



Department of Energy
Washington, DC 20585

June 4, 2020

BY ELECTRONIC MAIL

Mason Kortz
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Re: Case No. FIA-20-0027
Request Nos. FOIA-20-00071-EW
FOIA-20-00076-EW
FOIA-20-00087-EW
FOIA-20-00083-M
FOIA-20-00081-DD

Dear Mr. Kortz:

The Department of Energy (DOE) has considered the Freedom of Information Appeal that was filed on May 15, 2020. As the enclosed Decision and Order indicates, the DOE has determined that the Appeal, Case No. FIA-20-0027, be denied.

If you have any questions regarding this Decision and Order, please contact Kristin L. Martin, OHA staff attorney, by electronic mail message at Kristin.Martin@hq.doe.gov.

Sincerely,

A handwritten signature in blue ink, appearing to read "Poli A. Marmolejos".

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Enclosure

cc: Alexander Morris
FOIA Officer
Office of Public Information
Alexander.Morris@hq.doe.gov



Department of Energy
Washington, DC 20585

United States Department of Energy
Office of Hearings and Appeals

In the Matter of: Martin Pfeiffer)
)
Filing Date: May 15, 2020) Case No.: FIA-20-0027
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Issued: June 4, 2020

Decision and Order

On May 15, 2020, Martin Pfeiffer (Appellant) appealed five (5) Determination Letters issued to him from the National Nuclear Security Administration (NNSA) regarding Request Nos. FOIA-20-00071-EW, FOIA-20-00076-EW, FOIA-20-00087-EW, FOIA-20-00083-M, and FOIA-20-00081-DD. In those determinations, NNSA responded to five requests filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004 in which the Appellant requested a waiver of fees for processing his requests. NNSA denied the Appellant’s request for a fee waiver. The Appellant challenged this decision for all five requests, asserting that he is an educational requester and a representative of the news media. In this Decision, we deny the appeal.

I. BACKGROUND

On January 24, 2020, Appellant filed FOIA requests for the following records:

- Request No. FOIA 20-00071-EW The Pu Aging report referenced at 83 Fed. Reg. 48297–8 (Sept. 24, 2018).
- Request No. FOIA 20-00076-EW Meeting minutes, emails, reports, analyses, and other records relating to the conceptualization, creation, and appearances of the Nevada National Security Site’s mascot, the “Green Reaper.”
- Request No. FOIA 20-00081-DD Meeting minutes, emails, reports, analyses, exhibit development reports and plans, copies of exhibits, and other records related to the Nevada National Security Site’s educational efforts, programs, and exhibits at elementary, middle, and high schools in Nevada and other states.

On February 3, 2020, and February 6, 2020, respectively, Appellant filed requests for the following records:

Request No. FOIA 20-00083-M	Five subagency reports for the Federal Employee Viewpoint Survey conducted at NNSA and three field locations in 2017.
Request No. FOIA 20-00087-EW	Studies, report, memoranda, meeting minutes, test records, feasibility studies, and other records related to Projects Rumpler, Bayonet, Lek, and Sopwith (earth penetrating weapons).

For each of the five requests, Appellant requested a fee waiver, asserting that he was an education institution requester and a representative of the news media. In its responses to each request, NNSA asked Appellant to provide his specific intended uses for the requested records, as well as a list of all sites where he intended to distribute responsive records.

Appellant submitted responses to NNSA’s information requests, each providing nearly identical information. He asserted that the requested records would be used in pursuit of his PhD at the University of New Mexico and that they would also be disseminated to interested segments of the public through, but not limited to, his freely accessible online data archive. Pfeiffer Attachment 11 at 2; Pfeiffer Attachment 12 at 1–2; Pfeiffer Attachment 13 at 2; Pfeiffer Attachment 14 at 2. Further, he stated that “[w]ithout access to the documents, Mr. Pfeiffer does not have a rational basis to speculate on the relevance of their content to his PhD dissertation and ongoing research.” Pfeiffer Attachments 11–14 at 2. However, he clarified, he had a history of integrating records received from FOIA requests into his coursework and school-sponsored activities. *Id.*

Appellant further responded that he posts documents received through the FOIA to his Patreon blog (paid subscription required), his Twitter account, and a freely accessible online archive where the documents are separated into labelled categories. Pfeiffer Attachments 11 and 13 at 3; Pfeiffer Attachments 12 and 14 at 2–3. He also stated that “[w]ithout access to the documents, Mr. Pfeiffer does not have a rational basis to speculate on the relevance of their content to the public interest.” Pfeiffer Attachments 11–14 at 3.

