

BEFORE THE NATIONAL FREEDOM OF INFORMATION OFFICE,  
U.S. ENVIRONMENTAL PROTECTION AGENCY, FOIA AND PRIVACY BRANCH

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ON APPEAL FROM THE NATIONAL FOIA OFFICE, ENVIRONMENTAL  
PROTECTION AGENCY

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APPELLANT AMERICANS FOR LIMITED GOVERNMENT'S FREEDOM OF  
INFORMATION ACT APPEAL REGARDING DENIAL OF REQUEST FOR FEE  
WAIVER

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## STATEMENT OF FACTS

Appellant, Americans for Limited Government, (Appellant) filed a request under the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* with the U.S. Environmental Protection Agency (EPA) on May 16, 2012. A copy of that FOIA request is attached as Appendix 1.

In its FOIA request Appellant sought production of:

[A]ny records that exist regarding meetings between EPA's Office of Resource Conservation and Recovery, or the Office of Solid Waste and Emergency Response and representatives of the organizations listed below from January 21, 2009 through the present:

- Appalachian Voices
- Chesapeake Climate Action Network
- Environmental Integrity Project
- Kentuckians For the Commonwealth
- Montana Environmental Information Center
- Moapa Band of Paiutes
- Prairie Rivers Network
- Physicians for Social Responsibility
- Southern Alliance for Clean Energy
- Sierra Club
- Western North Carolina Alliance

In its FOIA request Appellant sought a fee waiver due to the public benefit that disclosing these records will provide.

National FOIA Officer, Larry F. Gottesman, by letter, dated May 18, 2012, denied Appellant's fee waiver request on the following grounds: "You have not expressed a specific intent to disseminate the information to the general public. As a result of you

failing to meet the above criteria, accordingly, there is no need to address the remaining prongs of the fee waiver criteria.” A copy of that denial is attached as Appendix 2.

Then on or about May 23, 2012, Appellant’s counsel spoke with Wanda McLendon, of the Office of Solid Waste and Emergency Response, who looking for a description of what the topic of these meetings might be. In response to both of these communications, the Appellant emailed Ms. McLendon a clarification letter, dated June 11, 2012 addressing both (1) the topic of the meetings (coal-ash regulations), and (2) a more detailed fee waiver request. See Appendix 3.

Then, on June 19, 2012, Appellant received a second letter from National FOIA Officer, Larry F. Gottesman, stating that in response to our request for reconsideration of our fee waiver request, he was affirming the denial of our request. See Appendix 4. In this one page response, Mr. Gottesman did not cite any specific factor that was insufficiently met in our clarification letter, nor was there any analysis of why he believes Appellant failed to meet such criteria. Furthermore, the letter contained no language regarding the right to an appeal as there was in the May 18, 2012 letter.

Appellant placed a call to the EPA to inquire about this determination, and was directed to Ms. Vivian Warden. After leaving messages, Appellant spoke with Ms. Warden on June 27, 2012 regarding the fee waiver request denial. Ms. Warden stated that because our June 11, 2012 letter of clarification did not include the word “appeal” in it anywhere, that it was treated as a “request for reconsideration.” She also stated that this did not bar Appellant’s right to appeal the denial. Appellant followed up this

phone conversation with an email outlining the conversation (see Appendix 5), to which Ms. Warden replied on June 29, 2012. See Appendix 6.

### **SUMMARY OF THE ARGUMENT**

Appellant is entitled to a fee waiver because the records sought will significantly increase the public understanding of the operations or activities of the U.S. Environmental Protection Agency and thus granting the fee waiver is in the public interest. Further, Appellant does not have a commercial interest in the records and should be considered a “representative of news media” under 40 C.F.R. § 2.107 (c)(1)(iii).

### **ARGUMENT**

#### **THE FEE WAIVER PROVISIONS FOUND IN THE FOIA EXIST TO FURTHER THE PUBLIC UNDERSTANDING OF THE GOVERNMENT AND ARE TO BE LIBERALLY CONSTRUED**

The information sought by Appellant in its FOIA request concerns the operations or activities of the U.S. Environmental Protection Agency and will be used to better the public’s understanding of how it is spending the taxpayers’ money and responding to the influence of outside advocacy organizations. Also, disclosure of the information is not primarily in the commercial interest of the requester. As such the public good that will occur in disclosing the information sought in and of itself weighs strongly in favor of a fee waiver.

