

November 6, 2019

VIA ELECTRONIC MAIL

U.S. Department of Energy
National Nuclear Security Administration
Office of the General Counsel
P.O. Box 5400
Albuquerque, NM 87185

Roberto Marquez
Government Information Specialist
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**Re: Completion Deadline for Freedom of Information Request
FOIA 19-00083-R**

Dear Ms. White and Mr. Marquez:

I am writing regarding a request submitted to the Department of Energy (“DOE”) under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, by my client, Savannah River Site Watch (“SRS Watch”), which is being processed by the Office of the National Nuclear Security Administration (“NNSA”). My client submitted this request on January 15, 2019, and the NNSA assigned it the tracking number FOIA 19-00083-R. Because this request has been languishing with NNSA for nearly 10 months—far longer than the 20 working days Congress provided for responding to FOIA requests—DOE and NNSA are in ongoing violation of mandatory statutory deadlines. I am writing today to seek clarification regarding the agency’s plans for responding to this FOIA request and to inform DOE and NNSA that if they do not come promptly into compliance with FOIA’s statutory mandate for a timely response to FOIA requests, SRS Watch will have no choice but to consider litigation in order to bring the agency into compliance with the statute.

FOIA-19-00083-R requests the following:

1. DOE/NNSA “statement of work” or “terms of work” provided to Savannah River Nuclear Solutions for development of “preliminary design and planning work” for conversion of the MOX plant¹ at SRS to production of plutonium pits for nuclear weapons; and

¹ DOE, NNSA, and others commonly abbreviate the Mixed Oxide Fabrication Facility as either “MFFF” or “MOX Facility.” These abbreviations address the same facility.



2. Any cover letter(s) and attachments to the above requested planning document, including any assessments of required documents and procedures to be met under the National Environmental Policy Act (“NEPA”).

The Freedom of Information Act

FOIA states that “[e]ach agency, upon any request for records made under paragraph . . . (3) . . . shall determine within 20 [working] days . . . whether to comply with such request and shall immediately notify the person making such request of . . . such determination and the reasons therefor.” 5 U.S.C. § 552(a)(6)(A)(i). “[I]n order to make a determination,” an agency must, inter alia, “determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents.” *Citizens for Responsibility and Ethics in Washington v. Fed. Election Comm’n*, 711 F.3d 180, 188 (D.C. Cir. 2013).

In “unusual circumstances,” an agency may extend FOIA’s 20 working-day deadline by up to ten additional working days, but the agency must also provide written notice to the requester including “the date on which a determination is expected to be dispatched.” 5 U.S.C. § 552(a)(6)(B)(i). Similarly, FOIA requires agencies to “provide[] information about the status of a request,” “including . . . an estimated date on which the agency will complete action on the request.” *Id.* § 552(a)(7)(B). DOE’s regulations recognize these requirements. *See* 10 C.F.R. § 1004.5(d)(1) (stating that DOE will act “within 20 days of a request for DOE records being received”); *id.* § 1004.5(d)(1)(iii) (recognizing that if DOE invokes “unusual circumstances” it may “take an extension not to exceed ten days” and must provide “the date on which a determination is expected to be dispatched”).

DOE and NNSA are in ongoing violation of FOIA

The laggardly pace of the response to SRS Watch’s FOIA request is plainly an ongoing violation of FOIA’s mandate for a timely agency determination. To begin with, DOE and NNSA have taken far longer than the 20 working days the statute and the agency’s implementing regulations provide, meaning that SRS Watch would be well within its statutory right to commence litigation today to compel the production of responsive records. *See* 5 U.S.C. § 552(a)(6)(C)(i).²

Compounding DOE and NNSA’s violation of FOIA and its implementing regulations is the fact that in providing an acknowledgment letter for the requests at issue, NNSA claimed that “unusual circumstances” apply but failed to follow FOIA’s mandate to inform SRS Watch of “the date on which a determination is expected to be dispatched.” *Id.* § 552(a)(6)(B)(i); 10 C.F.R. § 1004.5(d)(1)(iii). Likewise, when SRS Watch reached out by email to seek information about a completion date for this request, the agency responded via email on September 26, 2019—again, months after FOIA required a determination to already have been made—and again failed to provide the required information, instead stating only that the completion date was “TBD.”

² Because DOE and NNSA failed to comply with FOIA’s statutory deadlines, they may not assess any search fees for these requests. 5 U.S.C. § 552(a)(4)(A)(viii)(I).

Although FOIA clearly allows SRS Watch to commence litigation to compel the production of non-exempt, responsive information, SRS Watch wishes to determine whether it is possible to reach an amicable resolution regarding the FOIA requests at issue without subjecting either the requester or the agency to the expense and inconvenience that litigation entails. Accordingly, SRS Watch requests that DOE and NNSA respond to this letter in writing within 20 working days—by no later than December 9, 2019—to provide a date certain by which it will provide a determination for the requests at issue.

Please direct any response to this letter to both myself using the information in the signature block below, and to Tom Clements of Savannah River Site Watch, at TomClements329@cs.com.

Thank you for your prompt attention to this matter. I look forward to exploring whether it is possible to resolve the issues in this letter without resorting to litigation. However, please be advised that if the agencies do not provide a satisfactory deadline for responses to the requests at issue, SRS Watch will have no other choice but to evaluate all its legal options for bringing the agencies into compliance with FOIA's requirements.

Sincerely,

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