



November 16, 2005

Director
Office of Hearings and Appeals
Department of Energy
1000 Independence Ave SW
Washington D.C. 20585

VIA CERTIFIED MAIL (with Exhibits)
E-mail to FOIAAppeals@doe.gov (without Exhibits)

Re: Freedom of Information Act Appeal of FOIA Control No. 04-140-A

Dear Director:

Nuclear Watch of New Mexico (NWNM) hereby appeals:

- 1) The decision made by the National Nuclear Security Administration (NNSA) to redact more than 40 percent of the Fiscal Year (FY) 2004 Ten-Year Comprehensive Site Plan for the Los Alamos National Laboratory (hereinafter "LANL TYCSP").
- 2) The delay to releases of the FY 2003 and 2005 LANL TYCSPs. These were requested nearly eleven months ago under the same FOIA request, and their continuing delay constitutes constructive denial.

NWNM received the FY 2004 LANL TYCSP pursuant to our December 22, 2004, request under the Freedom of Information Act (FOIA), 5 U.S.C. §552, and Department of Energy FOIA Implementation Regulations 10 CFR 1004. Rather than receiving a letter of determination for the redactions, on October 25, 2005, we received a simple cover letter from the NNSA Albuquerque Service Center FOIA Office informing us of a partial response to our FOIA request for the FY02, FY03, FY04 and FY05 LANL TYCSPs. That partial response was to provide the FY04 TYCSP, while the FY03 and FY05 remain outstanding (we have subsequently notified the NNSA that we are dropping our request for the FY02 TYCSP).

We assert that the NNSA improperly redacted information because no exemptions for nondisclosure were cited, no explanation of applicability of exemptions was given, and there was no statement of why discretionary release is not appropriate, all of which are required by 10 CFR §1004.7(b)(1). Additionally, the person responsible for the redactions was not named, as required by 10 CFR §1004.7(b)(2). Finally, the NNSA partial response is in violation of 5 U.S.C. §552(a)(2) which states "in each case the justification for the deletion shall be fully explained in writing....."

The relevant part of our December 22, 2004 FOIA request asked for:

2. Los Alamos National Laboratory (LANL) Ten Year Comprehensive Site Plans (TYCSPs) for the years 2002, 2003, 2004 and 2005. We specifically request that your office inform us if the 2005 TYCSP has been completed, and if not when completion is expected and not to delay release of the other years.

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[NWNM's full request as Exhibit 1.]

The relevant parts of the responsive NNSA Albuquerque Service Center cover letter are:

In reference to Item 2, and as [DOE AL FOIA Officer] Ms. Terry Apodoca stated in her E-mail to both you and [NWNM staff member] Scott Kovac on October 14, 2005, we are providing you a copy of 2004 with this partial response. We are awaiting a copy of 2002 from the laboratory as well as an estimate of time to complete reviews of 2003, 2005, and 2006.

The remaining portions of your request are the 2002, 2003, 2005, and 2006 LANL Ten Year Comprehensive Site Plans (TYCSPs) that are responsive to Item 2. As soon as we receive these reports, we will provide them to you. [NNSA's partial response cover letter as Exhibit 2.]

On October 14, 2005, NWNM filed via e-mail a FOIA request for the FY06 LANL TYCSP. On that same day the DOE AL FOIA Officer replied by e-mail that, "Your new request will be added to the scope of this request" (i.e., the original request with FOIA control #04-140-A). [Exhibit 3.]

NWNM is a public interest nonprofit organization with specific interests in virtually all issues pertaining to the Los Alamos National Laboratory, Sandia National Laboratory and the Waste Isolation Pilot Project, and generally for the nuclear weapons complex as well. Full disclosure of the LANL TYCSPs is clearly in the public's interest. According to the NNSA:

"The site TYCSPs are the foundation for the strategic planning for the physical complex, incorporating the programs' technical requirements, performance measures, budget and cost projections within the funding constraints of the approved Future-Years Nuclear Security Program (FYNSP)."

