June 12, 2006

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Steven A. Ludsin

Date of Filing: April 11, 2006

Case Number: TFA-0159

On April 11, 2006, Steven A. Ludsin (Ludsin) filed an appeal from a determination issued to him on March 27, 2006, by the Department of Energy's (DOE) Freedom of Information and Privacy Act Group (FOI). In that determination, FOI denied a request for a waiver of fees in connection with a request Ludsin submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This appeal, if granted, would overturn FOI's determination and waive in full the fees associated with his request.

I. Background

Ludsin filed a request under the FOIA for "copies of real estate appraisals of DOE properties or properties under the Department's jurisdiction." Letter from Abel Lopez, FOI, to Steven Ludsin (March 27, 2006) (Determination Letter). Ludsin planned to place the requested information on a website. *Id*.

In his FOIA request, Ludsin also requested a fee waiver for the costs associated with processing the request. In its March 27, 2006 determination letter, FOI denied the request for a waiver on the grounds that Ludsin's request "did not adequately address the criteria that is considered in a fee waiver determination." *Id*. Specifically, FOI found that Ludsin did not adequately demonstrate how he will disseminate the information to the general public. *Id*.

Ludsin filed the present appeal on April 11, 2006. Letter from Ludsin to OHA (April 2, 2006) (Appeal Letter). In his appeal, Ludsin contends that "requiring the requester to establish that the information has actually been conveyed and not merely that there has been a passive dissemination of data is a difficult threshold." *Id*. He adds, "the proof would be available after the data is disseminated on a search engine and then the data can be analyzed to measure the number of clicks connected to the data provided. In other words, establishing that the information has actually been conveyed can only happen after the data dissemination." *Id*. Ludsin submitted additional information in support of his request for a fee waiver. *See* Electronic Mail Message from Ludsin to Diane DeMoura, OHA (May 7, 2006).

II. Analysis

The FOIA generally requires that requesters pay fees associated with processing their requests. 5 U.S.C. § 552(a)(4)(A)(i); *see also* 10 C.F.R. § 1004.9(a). However, the FOIA provides for a reduction or waiver of fees only if a requester satisfies his burden of showing that disclosure of the information (1) is 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* 10 C.F.R. §1004.9(a)(8).

In analyzing the public-interest prong of the two-prong test, the regulations set forth the following factors the agency must consider in determining whether the disclosure of the information is likely to contribute significantly to public understanding of government operations or activities:

> (A) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government" (Factor A);
>
> (B) The informative value of the information to be disclosed: Whether disclosure is "likely to contribute" to an understanding of government operations or activities (Factor B);
>
> (C) The contribution to an understanding by the general public of the subject likely to result from disclosure (Factor C); and
>
> (D) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities (Factor D).

10 C.F.R. § 1004.9(a)(8)(i).

Factor A

Factor A requires that the requested documents concern the "operations or activities of the government." *See Department of Justice v. Reporters Comm. for Freedom of the Press*, 109 S. Ct. 1468, 1481-1483 (1989); *U.A. Plumbers and Pipefitters Local 36*, 24 DOE ¶ 80,148 at 80,621 (1994). In the present case, it is undisputed that the requested information – copies of real estate appraisals of DOE properties or other properties under the agency's jurisdiction – concerns activities or operations of the government. Therefore, we find that Ludsin's request satisfies Factor A.

Factor B

Under Factor B, disclosure of the requested information must be likely to contribute to the public's understanding of specifically identifiable government operations or activities, i.e., the

records must be meaningfully informative in relation to the subject matter of the request. *See Carney v. Department of Justice*, 19 F.3d 807, 814 (2d Cir. 1994). This factor focuses on whether the information is already in the public domain or otherwise common knowledge among the general public. *See Roderick Ott*, 26 DOE ¶ 80,187 (1997); *Seehuus Associates*, 23 DOE ¶ 80,180 (1994) ("If the information is already publicly available, release to the requester would not contribute to public understanding and a fee waiver may not be appropriate.").

In the present case, it is unclear whether the requested information is already publicly available. However, given the nature of the information requested – information relating to the agency's real estate interests – and because we have no evidence that the information is already publicly available, we will assume that the information is not already in the public domain. Therefore, we find that Ludsin has satisfied Factor B.

Factor C

Factor C requires that the requested documents contribute to the general public's understanding of the subject matter. Disclosure must contribute to the understanding of the public at large, as opposed to the understanding individually of the requester or of a narrow segment of interested persons. *Schrecker v. Department of Justice*, 970 F. Supp. 49, 50 (D.D.C. 1997). Thus, the requester must have the intention and ability to disseminate the requested information to the public. *Ott*, 26 DOE at 80,780; *see also Tod N. Rockefeller*, 27 DOE ¶ 80,184 (1999); *James L. Schwab*, 22 DOE ¶ 80,133 (1992). In the present case, it is not disputed that Ludsin intends to disseminate the requested information to the public. However, FOI determined that Ludsin did not establish his ability to disseminate the information.

We find that Ludsin has not provided adequate evidence of his ability to disseminate the requested information to the public. Ludsin contends that dissemination of the requested information will occur because he plans to place the information on a website, allowing the general public to access the information using an internet search engine. This falls short of the proof required to establish a requester's ability to disseminate responsive information to the public. We have previously held that a plan to make information available on the internet does not ensure that the information will reach the public, compared to, for example, including the information in a newsletter or in printed articles and, therefore, falls short of the showing necessary to satisfy Factor C. *See Donald R. Patterson*, 28 DOE ¶ 80,107 (2000); *see also STAND*, 27 DOE ¶ 80,250 (1999). In this case, Ludsin's argument – that a requester cannot demonstrate that the information will be disseminated to the public until after dissemination has already occurred – is not persuasive. The admittedly high burden is on the requester to demonstrate that the information will be conveyed to the public. Ludsin has failed to make the necessary showing because simply placing the information on a website is a passive method of dissemination and does not ensure that the information will, in fact, reach the general public. Consequently, we find that Ludsin has not satisfied Factor C.

Factor D

Under Factor D, the requested documents must contribute significantly to the public understanding of the operations and activities of the government. "To warrant a fee waiver or

reduction of fees, the public's understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be enhanced by the disclosure to a significant extent." *Ott*, 26 DOE at 80,780 (quoting *1995 Justice Department Guide to the Freedom of Information Act* 381 (1995)).

In the present case, it remains unclear to what extent the public's understanding is likely to be enhanced by the disclosure of the information. However, we need not reach the issue because the inability to disseminate the information to the public is, in itself, a sufficient basis for denying a fee waiver request. *See Donald R. Patterson*, 27 DOE ¶ 80,267 at 80,927 (2000) (*citing Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988)).

III. Conclusion

As the foregoing indicates, Ludsin has failed to adequately demonstrate his ability to disseminate the requested information to the public. Therefore, we find that Ludsin has not shown that disclosure of the requested information is likely to contribute significantly to public understanding of government operations or activities. Because Ludsin has not satisfied the public-interest prong of the test set forth in the FOIA and in the DOE regulations concerning fee waivers, we need not address the commercial-interest prong of that test. Accordingly, the appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on April 11, 2006 by Steven Ludsin, OHA Case No. TFA-0159, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: June 12, 2006