

Oak Ridge Environmental Peace Alliance Nuclear Watch New Mexico

Freedom Of Information Request

March 26, 2018

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

**EXPEDITED PROCESSING
REQUESTED**

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

Dear FOIA Officer,

This is a request under the Freedom of Information Act (FOIA), 5 U.S.C. Section 552, as amended.

The Oak Ridge Environmental Peace Alliance (OREPA) and Nuclear Watch New Mexico (NWNM) request “The established definitive scope, schedule, and cost baselines as part of the CD-2/3 submission” for the Uranium Processing Facility, as stated in the National Nuclear Security Administration’s FY 2019 Congressional Budget Request (page 333).

It is clear that NNSA has completed the “definitive scope, schedule, and cost baselines as part of the CD-2/3 submission” given its March 23, 2018 press release *Uranium Processing Facility authorized to start construction on main buildings*.

Further, OREPA and NWNM request that release of these documents receive Expedited Processing. As you know, the FOIA provides that agencies must provide for the expedited processing of FOIA requests for requesters who demonstrate “compelling need,” and DOE regulations track the FOIA by providing that

... a compelling need exists when failure to obtain records expeditiously could reasonably be expected to pose a threat to the life or physical safety of an individual or, **when a request is submitted by a person primarily engaged in disseminating information and there is an urgency to inform the public about actual or alleged Federal Government activity.**

10 C.F.R. § 1004.5(d)(6) (emphasis added)

A. OREPA and NWNM are “person(s) primarily engaged in disseminating information.”

OREPA and NWNM are non-profit, tax-exempt, public policy research and information environmental organizations. They make information available to thousands of citizens by means of their 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.

OREPA and NWNM are in an excellent position to aid the public in its understanding of government activities, particularly with respect to DOE facilities. Our most effective means of information dissemination is through our web sites that together receive more than 2.5 million hits per year. The two organizations post fact sheets analyzing federal and state policies on their web sites. 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.

B. There is an urgency to inform the public about actual or alleged Federal Government activity in this case.

Congress will be soon considering annual funding (which has soared to \$703 million requested in FY 2019) for the Uranium Processing Facility, which has had a troubled budget history. Having the above requested information available to the public, media and Congress could lead to better-informed decisions on the use of taxpayers' money. The imminent beginning of both construction and the congressional appropriations process make the release of the information requested in this FOIA even more urgent.

There is intense public interest in the human safety, environmental risk, and budget issues facing this massive project, as demonstrated by numerous local and national articles on the topic. *See, e.g.,* Brittany Crocker, *Earthquake Risks Ignored at Uranium Processing Facility, Lawsuit Claims*, Knoxville Sentinel, July 28, 2017, *available at* <http://www.knoxnews.com/story/news/2017/07/28/oak-ridge-environmental-and-peace-alliance-nuclear-watch-new-mexico-natural-resources-defense-council/501142001/> (noting that a federal safety board has also raised concerns over these issues); or John Huotari, *Federal Lawsuit Asks for Environmental Review of New UPF Design*, Oak Ridge Today, July 23, 2017, *available at* <http://oakridgetoday.com/2017/07/23/federal-lawsuit-asks-environmental-review-new-upf-design/>

The high degree of public interest in these matters, coupled with the fact that Congress will soon be contemplating funding for the Uranium Processing Facility project, demonstrates an urgent need for clear and thorough information to allow for informed and meaningful public input as Congress makes important budgetary decisions.

We note that Title 10 Chapter X §1004.5(d)(7) states, “A determination to grant or deny a request for expedited processing will be made by the appropriate FOIA Officer within ten days after receipt of the request. The requester will be notified of the determination and informed that any denial may be appealed within 90 calendar days to the Office of Hearings and Appeals.”

As a reminder, the January 21, 2009 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.”
(<https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/presidential-foia.pdf>)

We request an unlocked electronic format (e.g. PDF or Word) of these documents, 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 copies of these documents. 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, OREPA and NWNM request 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, OREPA and NWNM request the prompt release of all elements of the document portions marked 'Unclassified,' 'For Official Use Only,' or 'Declassified.' Additionally, OREPA and NWNM request that the remaining classified portions undergo a careful review for the purpose of declassification, in whole or in part, and that you release to OREPA and NWNM all reasonably segregated portions of the classified record.

OREPA and NWNM further request 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, OREPA and 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.

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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, OREPA and NWNM herein respond to the above questions in sequential order. This will also help your office clarify any questions you may have regarding OREPA and 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.

OREPA and NWNM's answers are as follows:

1) All information requested relates directly 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, §1.067 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 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) OREPA and NWNM are in an excellent position to aid the public in its understanding of government activities, particularly with respect to DOE facilities in Tennessee and New Mexico. Our most effective means of information dissemination is through our web sites <http://orepa.org> and <https://www.nukewatch.org/> that receive over 2,500,000 hits a year. In order to better inform the public, OREPA and NWNM post 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 OREPA and NWNM with important information that will help clarify DOE activities. In turn, OREPA and NWNM will convey the information to the public so that the general citizenry can be better informed.

5) OREPA and NWNM have no commercial interest in this FOIA request. OREPA and NWNM operate as 501(c)3 non-profit organizations. As a result, we cannot in any way make a profit from their activities, whether from this FOIA request, or any other endeavor.

6) Disclosure is not "primarily in the commercial interest of the requester." As discussed in the response to question 5, OREPA and NWNM do not have any commercial interest in this FOIA request. Instead, disclosure would primarily and significantly promote public understanding of the operations of the government.

As per 10 C.F.R. § 1004.4(e), OREPA and NWNM assure 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), OREPA and NWNM are 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. § 552(a)(4)(A)(iii) and 10 C.F.R. § 1004.9(a)(8)) This request clearly meets these requirements, as described above. 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 OREPA and 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 the Response 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 these documents will be released to us, or, alternatively, any reason for denial.

The undersigned certify that the above demonstration of compelling need for expedited processing is true and correct to the best of our knowledge and belief.

Sincerely,

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