"Uses of the TYCSP.... 7. Facilitates assessment of the current status of the facilities and infrastructure within the NNSA complex to support the Nuclear Posture Review (NPR)'s focus on Responsive Infrastructure;... 9. Establishes realistic planning for, and execution toward, the intended NNSA complex of the future;... 13. Defines the high-level linkages among weapons workload and production capability with facility requirements;... 14. Provides the foundation for development of an Integrated Site Plan/ Enterprise Plan for the NNSA nuclear weapons complex..." (NNSA FY06 TYCSP Guidance," December 2004, p. 1 and pp. 3 – 4.)

The "intended NNSA [nuclear weapons] complex of the future" is the subject of much public and Congressional debate, as well as the implementation of the 2002 Nuclear Posture Review. Moreover, the northern New Mexican population is intensely interested in the future missions, strategies, facilities and production rates of the Los Alamos National Laboratory. Yet it appears to be precisely those future elements that have been redacted from the FY04 LANL TYCSP.

Procedural Background

On January 27, 2004, NWNM filed a request to LANL under the California Public Records Act (CPRA) for the FY04 LANL TYCSP, which was then given control number CPRA 04-021-C. Other than acknowledgement of receipt of our request, NWNM received absolutely no other responses from the LANL CPRA Officer until November 4, 2005. On that day she e-mailed that she was closing out our CPRA request because the NNSA had finally responded to our 12/23/04 FOIA request. [NWNM/LANL CPRA communications enclosed as Exhibit 4.]

NWNM made its initial FOIA request to the NNSA on December 22, 2004, which included the FY02, FY 03, FY04, and FY05 LANL TYCSPs. On October 14, 2005, NWNM added a request for the FY06 LANL TYCSP, which the NNSA Albuquerque Service Center FOIA Officer incorporated into our original request. We also dropped our request for the FY02 LANL TYCSP.

A full 10 ten months after our original FOIA request, and after repeated inquires into the status of our request, NNSA provided a partial response on October 20, 2005. That partial response consisted of a three-ring binder, approximately 350 pages long (not including dividers), entitled LANL Ten-Year Comprehensive Site Plan FY04-FY13, LA-UR-04-7750, dated September 1, 2003. As previously stated, in terms of the physical spatial parameters of text and tables, that plan is more than 40% redacted without the justifications required by statute. Additionally, requests are still outstanding for the FY03, FY05 and FY06 LANL TYCSPs under FOIA control number 04-140-A.

Argument

The FOIA provides that “each agency, upon request for records which (A)(i) reasonably describes such records and (B)(ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.” U.S.C. §522(a)(3)(A). NWNM contends it properly followed the FOIA request procedures. However, the NNSA has failed to promptly respond given that it took ten months to fulfill the request for one LANL TYCSP and still hasn’t supplied the others. Further, even when it supplied that one partial response, the NNSA acted in gross violation of FOIA requirements.

The Act allows for federal agencies to withhold records if they fit within one or more of nine specified exemptions. 5 U.S.C. §552 (b). Since the government agency has sole access to the relevant information it therefore bears the burden of justifying its disclosure decisions in “as detailed a description as possible.” *Ogelsby v. US Dept. of Army*, 79 F.3d 1172 (C.A.D.C. 1996). When exemptions are invoked, agencies are required to specify in detail which portions of a document are disclosable and which are allegedly exempt. 5 U.S.C § 552(a) and *Vaughn v. Rosen*, 484 F.2d at 827. Despite the above requirements and case law, the NNSA supplied NWNM with a LANL FY04 TYCSP that is approximately 40% redacted without explanation.

NWNM argues that the TYCSP should not be redacted to begin with. We have four bases for this:

1. The FY 2000 and 2001 LANL TYCSPs in our possession are completely without redaction (the former was even available on the world wide web). NWNM is aware, of course, of heightened security concerns following the September 11, 2001 attacks, especially related to facility maps and locations and quantities of sensitive materials.