In March 2020, NNSA sent Appellant determinations of his fee status for all five requests. NNSA characterized Appellant as a commercial use requester, stating that his “use of the requested records is for his commercial interest or profit because he also charges a fee to patrons of his website for viewing/accessing records provided by the agency.” NNSA Responses at 1–2. The costs to process Appellant’s requests were as follows:

Request No. FOIA 20-00071-EW	\$1227.60
Request No. FOIA 20-00076-EW	\$369.36
Request No. FOIA 20-00081-DD	\$3541.20
Request No. FOIA 20-00083-M	\$211.20
Request No. FOIA 20-00087-EW	\$1897.80

Appellant filed the present appeal, arguing that, for all five requests, his PhD research and dissemination of received FOIA records qualifies him for reduced fee status both as an educational institution requester and as a representative of the news media.

II. ANALYSIS

The FOIA generally allows agencies to assess “reasonable standard charges for document search, duplication, and review.” 5 U.S.C. § 552(a)(4)(A)(ii)(I). However, the FOIA provides that agencies may charge only duplication fees “when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media.” 5 U.S.C. § 552(a)(4)(A)(ii)(II). As explained below, we find that Appellant does not qualify for reduced fee status under the FOIA.

A. Educational Institution Requester Status

An educational institution is “a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.” 10 C.F.R. § 1004.2(g). A student who wishes to be categorized as an educational institution requester may make a FOIA request in furtherance of “coursework or other school-sponsored activities.” *Sack v. DOD*, 823 F.3d 687, 693 (D.C. Cir. 2016). However, a student is not entitled to categorization as an educational institution requester if he or she will use the requested records for a personal or commercial use. *Id.* In cases where a student’s intended use of requested records is in doubt, requesters may establish their intended use of the records through “a copy of a syllabus, a letter from a professor, or the like.” *Id.* DOE regulations clarify who may be an educational institution requester, stating that for inclusion in this fee category, “requesters must show that the request is being made as authorized by and under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly ... or scientific ... research.” 10 C.F.R. 1004.9(b)(2).

Appellant is a PhD student at the University of New Mexico, creating a firm relationship between him and an educational institution. He is writing a dissertation which examines¹ (1) how visitors to nuclear heritage sites interact with the sites and glean meaning about nuclear weapons and technology; (2) a historically sensitive analysis of practices by an undisclosed entity,² including sanctioning official knowledge and attracting particular types of visitors; and (3) the concept of the government’s information management as it relates to nuclear topics, including how it interacts with nuclear heritage, what use of the FOIA can reveal about government transparency, and

¹ To protect Appellant’s interests in maintaining the novelty of his dissertation, the description of its content is generalized.

² The name of the entity or location was redacted in materials submitted to the OHA.

possibilities for resisting a lack of government transparency. Pfeiffer Supplemental Attachment 2 at 7 (“Supp. Att. 2”).

However, we need not reach the question of whether NNSA properly denied Appellant’s request for educational institution fee status due to commercial use of records because, even if Appellant met the requirements for inclusion in the fee category, he cannot articulate how the requested records relate to his scholarly research or coursework. Specifically, Appellant stated, in response to a request for specific uses for requested records, that he was unsure if the requested materials were relevant to his research or dissertation. It is not immediately clear how the requested records relate to public engagement at nuclear heritage sites. In fact, it is apparently so unclear that the requester himself cannot draw a colorable line of relevance between the requested records and his work. While he submitted a letter from his professor, it was written over six months before the requests at issue were submitted and does not specify how the requests at issue relate to Appellant’s research. Pfeiffer Attachment 20. Indeed, the professor’s statements are so vague as to be of little help in determining the scope of Appellant’s research. *Id.* (“Mr. Pfeiffer’s dissertation research includes a substantial focus upon nuclear weapons history, government secrecy, and nuclear semiotics and practices. His research focus upon nuclear semiotics requires him to draw on a wide range of informational sources on a wide range of topics.”).³

