

Martin Pfeiffer
1522 Tijeras Ave NE, #10
Albuquerque, NM 87106
mpfeiffer1@unm.edu

Director
Office of Hearings and Appeals
HG-1, L'Enfant Plaza
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585-1615
OHA.filings@hq.doe.gov

FREEDOM OF INFORMATION ACT APPEAL

1) THIS IS A FOIA APPEAL

This letter constitutes an administrative appeal under the Freedom of Information Act, 5 U.S.C. Sec. 552(a)(6) and 10 CFR § 1004.8.

2) This FOIA Appeal Applies to Four FOIA Requests

This letter applies to the following Freedom of Information Act Requests filed with the National Nuclear Security Agency (NNSA):¹ FOIA 19-00232-EW (**Attachment 1**); FOIA-19-00237-EW (**Attachment 2**); FOIA-19-00231-DD (**Attachment 3**); and FOIA -19-00234-M (**Attachment 4**). My appeals (filed on or about July 27, 2019—see each individual attachment for associated materials) related to NNSA's denial of my requested fee status were previously bundled together in the decision issued by the Office of Hearings and Appeal on July 11, 2019: FLA-19-0023 (**Attachment 5**) regarding Case Nos. FLA-19-0020-23. I received virtually identical responses (**Attachment 6**) from Ms. Del Rio, Ms. White, and Ms. Perez regarding these requests in response to the decision issued in FLA-19-0023. I made virtually identical responses to each of them and I am making virtually identical arguments for why my appeal should be granted for all requests. Therefore I am in this one letter appealing NNSA's action with regards to all four of these requests although I will use correspondence from FOIA 19-00231-DD for illustrative examples in this appeal.

3) What this FOIA Appeal is Appealing and Justification for Appeal

I am writing to appeal NNSA's response (**Attachment 6**) to the decision issued by the Office of Hearings and Appeals on July 11, 2019 (**Attachment 5**). In that decision OHA returned the four involved requests (see above) to NNSA for clarification of my intent with regards to FOIA responsive documents so as to decide my appropriate fee status:

¹ Please note that each of these attachments contains my appeal and supporting materials as well as my original request as submitted as part of my appeal as submitted in Case Nos. FLA-19-0020-23.

“It is hereby ordered that the appeals filed by Martin Pfeiffer on June 27, 2019, Nos. FIA-19-0020-23 , are granted. This matter is hereby remanded to NNSA, which shall provide Appellant with the opportunity to clarify his intended use of the requested records in accordance with the above Decision” (Decision FIAs-19-0020-023).

In response I was sent on or about July 12th, 2019 by NNSA FOIA Analysts Ms. Del Rio, Ms. White, and Ms. Perez (**Attachment 6**) four virtually identical messages whose bodies I reproduce below:

“The Office of Hearings and Appeals issued a Decision and Order dated July 11, 2019, indicating that prior to a fee category determination, the agency must clarify your intended use of the records requested. Therefore, please clearly identify your intended use for the requested records in this FOIA matter. Please respond no later than July 19, 2019. If we do not receive a response from you by July 19, 2019, we will consider the lack of response as a withdrawal of your request, and it will be closed.”

My immediate responses were substantially similar to each other and I provide my response of on or about July 13th to Ms. Del Rio in **Attachment 7**.

A) NNSA Has Not Provided An Acceptable Response

In this appeal (and in my responses to the individual analysts) I argue that NNSA’s responses do not constitute a good-faith effort at clarification of my intent to use the requested documents that is required by 10 C.F.R. § 1004.2I, and as NNSA was directed by OHA in the decisions regarding FIAs-19-0020-23 since NNSA continues to not provide me with the necessary information to adequately respond to their potential denial of my requested fee status. This is a violation of my right to due process in addition to statute and policy (FOIA, as amended; 10 C.F.R. § 1004.2I; etc.).

B) Clarification of Patreon and use of Requested Documents

NNSA has failed to provide me with necessary information for meeting their challenge to my requested fee status. In addition, I argue that a “NNSA representative” has seemingly either intentionally misled the Office of Hearings and Appeals or misunderstood through inadequate investigation the nature of my Patreon. It is a gross misrepresentation, if not an actual act of deceit, to describe my Patreon (patreon.com/nuclearanthro) as “an online account created by the Appellant through which he charged users for access to the documents he had requested from the NNSA since 2017” (Decision FIAs-19-0020-023). I direct the OHA’s attention to my digital collection hosted at the Open Science Foundation (and regularly mentioned by me on my Patreon) (<https://osf.io/46sfd/>) where they will find virtually every document—**AVAILABLE PUBLICLY, IN THEIR ENTIRETY, FOR FREE AND TO EVERYONE**—released to me through the Freedom of Information Act. Prior to the creation of this online collection I used Dropbox links published on Twitter and my blog to disseminate documents released to me as a result of my FOIA requests.

I explicitly do not charge for access to records released to me through FOIA as such behavior would seem to be a violation of my statement—provided with each of my requests—that my use of requested records was for research and not primarily commercial or profit purposes. My practice for some time, and moving forward, has been near-immediate public release and digital archiving of responsive records provided to me through FOIA in keeping with how I describe using records in all of my requests.

