although the government contracts may be in the public domain, the supporting documents and communications of payments/reimbursements of legal fees are not.
3. The requested communications will likely provide necessary insight into the mental impressions, reasons, and policy decisions of those involved in formulating, discussing, and finalizing payments/reimbursements of legal fees. This is something that the contracts themselves do not accomplish. The supporting documentation and communications would likely fill this gap of understanding by the public in this government operation/activity.
4. The supporting documents and communications requested will likely add insight into what the federal government (via employees/officials) considers at various stages of legal fee payments/reimbursements. It will likely assist in explaining what was and was not important in this particular government operation/activity, which would enhance public understanding of this operation/activity.
5. The communications requested will likely aid in explaining the process of how the federal government (DOE) arrived at its positions for deciding when it provides payments/reimbursements for legal fees.
6. Unlike other federal government agency actions (like rulemaking, investigations, etc), where there is a record for decision-making, there is no such readily available records or documentation for payment/reimbursement of contractor legal fees. The public understanding of this government operation/activity will be significantly enhanced by releasing the specific documents and communications requested by having access to and seeing more of the record and accompanying documents of how their government arrived at their decisions.
7. There are no records, articles, published works, etc that cover the records requested in this request. Nor is the requested information common knowledge among the general public. The fact that some contractors receive payments/reimbursements may be known by the general public, the amounts, etc are not common knowledge.

8. Hanford Challenge intends to disseminate these records, and an analysis of the records, to media outlets, congresspersons, post it on Hanford Challenge's website, etc to get the information to the public.

Factor C: The disclosure of the requested records is likely to contribute to the general public understanding of government operations and activities.

1. Hanford Challenge expertise in the subject area:
 - a. The Hanford Challenge staff has many years of experience directly related to Hanford oversight and has unique expertise regarding the environmental, safety, and health issues associated with nuclear sites. Hanford Challenge, an independent non-profit and non-governmental agency, has been addressing cleanup and storage of nuclear and chemical waste at the Hanford Nuclear Site for almost a decade. Tom Carpenter, the Executive Director of Hanford Challenge, has been working on Hanford cleanup and waste storage issues for over 25 years.
 - b. Hanford Challenge consistently obtains information about Hanford, the cleanup process, the storage of nuclear and chemical waste, etc, and consistently uses its capacity to read, dissect, and share the information in an easily understandable format for the public.
 - c. Hanford Challenge has a seat on the Hanford Advisory Board, which advises the U.S. Department of Energy, The EPA, and the State of Washington on cleanup issues related to the Hanford Nuclear Site.
 - d. Hanford Challenge has set up a program called Inheriting Hanford to teach younger people about Hanford cleanup issues and connect younger people with mentors.
 - e. Hanford Challenge staff also accompany Hanford workers to Congress for congressional hearings and to testify before Congress.
 - f. Hanford Challenge is consistently requested to comment or be interviewed for news articles, news shows, radio talk shows, and reports related to Hanford. This includes BBC, 60 Minutes, Newsweek, CBS This Evening, National Geographic, The Rachel Maddow Show, Washington Post, New York Times, Seattle Times, LA Times, King5 TV, Northwest Public Radio, King5 news, The Tri-City Herald, etc.
 - g. There is no other non-governmental organization in existence that has as much collective experience or expertise on Hanford cleanup issues as Hanford Challenge.
 - h. Hanford Challenge also publishes reports on information it obtains, including from FOIA requests.
2. Ability and intention to effectively convey information to the public.
 - a. Hanford Challenge has already shared information obtained in the past and will share the specifically requested information with the broad public and specific media outlets:
 - i. Hanford Challenge will share the information with King5 Television in Seattle, Washington. Hanford Challenge regularly works with King5 TV, National Public Radio, LA Times, Washington Post, Tri-City Herald, Associated Press, Weapons Complex Monitor, and CBS Nightly News. Recently, King5 has been particularly effective in conveying information to the public. King5 TV has been doing a series of stories called "Hanford's Dirty Secrets." King5 has won a Peabody for their work on this series.
 - ii. In addition to the above-stated specific news company that has a proven record of specific interest in Hanford stories and can convey the information effectively, Hanford Challenge will also send out the likely press release from

this information and accompanying documents generated from this specific request to our media list. Hanford Challenge maintains and updates a media contact list of over 600 individuals that we send our press releases and accompanying documents to if any one of them are interested in further information we obtain from FOIA requests.