While the FOIA supports scholarly research, it does not subsidize fishing expeditions intended to “shake[] loose something more informative and exciting.” Supp. Att. 1 at 19 (regarding the requests regarding earth penetrating weapons, “I hope the actual #FOIA request shakes loose something more informative and exciting.”). In sum, we cannot tie Appellant’s scholarly work to his requests, and neither can the Appellant. Accordingly, regardless of Appellant’s university connections or intended use for the documents, Appellant’s request is not properly categorized as an educational institution request.

B. Representative of the News Media Requester Status

A representative of the news media is defined as “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” *Cause of Action v. FTC*, 799 F.3d 1108, 1120 (D.C. Cir. 2015). Freelance journalists may be considered associated with a news media outlet when “the journalist can demonstrate a solid basis for expecting publication through that entity.” 5 U.S.C. § 552(a)(4)(A)(ii). The FOIA states that publication contracts and history may be helpful in determining whether a requester is sufficiently aligned with a news-media outlet to be considered a representative of the news media. *Id.* The statute further clarifies the term “news” to mean “information that is about current events or that would be of current interest to the public.” *Id.* For relatively new “reporters” or those who use the FOIA as their primary means of information collection, the relevance of a request to the public’s interest is a helpful marker of whether a person

³ Semiotics is “a general philosophical theory of signs and symbols that deals especially with their function in both artificially constructed and natural languages and comprises syntactics, semantics, and pragmatics.” *Semiotics*, MERRIAM-WEBSTER.COM DICTIONARY, <https://www.merriam-webster.com/dictionary/semiotics> (last visited June 1, 2020).

or entity gathers information that is of potential interest to the public. *Cause of Action*, 799 F.3d at 1121. The FOIA also requires the requester to use his or her editorial skills to transform the requested documents into a distinct work. The bare minimum of editorial work appears to be some amount of editorial commentary on the documents or a collection of documents that has been indexed or made searchable. *Lieberman v. United States DOT*, 227 F. Supp. 3d 1, 11–12 (D.D.C. 2016). Indeed, when a party merely hosts documents, “act[ing] as a private library, information vendor or middleman, the party does not qualify as a ‘representative of the news media’ for purposes of the FOIA.” *Judicial Watch, Inc. v. United States DOJ*, 185 F. Supp. 2d 54, 59-60 (D.D.C. 2002).

Appellant describes three vehicles that he intends to use to disseminate the information he will receive from his FOIA requests. Examining each in turn, we find that none is properly considered a news media outlet under the FOIA.

1. Twitter

Appellant states that his publications via Twitter.com provide a sufficient connection to a news media outlet to categorize him as a representative of the news media. While it is possible that a Twitter account could potentially be a news dissemination platform, that is not the case with Appellant’s account. Rather than sharing current information of current interest to the public, Appellant’s account appears to be personal in nature. His liberal use of “cat memes” and “heart eyes emojis,” as well as the kinds of profanity generally avoided in print/online journalism, adorn a large number of personal posts ranging in content from cute cats to updates on his activities at a given moment to his personal trials and tribulations. *See, e.g.*, Martin “All Too Human” Pfeiffer (@NuclearAnthro), TWITTER (May 28, 2020, 2:05 PM), <https://twitter.com/NuclearAnthro/status/1266067995916300288>; Martin “All Too Human” Pfeiffer (@NuclearAnthro), TWITTER (May 28, 2020, 2:07 PM), <https://twitter.com/NuclearAnthro/status/1266068713565941761>; Martin “All Too Human” Pfeiffer (@NuclearAnthro), TWITTER (May 30, 2020, 4:01 PM), <https://twitter.com/NuclearAnthro/status/1266821968520548352>; Martin “All Too Human” Pfeiffer (@NuclearAnthro), TWITTER (May 31, 2020, 2:57 AM), <https://twitter.com/NuclearAnthro/status/1266987046737833984>.

