

Nuclear Watch New Mexico

Freedom Of Information Request

April 6, 2016

Freedom of Information Officer
NNSA Service Center
Office of Public Affairs
P.O. Box 5400
Albuquerque, NM 87185-5400

**EXPEDITED PROCESSING
REQUESTED**

Via e-mail to FOIOfficer@nnsa.doe.gov, foiofficer@doeal.gov

Dear FOIA Officers:

Pursuant to the Freedom of Information Act Nuclear Watch New Mexico requests all National Nuclear Security Administration (NNSA)

- 1) FY 2015 Contractor Performance Evaluation Reports (PERs), full and complete;
and
- 2) FY 2015 Contractor Performance Evaluation Report Summaries and Fee
Determination Letters

for the Los Alamos and Sandia National Laboratories.

Further, NWNM requests that release of these documents receive Expedited Processing. As you know, the FOIA provides that agencies must provide for the expedited processing of FOIA requests for requesters who demonstrate “compelling need,” and DOE regulations track the FOIA by providing that

... a compelling need exists when failure to obtain records expeditiously could reasonably be expected to pose a threat to the life or physical safety of an individual or, **when a request is submitted by a person primarily engaged in disseminating information and there is an urgency to inform the public about actual or alleged Federal Government activity.**

10 C.F.R. § 1004.5(d)(6) (emph. added)

A. NWNM is “a person primarily engaged in disseminating information.”

NWNM is a non-profit, tax-exempt, public policy research and information environmental organization. NWNM makes information available to thousands of citizens by means of its numerous and varied publications, educational programs, and public-interest litigation. The information disclosed pursuant to the request will be made directly available to the public and others engaged in policy analysis and research, including historians, area specialists, and journalists.

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NWNM is in an excellent position to aid the public in its understanding of government activities, particularly with respect to DOE facilities in New Mexico. Our most effective means of information dissemination is through our web site (www.nukewatch.org) that receives 6,000,000+ hits a year. In order to better inform the public, NWNM posts fact sheets analyzing federal and state policies on its web site. We also publish and distribute newsletters to the public. Additionally, we often work closely with regional and national journalists so that they can inform the public through their publications. The information received under this FOIA will be reviewed and presented to the public through any or all of these means.

B. There is an urgency to inform the public about actual or alleged Federal Government activity in this case.

There is great public interest in the NNSA's Contractor Performance Evaluation Reports for many NNSA Facilities, but particularly in those reports for the Los Alamos and Sandia National Laboratories: see the March 24, 2016 Albuquerque Journal Editorial Board Editorial available at <http://www.abqjournal.com/745237/opinion/tardy-posting-of-nnsa-evaluations-unacceptable.html>

For your convenience, we present it in its entirety:

Either the National Nuclear Security Administration is running really late in completing performance evaluations of national weapons contractors or it is stonewalling in releasing them. Neither possibility is good.

In past years, annual evaluations were made public in January. The federal fiscal year ends on Sept. 30, and in the past the government has been able to complete the evaluations in about three months.

After the Journal in early January requested the Fiscal Year 2015 evaluation for Los Alamos National Security LLC, the contractor that operates the lab for the government, the NNSA's press secretary responded that evaluations would be posted online when they are completed, and that was expected by middle January. Two months later, they have not been posted.

The Journal recently filed a Freedom of Information request and last week NNSA Press Secretary Francie Israeli wrote that the "situation has not changed."

Yet in December, LANL's contractor apparently already knew what its FY 2015 evaluation contained. LANS officials disclosed to employees that while the FY 2015 evaluation was better than the very critical FY 2014 evaluation – largely hurt by LANL's role in a radiation leak at the Waste Isolation Pilot Plant in southeastern New Mexico in February 2014 – it wasn't good enough to earn the contractor an extra year on its contract.

As a result of LANL's second unsatisfactory performance rating, the NNSA announced it would put the lab contract out for bid after 2017, only the second time it has been subject to competitive bidding.

Sandia National Laboratories has been hit hard by NNSA for what the agency said were improper payments to former Rep. Heather Wilson to lobby for federal funding for the lab. Sandia's contract expires at the end of April 2017 and a draft RFP was recently posted.

Money to run the labs comes from U.S. taxpayers, who deserve to know how it is being spent and if contractors are doing their jobs in a timely and efficient manner.