- iii. As stated above, Hanford Challenge is often requested to appear or be interviewed for specific Hanford stories and does so on a regular basis.
 - iv. Hanford Challenge will likely share the requested information with the Hanford Advisory Board.
 - b. Hanford Challenge will also likely disseminate the requested information via our website (www.hanfordchallenge.org; which is viewed by tens of thousands of visitors annually, includes documents, resources, and news on Hanford), quarterly newsletter, social media (Facebook (1,075 followers) and Twitter (712 followers)), report(s) (if appropriate), elected representatives, and public events.
3. It is likely that a reasonably broad audience would be interested in the payment/reimbursement of legal fees to government contractors because it involves the use of taxpayer money by DOE to fund contractors fighting legal cases against Hanford whistleblowers. The American public is typically very interested in how their tax dollars are being used.
 4. It is likely that a reasonably broad audience would be interested in the DOE payment/reimbursement of legal fees to contractors because the public does want to know if and how much the DOE is paying/reimbursing Hanford contractors for whistleblower cases. In fact, our members, media contacts, and congresspersons have already expressed great interest in this information.

Factor D: The disclosure of the requested records is likely to contribute 'significantly' to the public understanding of government operations and activities.

1. The release of the requested records are in the public interest and are likely to contribute significantly to the public understanding of the operations of the government because these types of records reveal the activities at the Hanford Site, including DOE support of activities relating to the payment of litigation fees associated with the whistleblower claims. The issue has gained Congressional attention, GAO oversight, and media attention over the past 30 years.
2. The requested records will contribute significantly to the public's understanding of how taxpayer dollars are paid to DOE Hanford contractors accused of harassing, firing, and isolating whistleblowers at the Hanford Nuclear Site. The requested records would give a complete picture of how DOE has funded contractors involved in whistleblower litigation/cases because the request seeks information as to all Hanford whistleblower cases since January 1, 2012 to the present, and not a single whistleblower.

Second Fee Waiver Requirement (Commercial Interest):

Factor A: Commercial Interest of Requester

1. Hanford Challenge, a non-profit public interest group, requests this information on behalf of our members and the public. Hanford challenge does not seek this information for a use or purpose that furthers the commercial trade or profit interest of Hanford Challenge.
2. Hanford Challenge will not profit from the requested information. Hanford Challenge will not receive monetary or other benefits from disclosing the requested information to the public.

3. One of the main purposes of this request is to turn the documents over to the public and the media for no charge so that they may know more about how DOE funds contractors who area involved in whistleblower litigation/cases.
4. Hanford Challenge has never received a profit from a FOIA request and will not with this FOIA request.

Factor B: Primary Interest of Disclosure

1. Hanford Challenge is not requesting the information for any private or commercial purpose and is a non-profit, public interest organization designated as a tax exempt entity under IRS code 501(c)(3). Our interest in the disclosure of these records is for public education, public participation, advocacy for public interest goals, and a more responsive and accountable government that promotes environmental protection and protection of human health and safety.

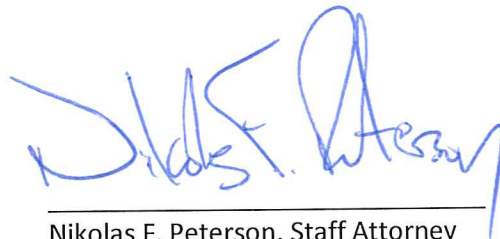
For the reasons stated above, Hanford Challenge hereby respectfully requests that any and all fees be waived for this FOIA request. Hanford Challenge looks forward to a response to this request within twenty (20) working days of the receipt of this letter.

