

September 4, 2007

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Citizen Action New Mexico

Date of Filing: June 21, 2007

Case Number: TFA-0211

On June 21, 2007, Citizen Action New Mexico (CANM) filed an Appeal from a determination issued to it on June 5, 2007, by the National Nuclear Security Administration (NNSA) of the Department of Energy in Albuquerque, New Mexico (DOE/AL) in response to a request for documents that CANM 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 require that DOE/AL perform an additional search for responsive material.

I. Background

On May 3, 2007, CANM filed a FOIA request with DOE/AL for “full and complete copies of documents in any form, whether from correspondence, memoranda, tape recordings, electronic or hand written communications, notes or handouts . . . attachments, maps, graphs and references to those documents . . .” regarding the Interim Status Storage Unit (ISSU) that operated at the Sandia National Laboratories (SNL) Mixed Waste Landfill. Letter from NNSA to CANM, June 5, 2007 (Determination). CANM listed 12 items in its request. DOE/AL did not release any responsive documents, stating that some of the information did not exist and that the rest was publicly available from the New Mexico Environment Department (NMED). CANM appealed the determination and asked OHA to order NNSA to release the responsive documents. Electronic mail message from CANM to OHA (June 19, 2007) (Appeal).

II. Analysis

CANM contends that the Agency’s final response does not comply with 5 U.S.C. §552(a)(3)(A). This section of the FOIA requires that in response to a proper request, the agency “shall make the records promptly available to any person.” According to CANM, “[i]f the responsive documents are in the possession and control of NNSA/DOE/SNL and are determined to be releasable, the FOIA duty is to provide them. . . . No documents have been supplied for any of the items of the FOIA request although the documents are in the possession of NNSA/DOE/SNL.” Appeal.

We contacted DOE/AL for further information regarding its Determination. DOE/AL told us that all of the responsive documents are available at the DOE FOIA Reading Room, located at the

Zimmerman Library, a University of New Mexico Government Information Reading Room. According to its website, the Zimmerman Library is “. . . a Regional Federal Depository Library coordinated by the U.S. Government Printing Office. Collections in the reading room have been developed outside the Depository program with the cooperation of federal agencies to enhance the library’s collection in local areas of interest.” See <http://library.unm.edu/doi>. Both CANM and the library are located in Albuquerque, New Mexico. The DOE/AL FOIA office also informed us that the documents that are the subject of CANM’s current request were the subject of an earlier request by the former executive director of CANM. Electronic mail message from DOE/AL FOIA officer to Valerie Vance Adeyeye, OHA (August 8, 2007). After the records were released to the former executive director, DOE placed the boxes of records in the Reading Room in anticipation of subsequent requests for the same records. *Id.*

It is true that section (a)(3) requires an agency to release records promptly to a requester. However, subsection (a)(2)(D) provides an exception and states that the agency shall make available for public inspection and copying:

“copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records”

5 U.S.C. § 552 (a)(2)(D).

Thus, the responsive material in this case falls within the purview of subsection (a)(2)(D). The records were released in an earlier request and then placed in the Reading Room for the convenience of future requesters. DOE/AL had no duty to release to CANM any material that was already disclosed under subsection (a)(3) and that was accessible in the public reading room. See *United States Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 152 (1999) (stating that under FOIA subsection (a)(3), an agency need not make available materials that have already been disclosed under subsections (a)(1) and (a)(2)).

We note that the Determination informed the requester that “. . . all the requested documentation is publicly available from the New Mexico Environment Department (NMED) unless otherwise stated.” Determination at 2. DOE/AL did not tell the requester that the responsive material was available for public access at the Zimmerman Library, its local public reading room. We have informed the requester that the records are in the DOE FOIA public reading room, and recommend that DOE/AL do the same in the future. Accordingly, this Appeal is denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Citizen Action New Mexico on May 2, 2007, OHA Case Number TFA-0211, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). 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.

William M. Schwartz
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Office of Hearings and Appeals

Date: September 4, 2007