

January 29, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Government Accountability Project

Date of Filing: November 21, 2002

Case Number: TFA-0004

On November 21, 2002, Government Accountability Project (GAP) filed an Appeal from a determination issued to it in response to a request for documents that it submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The determination was issued on October 24, 2002, by the DOE Oakland Operations Office (Oakland). This Appeal, if granted, would require that Oakland grant GAP a fee waiver.

I. Background

This Appeal concerns a FOIA request GAP originally filed with Oakland on August 27, 2002. GAP requested information reflecting the payment or reimbursement of money paid by DOE to any contractor in regard to any legal claims of two former employees of the contractor, Matthew Zipoli and Charles Quiñones. Request Letter dated August 27, 2002, from Thomas Carpenter, Director, Seattle Office, GAP, to Oakland. As authorized by the DOE FOIA Regulations, the request asked for a waiver of any fees associated with fulfilling the request. On September 10, 2002, Oakland sent GAP a letter asking for additional information to support the fee waiver request. Letter dated September 10, 2002, from RoseAnn Pelzner, FOIA Officer, Oakland, to Thomas Carpenter, GAP. GAP responded on October 10, 2002, providing arguments why it was entitled to a fee waiver for the information it was requesting. Letter dated October 10, 2002, from Clare Gilbert, Program Associate, GAP, to RoseAnn Pelzner. In response, Oakland denied GAP's fee waiver request but released eight responsive documents found in its two hour search allowed to "other requesters."^{2/} Determination Letter dated October 24, 2002, from James S. Hirahara, Acting Deputy Manager, FOIA Authorizing Official, Oakland, to Clare Gilbert.

^{2/} Other requesters are those requesters that are not commercial use requesters, educational and noncommercial scientific institutions, and representatives of the news media. 10 C.F.R. § 1004.9 (b). All "other requesters" are required to pay the full reasonable direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first two hours of search time are furnished without charge. *Id.* at § 1004.9 (b)(4).

GAP filed this Appeal on November 21, 2002, claiming that it was entitled to a fee waiver for this request and any future FOIA requests. Appeal Letter dated November 21, 2002, Clare Gilbert to Director, Office of Hearings and Appeals (OHA) (Appeal Letter).

II. Analysis

The FOIA generally requires that requesters pay fees for the processing of their requests. 5 U.S.C. § 552(a)(4)(A)(i); *see also* 10 C.F.R. § 1004.9(a). However, it provides a two-pronged test for agencies to use in considering whether to waive fees. The two prongs can be summarized as the “public interest prong” and the “commercial interest” prong. *See Ruth Towle Murphy*, 27 DOE ¶ 80,173 (1998). The public interest prong requires an examination of whether disclosure of the information is likely to contribute significantly to public understanding of the operations or activities of government. 5 U.S.C. § 552(a)(4)(A)(iii). The commercial interest prong asks whether the request is primarily in the commercial interest of the requester. If it is, fees will not be waived. *Id.* The requester bears the burden of satisfying the two-pronged test for a fee waiver. *See Roderick Ott*, 26 DOE ¶ 80,187 (1997).

As an initial matter, we note that decisions on fee waiver requests are made on a case by case basis. A requester cannot be granted a blanket fee waiver, even if it believes it will be requesting the same type of information in all requests. Consequently, we reject the GAP argument that because it has been granted fee waivers in the past, it should be granted a waiver in this case. GAP’s past success in receiving fee waivers is not necessarily indicative of success in this case.

In order to determine whether the requester meets the public interest prong (*i.e.*, whether disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of government operations or activities), the DOE considers four factors:

- (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;

(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.

10 C.F.R. § 1004.9(a)(8)(i). A requester who satisfies the four factors of the public interest prong must then address the second prong by showing that disclosure of the information is not primarily in his or her commercial interest. *See Information Focus on Energy*, 26 DOE ¶ 80,199 (1997).

In its Determination, Oakland found that although GAP did satisfy Factor A, it did not satisfy Factors B, C, or D of the public interest prong. Determination Letter at 2, 3. In its request, GAP asks for records reflecting the DOE reimbursement of its contractors's legal fees associated with the dismissal of two employees of the contractor. Oakland found that the request satisfied Factor A, in that it concerned an identifiable government operation. However, Oakland found that it did not satisfy Factor B because GAP did not show that the requested information contain a significant potential for benefitting the general public. Determination Letter at 2.

GAP argues in its Appeal it has satisfied all four Factors. In regard to Factor B, GAP contends that it has requested similar information in the past and been granted a fee waiver in those cases. It argues that the information it has gathered through the FOIA in the past has been used by national magazines and local newspapers in articles about the DOE whistleblower program, and claims that the information sought in this case would again shed light on that program. Appeal Letter at 3, 4. In regard to Factor C, GAP states that OHA has found in the past that GAP is able to disseminate the information publicly and Oakland's argument that there has been no showing of relevant whistleblower activities is irrelevant. Finally, GAP contests Oakland's finding that it does not satisfy Factor D. GAP states that the information it is requesting would reflect on DOE's claim that it is committed to zero tolerance for retaliation against whistleblowers. Appeal Letter at 6.

Factor B

GAP argues that it should be granted a fee waiver because the information it is requesting will contribute to an understanding of government operations or activities, specifically, that the information requested will show the extent of the support that DOE is giving its contractors in whistleblower cases and will show that DOE does tolerate reprisals against whistleblowers. GAP's argument fails because it lacks a factual basis; there is no evidence in the record that the information GAP seeks relates in any way to whistleblower activity. In its determination, Oakland stated that no retaliation by the employer was established in this case. In its response to GAP's Appeal, Oakland stated that an arbitrator found that

the contractor had cause to dismiss one of the employees and reprimand the other employee. No mention was made of the employees' status as whistleblowers. Response Letter from Jack Hug, Oakland, to Janet R. H. Fishman, Attorney-Examiner, OHA, citing *In Re Security Police Officers Association v. Lawrence Livermore National Laboratory*, report of arbitrator, December 13, 2002.

We agree with Oakland. There is nothing in the record to indicate that this case involves whistleblowers, other than an allegation by GAP that these employees were terminated because of whistleblower activities. No Part 708 complaint has been filed and as far as we know, none is contemplated. Therefore, release of the information would not shed any light on the reimbursement by DOE of a contractor's legal fee in a whistleblower situation. We agree with Oakland that GAP does not satisfy Factor B for this request.

GAP's argument regarding Factor B and public understanding is so remote and unlikely that even were we to find that GAP satisfied both Factors C and D, we would not grant it a fee waiver. Therefore, we will not address Factors C and D. We note however, that GAP does have a history of being able to disseminate the information it requests under the FOIA. However, as noted above, each request must be handled individually.

III. Conclusion

Oakland properly denied GAP's request for a fee waiver because GAP did not satisfy Factor B. Accordingly, the GAP Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Government Accountability Project on November 21, 2002, OHA Case Number TFA-0004, 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: January 29, 2003