If you have any questions or concerns about this FOIA request, please do not hesitate to contact Tom Carpenter or Nikolas Peterson at the contact information listed below.

Sincerely,



Tom Carpenter, Executive Director
Hanford Challenge
2719 East Madison Street, Suite 304
Seattle, WA 98112
(206) 292-2850 ext. 22
tomc@hanfordchallenge.org



Nikolas F. Peterson, Staff Attorney
Hanford Challenge
2719 East Madison Street, Suite 304
Seattle, WA 98112
(206) 292-2850 ext. 25
nikolasp@hanfordchallenge.org



June 8, 2017

Public Records Officer
Radiation Protection
Washington State Department of Health
PO Box 47827
Olympia, WA 98504-7827

Sent to: EPHPublicDisclosure@doh.wa.gov

Dear Public Records Officer,

Under provisions of Washington's Public Records Act (RCW 42.56), I hereby request that you provide a copy of the following records:

- Any and all records reflecting radiation readings, sampling, and analyses, including but not limited to direct readings, swipes, smears, or the collection and analysis of filter media related to or generated in connection with the contamination incident at the 618-10 Burial Ground in 2015. Please include all records such as correspondence, emails, memoranda, maps, charts, photographs, and any other record that describes, documents or records this incident. The specific incident that is the subject of this request was reported in the *Tri-City Herald* newspaper on February 21, 2016, entitled, *Hanford contamination spread across public highway*. The incident apparently occurred in November 2015.

I specifically request that you undertake a search of all Washington Department of Health offices that may be in possession or control of these records. If the records covered by the request are voluminous, I request an opportunity to review the records in person at your offices.

For any records or portions of records that you deny because of specific Public Records Act exemptions, please provide a statement of the specific exemption authorizing the withholding of the record (or part) and an explanation of how the exemption applies to the record withheld. Your response should include a specific means of identifying any individual records which are being withheld in their entirety. This is required by *Progressive Animal Welfare Soc'y v. Univ. of Washington*, 125 Wash.2d 243 (1994).

These requested records will be used for the public interest without any commercial purpose. Therefore, I request that all costs be waived. Hanford Challenge is a non-profit, public interest organization designated as a tax exempt entity under IRS Code 501(c)(3). Hanford Challenge is also a member of the Hanford Advisory Board. We would prefer that production of these records be provided in a digital format, such as on an online site and/or a DVD.

I request a response within five business days of receipt of this letter. Please contact me via email at tomc@hanfordchallenge.org or at the address above if you have any questions.

Very truly yours,

A handwritten signature in blue ink that reads "Tom Carpenter". The signature is written in a cursive style with a large initial "T" and "C".

Tom Carpenter, Executive Director



June 9, 2017

FOIA Officer
Environmental Protection Agency, Region 10
1200 6th Ave.
Seattle, WA 98101

Sent to:

Dear FOIA Officer,

Pursuant to the Freedom of Information Act (5 U.S.C., Section 552) ("FOIA"), Hanford Challenge requests a copy of the following agency records:

- Any and all records reflecting an incident that occurred at the Hanford nuclear site on or about November 17, 2015, relating to dispersion of radioactive materials from a Hanford facility following a windstorm. The specific incident that is the subject of this request was reported in the *Tri-City Herald* newspaper on February 21, 2016, entitled, *Hanford contamination spread across public highway*. The incident apparently occurred in November 2015. This request includes, but is not limited to --
 - Any and all radiation readings, sampling, and analyses, including but not limited to direct readings, swipes, smears, or the collection and analysis of filter media related to or generated in connection with the contamination incident at the 618-10 Burial Ground in 2015.
 - Any and all records such as correspondence, emails, memoranda, maps, charts, photographs, and any other record that describes, documents or records this incident. This is intended to include, but not be limited to correspondence referenced in the above-cited news article.

