



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, DC 20555 - 0001

2 2018

NRC-2018-000575

Terry J. Lodge, Esq.
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Toledo, OH 43604-5627

Dear Mr. Lodge:

On behalf of the U.S. Nuclear Regulatory Commission (NRC), I am responding to your June 22, 2018, letter, in which you appealed the agency's denial of your request for expedited processing of your June 20, 2018, Freedom of Information Act (FOIA) request, NRC-2018-000563, which seeks the records generated in contemplation of, and actually presented, exchanged or distributed, at both the public and non-public portions of the June 7, 2018, Joint Meeting of the Commissioners of the NRC and the Federal Energy Regulatory Commission (FERC).

Acting on your appeal, I have considered the matter and have determined that the denial of your request for expedited processing was appropriate. Therefore, I have denied your appeal.

A request for expedited processing may be granted only when the requester shows a "compelling need" based on meeting either of two criteria: (1) when failure to obtain the records quickly could reasonably be expected to pose an imminent threat to the life or physical safety of an individual, or (2) if the requester is a "person primarily engaged in disseminating information," by demonstrating that there exists an urgency to inform the public about actual or alleged Federal Government activity. 5 U.S.C. § 552(a)(6)(E)(v); 10 C.F.R. § 9.25(e).

The FOIA expedited processing provision was added in 1996 by the Electronic Freedom of Information Act Amendments, Pub. L. 104-231, § 8, 110 Stat. 3048, 3051-52. The United States Court of Appeals for the District of Columbia Circuit, in examining the legislative history of these amendments, has noted that "the specified categories for compelling need are intended to be narrowly applied." Al-Fayed v. CIA, 254 F.3d 300, 310 (D.C. Cir. 2001) (quoting H.R. Rep. No. 104-795, at 26 (1996)). The Circuit reiterated Congress' concern for agencies' "finite resources" and the possibility that overuse of the expedited process would unfairly disadvantage other requesters. Your appeal letter concedes that your request does not seek or meet expedited processing based on the first criterion, and instead focuses on the second criterion (*i.e.*, that your clients are primarily engaged in disseminating information and there is an urgency to inform the public).

However, your appeal letter does not provide sufficient information to demonstrate that your clients are "primarily engaged in disseminating information" as that term is used in the context of the FOIA expedited processing provision. Courts have regularly found that reporters and members of the media qualify as persons primarily engaged in the dissemination of information. But, given congressional intent that this category be narrowly construed, the "primarily engaged" standard requires that dissemination of information be the primary activity of the requester to the exclusion of other main activities. It does not include organizations that are only incidentally involved in the dissemination of information. See, *e.g.*, Landmark Legal Foundation v. EPA, 910 F.Supp.2d 270, 275-76 (D.D.C. 2012).

Your appeal letter concludes by saying that your clients are “indisputably primarily engaged in disseminating information.” However, the appeal letter provides no additional information to support this statement, other than reproducing portions of your initial request stating that your clients are engaged in environmental advocacy and intend to publicly disseminate any records received. Indeed, your initial FOIA request itself states that publicly disseminating any records received is one of *three* purposes for filing this FOIA request and seeking expedited processing. Specifically, you have stated that the information sought is also for the purpose of “undertak[ing] investigations” and “decid[ing] whether to prepare to litigate” the subject of your request. These statements do not support that your clients are “primarily” engaged in disseminating information, as opposed to disseminating information as an incidental activity or one of several main activities, and your appeal letter does not provide any additional information to support a conclusion otherwise.¹ See Landmark Legal Foundation, 910 F.Supp.2d at 276 (holding that a public interest law firm that “investigates, litigates, and publicizes” government activity amongst its primary activities did not “primarily” engage in information dissemination).

To be clear, the NRC does not take issue with your representations that your clients are nonprofit corporations engaged in environmental advocacy with no commercial interest in the FOIA request. However, your appeal letter falls short of demonstrating that your clients are “primarily engaged in information dissemination” within the narrow meaning of the expedited processing provision of the FOIA.² Granting expedited processing for this request would unfairly disadvantage other FOIA requesters.

This is NRC’s final decision. As set forth in the FOIA (5 U.S.C. § 552(a)(4)(B)), judicial review of this decision is available in a district court of the United States in the district in which you reside or have your principal place of business. Judicial review can also be had in the district in which the agency’s records are situated or in the District of Columbia.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a nonexclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

¹ In consideration of this appeal I have also reviewed the publicly available websites of your clients to assist in determining whether information dissemination is their “primary” activity, and have determined that these websites similarly do not reveal information dissemination to be a primary activity to the exclusion of other main activities. For example, two of these sites list educating the public as one of several goals or one of several aims in a mission statement. See <https://dwmi.homestead.com>, <https://www.sierraclub.org/policy> (last accessed June 29, 2018).

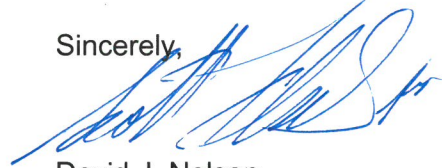
² Because I have determined that there is insufficient information to conclude that your clients are “primarily engaged in disseminating information,” as that term is used in the FOIA’s expedited processing provision, I do not address here your argument that there is an urgency to inform the public concerning actual or alleged Federal government activity.

Lodge

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Sincerely,



David J. Nelson
Chief Information Officer
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