Past shoddy attention to detail by NNSA contractors and lackadaisical oversight by the U.S. Department of Energy are some of the reasons why the evaluations are critical to protecting national security. The potential search for new contractors makes the evaluations especially critical. They should be made public post haste. (emph. added)

This editorial first appeared in the Albuquerque Journal. It was written by members of the editorial board and is unsigned as it represents the opinion of the newspaper rather than the writers. – End -

Thus, for both the Los Alamos and Sandia National Laboratories, the requested documents bear directly on issues of contractor inefficiency, waste, and possible corruption, governmental fiscal responsibility, accountability, and unjustified secrecy. Further, NNSA's daily failure to promptly release these documents is undermining confidence in the integrity of DOE, NNSA, and the operation of NNSA facilities. This is clearly seen not only in the Albuquerque Journal editorial above, but also in this statement from the respected Knoxville News Sentinel journalist Frank Munger, who has long reported on NNSA and Y-12 Plant issues (again included in its entirety):

<http://knoxblogs.com/atomiccity/2016/03/14/what-to-think/>

What to think?

As I noted in a column last week, it's hard to figure out whether the [National Nuclear Security Administration](#) has any intention of releasing the FY 2015 performance evaluations for its contractors. Based on NNSA's actions to date, the release of documents [appears to be on hold](#), although there's been no real explanation of why.

I have repeatedly requested the performance evaluation for Consolidated Nuclear Security, the NNSA's managing contractor at the Y-12 and Pantex nuclear weapons plants. Because CNS took over management of the plants on July 1, 2014 (three-fourths of the way through FY 2014), the contractor's first report card will cover 15 months.

Fiscal Year 2015 ended on Sept. 30, 2015, and later that fall I requested the performance evaluation for CNS. On Dec. 14, NNSA spokeswoman

Shelley Laver said she had not received any of the performance evals from the sites, noting they wouldn't be released until they were all completed and "released at once."

She wrote in an email, "I suspect we will post them the beginning of January."

That didn't happen, and I later filed a Freedom of Information Act request, seeking the federal documents, as others reportedly did as well. The performance reports contain valuable information on how the NNSA contractors are carrying out their missions involving billions of taxpayer dollars annually.

As [noted recently](#), I asked NNSA if it intended to release the performance reviews, and Laver said in a March 8 email, "It is our intent to release the PERs (performance evaluation reports)." She added: "I am hoping to be able to release them in the coming weeks, no set timeline as of yet."

However, based on another report, those "coming weeks" could turn into coming months.

Ralph Hutchison, coordinator of the Oak Ridge Environmental Peace Alliance, recently filed a FOIA request for the evaluation reports, and he received a response last week from a FOIA officer at NNSA's office in Albuquerque, N.M.

In that response, Karen Laney, a government information specialist, acknowledged Hutchison's request and wrote: "NNSA's Office of Acquisition & Project Management has advised the FOIA office that they expect to release the PERs in early July 2016."

July 2016 would mark the two-year anniversary of CNS managing the Y-12 and Pantex national security facilities without the public release of an evaluation report. Former CNS President Jim Haynes last year acknowledged that the contractor had received a "disappointing" performance score of 57 (out of 100) from the National Nuclear Security Administration, but that score has not been explained or substantiated.

- End -

Time is of the essence for the release of these documents if the public watchdog function of NWNM and other requesters is not to be compromised. Therefore, we request expedited processing for the release of these critical documents.

Finally, please note that release of the requested documents must be to the NNSA Electronic Reading Room, as required by E-FOIA, because these PERs are "frequently requested records." NWNM is aware of numerous requests for these PERs, as you must be. The Albuquerque Journal editorial and the Knoxville News Sentinel blog piece noted that those two newspaper had made FOIA requests for these PERs, and they have also been requested by the nonprofit organizations SRS Watch and the Oak Ridge Environmental and Peace Alliance. Thus, in addition to NWNM's FOIA requests in

2010, 2012, 2013, and 2015 for the PERs, we can document that there are at least four other requests for the PERs, mandating release to the NNSA Electronic Reading Room as “frequently requested records.”

If and when our FOIA request is honored, any redactions or use of FOIA exemptions must be applied individually to the text in question, with the number of the claimed exemption used for each.

As a reminder, President Obama’s Freedom of Information Act Memorandum For The Heads Of Executive Departments And Agencies states, “All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.”

(http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/)

If you regard this information as exempt from required disclosure under the Act, NWNM requests that you exercise your discretion to disclose them nevertheless. If the document(s) includes classified or otherwise restricted information and the volume of this material makes a lengthy declassification review necessary, NWNM request the prompt release of all elements of the document portions marked 'Unclassified,' 'For Official Use Only,' or 'Declassified.' Additionally, NWNM request that the remaining classified portions undergo a careful review for the purpose of declassification, in whole or in part, and that you release all reasonably segregated portions of the classified record, except those portions which would actually damage national security.

NWNM further request that you disclose these materials as they become available to you without waiting until all the documents have been assembled.