Concerning facility maps, unredacted portions of the LANL FY04 TYCSP have maps of “Facility Status, 2004, with Currently Funded Construction,” generalized to the point where presumably there are no associated security concerns since they were released. However, in each case, “Facility Status, 2013, with Proposed Future Construction,” juxtaposed side-by-side with “Facility Status, 2004,” is redacted in full. Logically, TYCSP maps of future construction also would or could be generalized to the point where there would be no related security concerns. In effect, the NNSA appears more concerned about protecting from public disclosure speculative plans that may or may not happen, rather than sensitive facilities that actually exist on the ground. This leads us to question NNSA motives while redacting.

Concerning locations and quantities of sensitive materials, the FY 2000 and 2001 LANL TYCSPs in our possession do not even broach the subjects. Neither do the unredacted portions of the FY04 LANL TYCSP. We therefore find it highly unlikely that the redacted portions contain reference to sensitive materials, again leading us to question NNSA motives while redacting.

2. The Lab designated the FY04 LANL TYCSP as a “LA-UR” document, that is “Los Alamos – Unlimited Release,” without any further designation. The FY04 LANL TYCSP did not even rise to the level of “Official Use Only.” There are no classification markings in the body of the TYCSP, which in other documents that we have FOIAed for are struck through after release. In short, the need for redaction due to classification requirements does not exist for the FY04 LANL TYCSP.

3. Large portions of the redactions are available elsewhere. One example is “Future Land Use,” which is redacted in full, whereas “Existing Land Use” is provided. However, the contemporary November 2003 “Proposed Risk-Based End States for Completion of the EM Cleanup Mission at LANL,” supplied to us by the Lab without a FOIA request despite its Official Use Only designation, has numerous future land use maps. Additionally, since the TYCSPs have a 10-year planning horizon from year to year, much of the redacted material in the FY04 LANL TYCSP will be available in the FY 2000 and 2001 TYCSPs. The 2001 Plan, for example, has a planning horizon to 2010, whereas the 2004 Plan has a planning horizon to 2013. Therefore, across the board in all planning categories, the 2001 Plan contains the same information (unless where changed) as the 2004 Plan does up to the year 2010. In the event that information for up to 2010 has changed, that should also be disclosed pursuant to FOIA for all the other reasons given in this appeal.

4. FOIA has an exemption from disclosure when agencies claim that requested documents are predecisional. NMNM asserts that the TYCSPs are not predecisional, and are in fact the final planning document on the site level that feed directly into the NNSA’s Congressional Budget Request for the following fiscal year. The fact that “the site TYCSPs are the foundation for the strategic planning for the physical complex” has already been quoted. Some other relevant quotes are:

The FY 2006 site TYCSPs will support the FY 2007 - 2011 PPBE [Planning, Programming, Budgeting and Evaluation process] and development of the FY 2007 Budget Request, and will clearly demonstrate the results that will be accomplished for the resources expended... The September 2005, Site’s Final FY 2006 TYCSP submissions will be their comprehensive annual Plan and will reflect data to be reported in support of the FY 2006 Budget. (NNSA FY06 TYCSP Guidance,” December 2004, pp. 1 and 11.)

Therefore, the TYCSPs are clearly not predecisional documents.

In sum, NWNM argues for the prompt, unredacted release of the FY04 LANL TYCSP, and the other years’ TYCSPs still not released under FOIA Control No. 04-140-A.

Relief Requested

Nuclear Watch New Mexico respectfully requests the Director to grant this appeal and order the NNSA to release an unredacted FY04 LANL TYCSP, in both hard copy and electronic form. Similarly, we request the Director to order the prompt release of unredacted FY03, ’05 and ’06 LANL TYCSPs, in both hard copy and electronic form, all as part of FOIA Request Control No. 04-140-A.

Sincerely,

Jay Coghlan,
Executive Director