I specifically request that you undertake a search of all offices that may be in possession or control of these records. If the records covered by the request are voluminous, I request an opportunity to review the records in person at your offices.

Fee Waiver Request:

I hereby request that all fees, if any, be waived because this information is in the public interest, and can lead to a greater understanding of the permitting and operations of the federal facilities at Hanford. Hanford Challenge is not requesting the information for any private or commercial purpose and is a non-profit, public interest organization designated as a tax exempt entity under IRS code 501(c)(3).

Our interest in the disclosure of these records is for public education, public participation and commenting on the permitting process, advocacy for public interest goals, and a more responsive and accountable government that promotes environmental protection and protection of human health and safety.

I. This Specific FOIA Request Meets the Fee Waiver Requirements of FOIA and 40 C.F.R. §2.107(l):

5 USC § 552(a)(4)(A)(iii) of FOIA “requires agencies to waive fees for requesters able to demonstrate that ‘disclosure of the information is in the public interest.’” Judicial Watch, Inc. v. Rossotti, 326 F.3d 1309, 1310 (D.C.C. 2003). In order to demonstrate that a FOIA Request is in the public interest, and therefore eligible for a fee waiver, the requester must show that disclosure of the information ‘is likely to contribute significantly to public understanding of the operations or activities of the government as is not primarily in the commercial interest of the requester.’” Id. at 1312 (citing 5 U.S.C. § 552(a)(4)(A)(iii)).

“Congress intended independent researchers, journalists, and public interest *watchdog groups* to have inexpensive access to government records in order to provide the type of public disclosure believed essential to our society Congress ensured that when such requesters demonstrated a minimal showing of their legitimate intention to use the requested information in a way that contributes to public understanding of the operations of government agencies, no fee attached to their request.” Inst. for Wildlife Prot. v. United States Fish & Wildlife Serv., (290 F. Supp. 2d 1226, 1232 (D. Or. 2003) (emphasis added). “Congress amended FOIA to ensure that it is ‘liberally constructed in favor of waivers for noncommercial requesters.’” Judicial Watch, Inc., at 1312 (quoting McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 CONG. REC. 27,190 (1986) (Sen. Leahy)).

a. First Fee Waiver Requirement (Public Understanding)

Under 40 C.F.R. 2.107(l)(2), in order to determine whether the first fee waiver requirement is met (likely to contribute significantly to the public understanding of the operations or activities of the federal government) FOI Offices will consider the following four factors:

- (i) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government." The subject of the requested records must concern identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote.
- (ii) The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities. The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be "likely to contribute" to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding when nothing new would be added to the public's understanding.

(iii) The contribution to an understanding of the subject by the public is likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding." The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public will be considered. It will be presumed that a representative of the news media will satisfy this consideration.

(iv) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent. FOI Offices will not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government is "important" enough to be made public. (40 C.F.R. 2.107(l)(2)).

Factor 1: The requested records concern the operations and activities of the Federal government because The records relating to a release of radioactive materials at a government facility, impacting a public highway, and the governmental response to such a release, is directly related to one of the core operations/activities of the federal government (U.S. EPA)— compliance & enforcement of environmental laws and regulations. Compliance and enforcement is how the EPA ensures that governments, businesses, and industry understand and follow U.S. environmental laws and regulations. Compliance helps organizations and individuals meet their obligations under environmental laws and regulations. Enforcement often involves legal action against an organization or industry when they do not comply with the laws or regulations.

Factor 2 and 4: The disclosure is likely to contribute to a public understanding of government operations or activities because the records sought will provide necessary insight into the EPA and other federal agency response to radiological contamination that occurred during the course of a cleanup operation at a government-owned facility. Since this occurrence, there have been several other radiation releases to the environment, including the spread of plutonium particles at the Plutonium Finishing Plant and the collapse of the PUREX tunnel containing large inventories of nuclear materials.