Further, the EPA should be reminded of the policy in favor of disclosure mandated by President Barack Obama on January 26, 2009. President Obama instructed the executive departments and agencies to operate with a presumption towards disclosure. On this point the President stated as follows:

A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, "sun-light is said to be the best of disinfectants." In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.<sup>1</sup>

These instructions from the President were followed up by further instructions from Attorney General Eric Holder on March 19, 2009. The Attorney General stated as follows:

First, an agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.

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<sup>1</sup> Freedom of Information Act, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683 (January 26, 2009).

Second, whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure. Agencies should always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information. Even if some parts of a record must be withheld, other parts either may not be covered by a statutory exemption, or may be covered only in a technical sense unrelated to the actual impact of disclosure.<sup>2</sup>

In further support of its argument Appellant submits the following further analysis of the factors found in the EPA's FOIA regulation related to fee waivers.

**I. APPELLANT'S REQUEST MEETS THE CRITERIA FOR A FEE WAIVER AS SET FORTH IN THE EPA'S FOIA REGULATIONS, THUS THE REQUEST FOR A FEE WAIVER SHOULD BE GRANTED**

The EPA's FOIA regulation at 40 C.F.R. § 2.107 (1)(2) lists four factors that are to be used in determining whether a requestor has met the requirements for a waiver of fees, *i.e.* contributes to the public understanding. As discussed below, Appellant meets these factors, and as such qualifies for a fee waiver.

**A. 40 C.F.R. § 2.107(1)(2)(i) THE INFORMATION SOUGHT BY APPELLANT'S REQUEST CONCERNS THE OPERATIONS OR ACTIVITIES OF THE GOVERNMENT, I.E. THE EPA**

The EPA's regulation at 40 C.F.R. § 2.107 (1)(2)(i) contains the first factor to be used in determining whether a fee waiver should be granted. That factor is, "Whether the subject matter of the requested information concerns the operations or activities of

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<sup>2</sup> Freedom of Information Act, Attorney General Memorandum for Heads of Executive Departments and Agencies (March 19, 2009).



the Federal government.” The subject of Appellant’s request relates solely to the EPA’s interaction without outside organizations prior to a suit. As such, this subject concerns the operations and activities of the EPA.

**B. 40 C.F.R. § 2.107 (1)(2)(ii) THE DISCLOSURE OF THE INFORMATION SOUGHT BY THE APPELLANT IS LIKELY TO CONTRIBUTE TO AN UNDERSTANDING OF GOVERNMENT OPERATIONS OR ACTIVITIES**

These expenditures have not previously been reported on in the public domain. As such the public has little or no current understanding of them. Therefore any disclosure of these records will increase the public’s understanding of how the EPA has been interacting with the named organizations above. Upon receipt of the requested records Appellant will perform extensive analysis of these records. We have an experienced research and legal staff who will carefully scrutinize any responsive records provided. After completing that analysis Appellant will publish its findings using the media described below. The records sought will significantly improve the understanding of the public as to the operation and activities of the EPA in this area.

**C. 40 C.F.R. § 2.107 (1)(2)(iii) THE DISCLOSURE OF THE REQUESTED INFORMATION WILL CONTRIBUTE TO THE PUBLIC UNDERSTANDING AS OPPOSED TO THE INDIVIDUAL UNDERSTANDING OF THE REQUESTER OR A NARROW SEGMENT OF THE INTERESTED PERSONS**

Appellant regularly publishes information on the activities, structure, and operations of the federal government. This information is distributed to a large number of diverse individuals across the entire nation. The records sought are of the type which the Appellant regularly provides to the public through its publications and

website, [www.getliberty.org](http://www.getliberty.org). By way of example, on a typical day our materials are read by over 70,000 individuals. Included in that number are 9,000 editors and publishers, 8,000 bloggers, 4,000 T.V. staff, 5,000 radio talk show personnel, 3,000 political journalists, and 3,000 key individuals in positions within Washington, DC. Many of these 70,000 individuals and their respective entities republish our materials which we provide free of charge and without copyright restriction, allowing for wide dispersal of these materials. Additionally, Appellant's staff are regular guests on national T.V. and radio media outlets speaking to hundreds of thousands of individuals at a time regarding the activities of the federal government. The records received from the EPA will be disseminated through these distribution channels. As such, the disclosure of the requested information will contribute to the general public understanding as opposed to an individual understanding of the Appellant or a narrow segment of interested persons.