Appellant’s posts regarding documents he has received through FOIA requests or other means also appear to be personal in nature, including commentary such as “And at least some of it is in comic sans AND I WANT TO DIE” [sic] along with links to his online archive. *See* Pfeiffer Attachment 28a at 3. *See also, e.g.*, Martin “All Too Human” Pfeiffer (@NuclearAnthro), TWITTER (May 28, 2020, 9:37 PM), <https://twitter.com/NuclearAnthro/status/126618184839836-0576> (“Enjoy NEWLY SCANNED “are you sh[**]ting me” 1978 document on US vs USSR Civil Defense!”). What little news appears on his account is linked from traditional news sites, such as the Washington Post, C-Span, and NBC. *See, e.g.*, Martin “All Too Human” Pfeiffer (@NuclearAnthro), TWITTER (May 29, 2020, 7:22 PM), <https://twitter.com/NuclearAnthro/status/1266510348489637888>; Martin “All Too Human” Pfeiffer (@NuclearAnthro), TWITTER (May 29, 2020, 11:43 PM), <https://twitter.com/NuclearAnthro/status/1266575982523-105280>.

Given the personal nature of most of his posts and the lack of editorial transformation applied to the occasional informative post, we find that the primary nature of Appellant's Twitter account is personal expression, not dissemination of news. Accordingly, Appellant's Twitter account is not a news media outlet, and, therefore, potential publication there is not a basis for categorizing Appellant as a representative of the news media.

2. Online Archive

Appellant states that his publications via his free online archive provide a sufficient connection to a news media outlet to categorize him as a representative of the news media. The archive, available at <https://osf.io/46sfd/>, includes about 70 files obtained through Appellant's FOIA requests, distributed into 12 categories. These files, many with names such as "00470341.pdf" and "1965_Wind_and_Sand_V11_Issue_2.pdf", represent hundreds of pages of documents. The archive is searchable by the titles of categories or by file names, but not by file contents. There does not appear to be an index of words, cross references, or any other editorial transformation. The documents appear to be sorted via broad categories that do not describe the contents of the documents with any useful specificity. For example, the document named 1965_Wind_and_Sand_V11_Issue_2.pdf is filed in the category named Destruction of Trinity Site Structures_ White Sands Missile Range. The document appears to be a site newspaper and includes an article, titled "'Baby's Born' Brings Nuclear Explosion News to President," which describes the news of the first nuclear explosion to President Truman 20 years earlier, as well as anecdotes about the first nuclear explosion in the New Mexico desert. 1965_Wind_and_Sand_V11_Issue_2.pdf, PFEIFFER NUCLEAR WEAPON AND NATIONAL SECURITY ARCHIVE (July 14, 2019, 7:18 PM), <https://osf.io/hf6yp/>. Archive searches for terms "baby," "Truman," and "anniversary each yielded no results. A picture under the name C1512-01.jpg, filed under the category PuF4 Docs & Pics, depicts some sort of gelatinous substance in a broken container, but there is no caption to identify what the viewer is seeing. C1512-01.jpg, PFEIFFER NUCLEAR WEAPON AND NATIONAL SECURITY ARCHIVE (Sept. 28, 2019, 1:14 AM), <https://osf.io/xqpws/>.

Though Appellant has created general categories for his files, they do not provide a curated experience. Often, the viewer has no context or explanation for a document. There is no way for a researcher to know what information is contained in the archive. Appellant has not provided visitors to the archive with a distinct work so much as a mass of raw data of little use to anyone who is not already familiar with the documents. Because he has not applied editorial skills to create distinct works, Appellant has historically not acted as a representative of the news media when publishing to his free online archive. Accordingly, potential publication there is not a basis for categorizing Appellant as a representative of the news media.

3. Patreon

Appellant states that his publications via his Patreon account provide a sufficient connection to a news media outlet to categorize him as a representative of the news media. Patreon is a blog site where interested parties purchase a subscription to a blog to gain access to the blogger's work.