In addition to the documents released to me personally under FOIA, I also post other research materials at my digital archive such as photos of museum exhibits, photos of artifacts, documents that I have scanned in the NNSA FOIA reading room at the University of New Mexico, etc. In terms of total size, I estimate that materials released to me personally through the FOIA make up less than half of the collection at this point. In other words, this online collection is a research archive of research materials collected as part of my PhD research that I have chosen to make publicly available to everyone for free. My Patreon exists so that if someone feels they wish to support my research efforts—which include but are far from limited to the creation and public maintenance of this archive—then they can do so. Whether people donate to my Patreon or not is irrelevant to whether or not they can access documents released to me under FOIA. My practice for some time, which will continue moving forward, is to near-immediately publish records provided to me under FOIA.

C) NNSA Seems to Be Acting in Bad Faith and I Ask that OHA Act

I argue that, based on the preponderance of evidence to date, NNSA or individuals acting for NNSA appear to be acting in bad faith—or the results of their actions are indistinguishable from bad faith—and that therefore OHA should render a judgment this case rather than allowing NNSA another opportunity to delay my access to documents responsive to my FOIA requests. Actions I would identify as indexing prejudiced or bad-faith behavior include: consistent and repeated failure to follow policy beginning with the en masse and sudden denial of my fee status; false, misleading, or lazily investigated statements made to OHA about my Patreon account and digital archive; and the failure of individual FOIA analysts to properly respond to OHA's order that they seek clarification from me regarding my use of records. Although NNSA FOIA analysts used the word "clarify" in their messages to me they decided to be Kafkaesque and demand information (to their credit they did use some form of the word "clarify") without providing the context or data necessary for me to make a reasonable response. This is a violation of my right to due process as well as of policy (10 C.F.R. § 1004.2I)

D) Desired Relief

As relief, and considering the time, effort, and annoyance involved, I ask that OHA forbid NNSA from seeking fees in any of the four FOIA requests named above. Other partial forms of relief would include OHA granting me for these requests one of the two fee status categories I demonstrate my eligibility for (educational institution or media). Finally, I ask what power OHA has to prevent future incidences of a failure to adhere to policy and statute in my future requests as such behavior equates—whatever its causative reasons—to illegal obstruction of my access to FOIA responsive documents as well as violations of my right to due process.

4) Justifications for Fee Status

A) Educational Requestor:

As I have previously stated in my original requests and on appeal: I should be granted my requested fee status as these requests are being made as part of my PhD research as an enrolled student at the University of New Mexico and not primarily for commercial or profit reasons. I make received records available to the public via an online collection (<https://osf.io/46sfd/>); I share, analyze, and discuss received FOIA documents via my Twitter account which has over 14,000 followers; and I have written about documents released via FOIA journalistically (**see Attachment 8, my CV**). You may access my UNM student page here: <https://anthropology.unm.edu/people/grad-students/profile/martin-pfeiffer.html>. Furthermore, by filing this request using the news site “Muckrock.Com,” all records will become immediately public once released. I reiterate: these documents are part of my scholarly research; are not primarily for commercial use or profit; and I have a well demonstrated public record of making both the documents, and my analysis of them, publicly available for free.

B) Media

I also argue that NNSA could assign me press/media fee status due to my making records I receive publicly accessible; conducting public analysis on social media; and in my writing for news, journalistic, scientific, and research outlets. I request here that the fee status appropriate to news media fee status be granted if my request for Educational/Institutional fee status is denied.

I am properly considered a member of the news media as I have previously written about the United States government and its (nuclear) activities for outlets such as Playboy UK and the Deep Sea Mining Observer in addition to publishing analysis of my research results—including my FOIA requests—on my blog and on my Twitter account which has over 14,000 followers and averages over 3 million impressions a month. As such, as I have a reasonable expectation of dissemination and readership by my own efforts in addition to publication in additional scholastic, news, research, or other outlets. My editorial and writing skills are well established.

While my research is not limited to this, a great deal of it, including this, focuses on the activities and attitudes of the government itself. As such, it is not necessary for me to demonstrate the relevance of this particular subject in advance. Additionally, case law states that “proof of the ability to disseminate the released information to a broad cross-section of the public is not required.” *Judicial Watch, Inc. v. Dep’t of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004); see *Carney v. U.S. Dep’t of Justice*, 19 F.3d 807, 814-15 (2d Cir. 1994). Further, courts have held that “qualified because it also had “firm” plans to “publish a number of . . . ‘document sets’” concerning United States foreign and national security policy.” Under this criteria, as well, I qualify as a member of the news media. Additionally, courts have held that the news media status “focuses on the nature of the requester, not its request. The provision requires that the request be “made by” a representative of the news media. *Id.* § 552(a)(4)(A)(ii)(II). A newspaper reporter, for example, is a representative of the news media regardless of how much interest there is

in the story for which he or she is requesting information." As such, the details of the request itself are moot for the purposes of determining the appropriate fee category.

5) Conclusion and Contact Information

I look forward to receiving your decision on this appeal within the 20-day statutory time limit. If you have any questions, or believe discussion of this matter would be beneficial, please contact me directly by email at mpfeiffer1@unm.edu. Email is my preferred method of communication. You may also, if unable to contact me via email, contact me at the address provided at the beginning of this letter.

Thank you for your consideration and effort on this matter. Please note that a copy of this letter in PDF form is provided as **Attachment 9**.

Regards,
Martin Pfeiffer