**D. 40 C.F.R. § 2.107 (1)(2)(iv) THE DISCLOSURE OF THE REQUESTED INFORMATION WILL CONTRIBUTE SIGNIFICANTLY TO THE PUBLIC UNDERSTANDING**

As noted above, records of these interactions have not been reported in the public domain. Appellant has an experienced research and legal staff who will carefully scrutinize any responsive records provided. Appellant will perform analysis of the expenditures found in these records to better understand how the EPA is interacting with these organizations and what policy comes out as a result of these interactions. Since the public has little, if any, present understanding of how the EPA is

conducting these interactions, any further information published via the methods described above will constitute a significant increase in the public understanding of this issue.

**II. THE DISCLOSURE OF THE INFORMATION REQUESTED IS NOT IN THE COMMERCIAL INTEREST OF THE APPELLANT UNDER 40 C.F.R. § 2.107 (k)(3)**

In addition to meeting the criteria in 40 C.F.R. § 2.107 (l)(2), the ALG also qualifies for a fee waiver under 40 C.F.R. § 2.107 (l)(3), used to determine whether the requester has a primarily commercial interest in the disclosure of material. The factors here consider whether the requester has a commercial interest in the requested information and if so whether the magnitude of the commercial interest, if any, is sufficiently small in comparison to the public interest in disclosure. As discussed below, the Appellant does not have a commercial interest in the disclosure of the material, and as such should be granted a fee waiver.

**A. 40 C.F.R. § 2.107 (l)(3)(i) APPELLANT DOES NOT HAVE A COMMERCIAL INTEREST IN THE DISCLOSURE OF THE REQUESTED DOCUMENTS AND SHOULD THEREFORE BE GRANTED A FEE WAIVER**

The central focus of the analysis in determining whether the fee waiver is in the public interest is whether the public rather than the requestor is the primary beneficiary of the release of the information. “The statute indicates that the issue to be considered by the agency is whether furnishing the information will primarily benefit the public at

large or whether any benefit will inure primarily to the specific individual requesting the documents.” *Eudey v. Central Intelligence Agency*, 478 F.Supp. 1175, 1177 (D.D.C. 1979). In the instant case the records sought will be used to further the public’s understanding of the operations and activities of the EPA. We operate as a nonprofit, offering free expert analysis on a variety of political issues, and welcome republication of our materials in order to get the information to as wide an audience as possible. The records sought will be disseminated widely to parties interested in the workings of the government and as such will not inure primarily to the benefit of the requestor. Therefore, we have no commercial interest in the disclosure of the records.

**B. 40 C.F.R. § 2.107 (l)(3)(ii) ANY IDENTIFIED COMMERCIAL INTEREST IS SUFFICIENTLY SMALL IN COMPARISON WITH THE PUBLIC’S INTEREST IN DISCLOSURE**

Lastly, the EPA must balance the requester’s commercial interest against that of the public’s interest to determine which is greater. Even if Appellant should be found to have a commercial interest in the disclosure, its interest would be minimal in comparison to the magnitude of the public’s interest in records sought by the Appellant, *i.e.*, meetings on the topic of coal-ash regulation with the named Advocacy Organizations in Appellant’s FOIA request. Therefore, the request for waiver of fees should be granted.

**III. APPELLANT SHOULD BE CONSIDERED A “REPRESENTATIVE OF THE NEWS MEDIA” UNDER 40 C.F.R. § 2.107 (c)(1)(iii), AND AS SUCH, APPELLANT’S REQUEST FOR A FEE WAIVER SHOULD BE GRANTED**

Based on the previous arguments, the nature of Appellant's work, and the description given in 40 C.F.R. § 2.107 (c)(1)(iii), Appellant is a "representative of the news media." As such, the Appellant's request for a fee waiver should be granted.

## CONCLUSION

Based on the foregoing Appellant respectfully urges the National Freedom of Information Office of the U.S. Environmental Protection Agency to reverse the decision of FOIA Officer Mr. Gottesman, and grant Appellant a waiver of fees for its May 16, 2012 FOIA request.

Dated this 6<sup>th</sup> day of July, 2012.

Respectfully Submitted,



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Nathan Paul Mehrens



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Counsel for Appellant



# AMERICANS FOR LIMITED GOVERNMENT

Appendix 1

9900 MAIN STREET SUITE 303 · FAIRFAX, VA 22031 · PHONE: 703.383.0880 · FAX: 703.383.5288 · WWW.GETLIBERTY.ORG

May 16, 2012

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460

Via email to: [hq.foia@epa.gov](mailto:hq.foia@epa.gov)

**Re: Freedom of Information Act (FOIA) Request**

Dear FOIA Officer:

Pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, I request on behalf of Americans for Limited Government (ALG) copies of the federal records described below.