Subscriptions for Appellant's blog range from \$2.00 per month to \$150.00 per month and Appellant receives about \$1,800.00 per month from nearly 250 subscribers. DOE Exhibit Patreon Screen Shot 2-24-20; DOE Exhibit Patreon Users 2-4-20. Appellant's Patreon posts are primarily devoted to nuclear subjects ranging far beyond his PhD research topics, as well as updates on Appellant's various FOIA requests.

Appellant submitted all of his Patreon posts from January 1, 2020, through May 14, 2020—a total of 14 posts. Most of the content linked in the posts is in the form of sets of photographs from Appellant's trips to various nuclear sites and links to document sets from scans of documents he did not receive through FOIA requests. These documents and photo sets are grouped by subject, but there does not appear to be any index nor a way to search document contents. Among posts submitted to the OHA, there are three that include distinct works written by Appellant. The first two distinct work posts include links to a talk Appellant gave at the Los Alamos Historical Society on January 12, 2020; the first post included a link to the event schedule on which his talk was listed and the second linked to a video of the event. Supp. Att.1 at 10, 18. The third distinct work post included a link to a book review Appellant had written that had been recently published in *The Nonproliferation Review*. *Id.* at 30. The remainder of Appellant's posts for the first quarter of 2020 included neither editorial commentary nor indexing.

Considering the editorial state of the contents of his Patreon account, Appellant is more like a curio collector than a journalist. He sells access to obscure objects without providing context, explanation, or theory. Furthermore, even if he were to curate his collections with indexes and editorial commentary, they would still fall short of news. Pictures of nuclear heritage sites are not "information about current events." Neither are mere copies of decades old documents. And in regard to the present records requests, the progress of which Appellant has shared on his blog, Appellant stated that he "does not have a rational basis to speculate on the relevance of their content to the public interest." Without an articulation of current interest to a segment of the public, the content on Appellant's Patreon site fails to meet the FOIA's statutory definition of "news." Accordingly, Appellant's Patreon is not a news media outlet, and, therefore, potential publication there is not a basis for categorizing Appellant as a representative of the news media.

C. Commercial Use Requester Status

Under the DOE's FOIA regulations, a commercial use requester is one who "seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made." 10 C.F.R. 1004.2(c). Barring simultaneous inclusion in a reduced fee category, profit interests need not be the primary purpose of the information's use in order for that use to qualify as commercial. Nor does a non-commercial use elsewhere prevent a profit-based use from being considered commercial. The language of the regulation is straightforward and unambiguous: if a profit interest of the requester is furthered, the use is commercial.

Appellant's Patreon raises an income for Appellant higher than that of a full time job at minimum wage in his state of residence. Because the content of Appellant's Patreon account is not news

under the FOIA, his profit interest in the blog indicates that publication there of documents obtained through the FOIA is properly categorized as a commercial use under the FOIA. *See Martin Pfeiffer*, OHA Case No. FIA-19-0027 at 3 (July 31, 2019) (finding that charging Patreon fees to access documents obtained through the FOIA is a commercial use of such documents). In his response to NNSA's information request, as well as his Patreon account, Appellant stated his intent to post documents received through his FOIA requests to his Patreon account. Pfeiffer Attachment 11 at 4; Pfeiffer Attachments 12–14 at 3; Supp. Att. 1 at 19, 24. Accordingly, Appellant is a commercial use requester.

III. ORDER

For the foregoing reasons, we hold that NNSA properly categorized Appellant as a commercial use requester. It is hereby ordered that the Appeal filed on June 15, 2020, by Martin Pfeiffer, No. FIA-20-0027, is denied. Processing of his appeal may move forward upon payment of such fees as are authorized or required by DOE regulations.

This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 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.

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 non-exclusive alternative to litigation. Using OGIS services does not affect one's right to pursue litigation. OGIS may be contacted in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS, College Park, MD 20740
Web: <https://www.archives.gov/ogis> Email: ogis@nara.gov
Telephone: 202-741-5770 Fax: 202-741-5769 Toll-free: 1-877-684-6448



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