Factor 3: The disclosure is likely to contribute to the public understanding of a reasonably broad audience of persons interested in the subject matter because:

1. Hanford Challenge expertise in subject area:
 - o The Hanford Challenge staff has many years of experience directly related to Hanford oversight and has unique expertise regarding the environmental, safety, and health issues associated with nuclear sites. Hanford Challenge, an independent non-profit and non-governmental agency, has been addressing cleanup and storage of nuclear and chemical waste at the Hanford Nuclear Site for

ten years. Tom Carpenter, the Executive Director of Hanford Challenge, has been working on Hanford cleanup and waste storage issues for over 30 years.

- o Hanford Challenge consistently obtains information about Hanford, the cleanup process, the storage of nuclear and chemical waste, etc, and consistently uses its capacity to read, dissect, and share the information in an easily understandable format for the public.
 - o Hanford Challenge has a seat on the Hanford Advisory Board, which advises the U.S. Department of Energy, The EPA, and the State of Washington on cleanup issues related to the Hanford Nuclear Site.
 - o Hanford Challenge has set up a program called Inheriting Hanford to teach younger people about Hanford cleanup issues and connect younger people with mentors.
 - o Hanford Challenge staff also accompany Hanford workers to Congress for congressional hearings and to testify before Congress.
 - o Hanford Challenge is consistently requested to comment or be interviewed for news articles, news shows, radio talk shows, and reports related to Hanford. This includes BBC, 60 Minutes, Newsweek, CBS This Evening, The Rachel Maddow Show, Washington Post, Seattle Times, King5 TV, Northwest Public Radio, The Tri-City Herald, etc. For a few examples, see:
 - <http://www.bbc.com/news/magazine-26658719>
 - <http://www.msnbc.com/rachel-maddow-show/watch/whistleblower-pays-price-for-voicing-nuke-safety-concerns-44137027537>
 - <http://usnews.nbcnews.com/news/2013/06/22/19088481-feds-nuclear-waste-may-be-leaking-into-soil-from-hanford-site?lite>
 - <http://www.newsweek.com/americas-fukushima-243996>
 - o There is no other non-governmental organization in existence that has as much collective experience or expertise on Hanford cleanup issues as Hanford Challenge.
 - o Hanford Challenge also publishes reports on information it obtains, including from FOIA requests.
 - http://www.hanfordchallenge.org/cmsAdmin/uploads/2003_Knowing_End_angerment_002.pdf
2. Ability and intention to effectively convey information to the public
- o Hanford Challenge has already shared information obtained in the past and will share the specifically requested information with the broad public and specific media outlets:
 - Hanford Challenge will share the information with Susannah Frame, King5 Investigator, at King5 Television in Seattle, Washington. Hanford Challenge has worked with King5 TV, in particular, Susannah Frame has been particularly effective in conveying information to the public. King5 TV has been doing a series of stories called “Hanford’s Dirty Secrets.” They even won a [Peabody](#) for their work on this series.
 - Hanford’s Dirty Secrets Link:
<http://www.king5.com/news/investigators/series/Hanford-Dirty-Secrets-series-radiation-nuclear-waste-205308821.html>

- In addition to the above-stated specific individual at a specific news company that has a proven record of specific interest in Hanford stories and can convey the information effectively, Hanford Challenge will also send out the likely press release from this information and accompanying documents generated from this specific request to our media list. Hanford Challenge maintains and updates a media contact list of over 600 individuals¹ that we send our press releases and accompanying documents to if any one of them are interested in further information we obtain from FOIA requests.
 - As stated above, Hanford Challenge is often requested to appear or be interviewed for specific Hanford stories and does so on a regular basis.
 - Hanford Challenge will likely share the requested information with the Hanford Advisory Board.
 - o Hanford Challenge will also likely disseminate the requested information via our website (www.hanfordchallenge.org; which is viewed by tens of thousands of visitors annually, includes documents, resources, and news on Hanford), quarterly newsletter, social media (Facebook and Twitter, report(s) (if appropriate), elected representatives, and public events.
3. It is likely that a reasonably broad audience would be interested in the details behind this particular incident that is the subject of the records request because of the intense national and international media attention that resulted from the collapse of the PUREX tunnel and other recent news about the Hanford site.
 4. It is likely that a reasonably broad audience would be interested in the radiation release because the public does want to know if federal agencies have complied with federal environmental and procedural laws. In fact, our members, media contacts, and King5 TV have already expressed great interest in this information.