Should you elect to invoke an exemption to the FOIA, NWNM will require in your full or partial denial letter sufficient information to appeal the denial. In accordance with the minimum requirements for administrative due process, this information should include:

1. Basic factual material, including the originator, date, length, and addresses of the withheld items.

2. Explanations and justifications for denial, including the identification of the procedural category of E.O. 12356 under which the withheld document or portions of the document was found to be subject to classification, at what level the entire document was ultimately classified and the nature and variety of the document's portion-marking and, most importantly, explanations of how each exemption fits the withheld material.

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In the past, the Department of Energy has, as a matter of course, sent a letter asking for clarification of the following:

1. Whether the subject of the requested record(s) concerns "the operations or activities of the government;"
2. Whether the disclosure is "likely to contribute" to an understanding of government operations or activities;
3. The contribution to an understanding by the general public of the subject likely to result from disclosure, taking into account one's ability and intent to disseminate the information to the public in a form that can further understanding of the subject matter;
4. Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities;
5. Whether the requester has a commercial interest that would be furthered by the requested disclosure; and if so
6. The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in the disclosure, that disclosure is "primarily in the commercial interest of the requester."

In order to save time and help expedite our request, NWNM herein responds to the above questions in sequential order. This will also help your office clarify any questions you may have regarding NWNM's eligibility for FOIA fee waivers or reductions under 10 CFR 1004.9(a)(8). Furthermore, it should assist your office in speedy compliance and consideration of this FOIA request, as required by 5 U.S.C. Section 552, as amended.

Our answers are as follows:

- 1) All information requested in this FOIA is for information directly related to federal Department of Energy (DOE) activities. Therefore, our request indisputably concerns "the operations or activities of the government." Further, documents generated by DOE management contractors are "owned" by the federal government and therefore fall under this request (e.g., see LANL management contract #W-7405-ENG-36/Mod M440/M507, §I.067 and NM CIVIL NO. 97-1412 DJS/WWD "Los Alamos Study Group vs. Dept. of Energy"). Additionally, the fact that a requested document may have been generated by a contractor, rather than by the federal government itself, does not excuse any delay to the fulfillment of our request.
- 2) DOE activities are of concern to many citizens, yet it is an area where public information is often lacking or inadequate. This FOIA request will enable the public and their advocates to better understand DOE activities.
- 3) NWNM is in an excellent position to aid the public in its understanding of government activities, particularly with respect to DOE facilities in New Mexico. Our most effective means of information dissemination is through our web site (www.nukewatch.org) that receives 4,000,000+ visits a year. In order to better inform the public, NWNM posts fact sheets analyzing federal and state policies on its web site. We also publish and distribute newsletters to the public. Additionally, we often work closely with regional and national journalists so that they can inform the public through their publications. The information received under this FOIA will be reviewed and presented to the public through any or all of these means.

- 4) The requested material in this FOIA is likely to contribute "significantly" to public understanding of government operations or activities because it will provide NWNM with important information that will help clarify DOE activities. In turn, NWNM will convey the information to the public so that the general citizenry can be better informed.
- 5) NWNM has no commercial interest in this FOIA request.
- 6) The response to question 5 satisfies question 6.

As per 10 CFR 1004.4 (e), NWNM assures our willingness to pay fees, unless a waiver is granted. Beyond the required first 100 pages of duplication and the first two hours of search time without charge (10 CFR 1004.9 (a)(6), NWNM is prepared to pay normal search and copying fees up to \$50.00. If fees exceed \$50.00, please advise. However, the FOIA provides that you may waive fees "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." (5 U.S.C. Section 552(a)(4)(A)(iii) and 10 CFR 1004.9(a)(8)) This request clearly meets these requirements. Therefore, we request that you waive all fees in connection with this request. We further ask, in the event that fees are not waived, that you inform us of the specific basis for such a decision.

We appreciate your help in obtaining this information. Should you need further information concerning NWNM, or this request, we would appreciate your immediate attempts to contact us in order to expedite this request. We expect a definitive decision on our request for expedited processing within 10 working days per 10 C.F.R. § 1004.5(d)(7). Whatever that decision, we look forward to receipt of NNSA's determination of intent to release or withhold the requested documents within 20 working days, as 5 U.S.C. Section 552, (a)(6)(A) stipulates:

Each agency... shall - - (i) determine within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefore, and of the right of such person to appeal to the head of the agency any adverse determination.

In your determination, we also expect a stated date when this document will be released to us, or, alternatively, any reason for denial. Thank you for your assistance.

Sincerely,

Jay Coghlan
Executive Director, NWNM

Scott Kovac,
Operations Director, NWNM