b. Second Fee Waiver Requirement (Commercial Interest)

Under 40 C.F.R. 2.107(1)(3), in order to determine whether the second fee waiver requirement is met (request is primarily in the commercial interest of the requester, FOIA offices will consider the following factors:

- (i) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure. FOI Offices will consider any commercial interest of the requester (with reference to the definition of "commercial use request" in paragraph (b)(1) of this section), or of any person on whose behalf the requester may be acting, that would be furthered by the requested disclosure. Requesters will be given an opportunity in the administrative process to provide explanatory information regarding this consideration.
- (ii) The primary interest in disclosure: Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."

¹ See Attachment #2

A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. FOI Offices ordinarily will presume that when a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

Factor 1: Hanford Challenge has no commercial interest that would be furthered by the requested documents.

1. Hanford Challenge, a non-profit public interest group, requests this information on behalf of our members and the public. Hanford challenge does not seek this information for a use or purpose that furthers the commercial trade or profit interest of Hanford Challenge.
2. Hanford Challenge will not profit from the requested information. Hanford Challenge will not receive monetary or other benefits from disclosing the requested information to the public.
3. One of the main purposes of this request is to turn the documents over to the public and the media for no charge so that they may know more about Hanford operations.
4. Hanford Challenge has never received a profit from a FOIA request and will not with this FOIA request.

Factor 2: The public interest in disclosure outweighs any remote commercial interest that the EPA may assert that Hanford Challenge has in the requested information.

1. Although Hanford Challenge may receive media attention from conveying the requested information to the media, public, etc (see above for ways Hanford Challenge will convey the information), the commercial interest from this attention/exposure is outweighed because these documents primarily serve the public by providing insight into the radiation release in 2015 at Hanford.

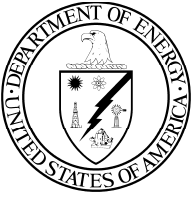
These requested records will be used for the public interest without any commercial purpose. Therefore, I request that all costs be waived. Hanford Challenge is a non-profit, public interest organization designated as a tax exempt entity under IRS Code 501(c)(3). Hanford Challenge is also a member of the Hanford Advisory Board. We would prefer that production of these records be provided in a digital format, such as on an online site and/or a DVD.

I request a response within five business days of receipt of this letter. Please contact me via email at tomc@hanfordchallenge.org or at the address above if you have any questions.

Very truly yours,



Tom Carpenter, Executive Director



Department of Energy
Richland Operations Office
P.O. Box 550
Richland, Washington 99352

October 30, 2015

CERTIFIED MAIL

Mr. Nikolas Peterson
Hanford Challenge
219 First Avenue South
Suite 310
Seattle, Washington 98104

Dear Mr. Peterson:

FREEDOM OF INFORMATION ACT REQUEST (FOI 2016-00015)

This letter is in response to the electronic Freedom of Information Act (FOIA) request you submitted to the U.S. Department of Energy (DOE) Headquarters FOIA Office on September 1, 2015, requesting “the document(s) titled (either specifically or similarly to): Federal Occupational Health Initial Assessment for Electronic Medical Record System, dated on or about August 20, 2015 (8/20/2015), and in possession by the Department of Energy.” In a letter to you dated October 13, 2015, this office notified you that since the requested document was generated by another Federal agency, the U.S. Department of Health and Human Services (HHS), your request was transferred to the FOIA Officer at that location for a release determination. Since that time, HHS requested DOE make the release determination and provide the response directly to you.

We have interpreted your request for a copy of the enclosed document entitled “Initial Assessment of Electronic Medical Records System” generated by Federal Occupational Health (FOH). If our interpretation of your request is incorrect, please contact this office.

The document is enclosed with certain deletions pursuant to Exemptions 5, 6 and 7E of the FOIA. Exemption 5 protects “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency. This Exemption protects those documents normally privileged in the civil discovery process, such as pre-decisional, deliberative process material. The deliberative process protects advice, recommendations, and opinions that are pre-decisional and part of the decision-making process of the Government. This privilege protects not merely the documents, but also the integrity of the deliberative process itself where the exposure of that process, or an element thereof, would result in harm. It is reasonably foreseeable that release of such information could chill open and frank discussions, limit government personnel’s range of options to consider, and thus detract from the quality of Agency decisions.

We also withheld the name of the employee interviewed on page 5 pursuant to Exemption 6. Exemption 6 provides that an agency may protect from disclosure all personal information if its disclosure would constitute a clearly unwarranted invasion of privacy by subjecting the individuals to unwanted communications, harassment, intimidation, retaliation, or other substantial privacy invasions by interested parties.

In invoking Exemption 6 we considered 1) whether a significant privacy interest would be invaded by disclosure of information, 2) whether release of the information would further the public interest by shedding light on the operations or activities of the government, and 3) whether in balancing the private interest against the public interest, disclosure would constitute a clearly unwarranted invasion of privacy. We have determined that the public interest in the identity of the individual whose name appears in the document does not outweigh the individual's privacy interests.

Lastly, Exemption 7(E) provides that, "records or information compiled for law enforcement purposes" may be withheld from disclosure, but only to the extent that the production of such documents "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."

Sensitive information about DOE networks, systems, and communications has been withheld pursuant to Exemption 7(E). The withheld information pursuant to Exemption 7(E) includes, but is not limited to, preventative law enforcement and/or security purposes to prevent future illegal acts in the form of cyber security intrusions, and investigative techniques that could be used to obtain classified or sensitive information on DOE networks without authorization. This report includes specific system vulnerabilities and if released, could compromise DOE's cyber security posture and ability to protect sensitive information.

This satisfies the standard set forth by the Attorney General by Memorandum on March 19, 2009, that the agency is justified in not releasing material that it reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions or disclosure is prohibited by law. This also satisfies DOE's regulation at Title 10, Code of Federal Regulations (CFR), Section 1004.1, to make records available which it is authorized to withhold under 5 U.S.C. 552 when it determines that such disclosure is in the public interest. Accordingly, we will not make discretionary disclosure of this information.

All releasable information in the documents has been segregated and is being provided to you. The undersigned individual is responsible for this determination. You have the right to appeal to the Office of Hearings and Appeals, as provided in 10 CFR 1004.8. Your appeal shall be filed within 30 days after receipt of this letter. You may submit your appeal by e-mail to OHA.filings@hq.doe.gov, including the phrase "Freedom of Information Appeal" in the subject line. Alternatively, any such appeal may be made in writing to the following address: Director, Office of Hearings and Appeals (HG-1), U.S. Department of Energy, L'Enfant Plaza Building, 1000 Independence Avenue SW, Washington, D.C. 20585-1615. Should you choose to appeal, please provide this office with a copy of your e-mail or letter.

Mr. Nickolas Peterson

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October 30, 2015

If you have any questions regarding your request, please contact me at our address above or on (509) 376-6288.

Sincerely,

A handwritten signature in black ink, appearing to read "Dorothy Riehle". The signature is written in a cursive style with a large initial "D" and a long horizontal stroke.

Dorothy Riehle
Freedom of Information Act Officer
Office of Communications
and External Affairs

OCE:DCR

Enclosure