Please provide copies of any records that exist regarding meetings between EPA's Office of Resource Conservation and Recovery, or the Office of Solid Waste and Emergency Response and representatives of the organizations listed below from January 21, 2009 through the present:

- Appalachian Voices
- Chesapeake Climate Action Network
- Environmental Integrity Project
- Kentuckians For the Commonwealth
- Montana Environmental Information Center
- Moapa Band of Paiutes
- Prairie Rivers Network
- Physicians for Social Responsibility
- Southern Alliance for Clean Energy
- Sierra Club
- Western North Carolina Alliance

If reasonably possible I request that responsive records be provided in electronic form on either unencrypted CDs or DVDs.

### **Further Definition of Records Sought**

The term "record" should be construed to mean any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, interoffice and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone calls, meetings or other communications, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, voicemails, microfiche, microfilm, videotape, recordings and motion pictures), and electronic and mechanical records or representations of any kind (including, without limitation, tapes, cassettes, disks, computer server files, computer hard drive files, CDs, DVDs, memory sticks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind of nature. A record bearing any notation not a part of the original text is to be considered a separate record. A draft of a non-identical copy is to be construed as a separate record.

The term "relating" and "regarding" with respect to any given subject, should be construed to mean anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is in any manner whatsoever pertinent to that subject.

The inclusion and description of particular records in this request should not be construed to eliminate other records that are not described in particular detail if they should exist in another format.

### **Procedure Regarding Records Exempt from Disclosure**

Given the nature of the records requested I anticipate that the vast majority of any responsive records will be of the type required to be released under FOIA. However, in the event that records exist that FOIA does not require to be released I request that they be released regardless unless the failure to release such records can be justified based upon sound reasoning related to one of the statutory exemptions or exceptions in FOIA and there is a patently manifest danger of significant harm that would occur from release of such records, *e.g.*, danger to health or safety of an individual.

Further, the EPA should be reminded of the policy in favor of disclosure mandated by President Barack Obama on January 26, 2009. President Obama instructed the executive departments and agencies to operate with a presumption towards disclosure. On this point the President stated as follows:

A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, "sun-light is said to be the best of disinfectants." In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public. Freedom of Information Act, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683 (January 26, 2009.)

These instructions from the President were followed up by further instructions from Attorney General Eric Holder on March 19, 2009. The Attorney General stated as follows:

First, an agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.

Second, whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure. Agencies should always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information. Even if some parts of a record must be withheld, other parts



either may not be covered by a statutory exemption, or may be covered only in a technical sense unrelated to the actual impact of disclosure. The Freedom of Information Act (FOIA), Attorney General Memorandum for Heads of Executive Departments and Agencies, March 19, 2009.

Based on this policy I believe that there will be no records sought that the EPA will withhold. However, in the event that records are withheld I request to be provided with the following information:

1. Reason each record is not being produced;
2. Type of record withheld;
3. Subject matter of record withheld; and
4. Date, author, and addressee, if applicable of the record.

Further, I request that the above information be indexed by individual record and comply with *Vaugh v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), by providing information sufficient for a reasonable person to be able to ascertain whether the record sought is actually exempt from disclosure.

### **Request for Waiver of Fees**

The information sought by ALG in this FOIA request will be used to better the public's understanding of how the EPA is spending the taxpayers' money. As such the public good that will occur in disclosing the information sought in and of itself weighs strongly in favor of a fee waiver. Further, the information sought 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. § 552(a)(4)(A)(iii). ALG regularly publishes information on the activities, structure, and operations of the federal government. This information is distributed to a large number of diverse individuals across the entire nation. The records sought are of the type which ALG regularly provides to the public through its publications and website, [www.getliberty.org](http://www.getliberty.org). As such granting the request to waive fees is in the public interest. Further, "Congress intended that the **public interest standard be liberally construed** and that fees not be used as an obstacle to disclosure of requested information." (*Emphasis added.*) *Eudey v. Central Intelligence Agency*, 478 F.Supp. 1175 (D.D.C. 1979). (*Internal citations omitted.*) The central focus of the analysis in determining whether the fee waiver is in the public interest is whether the public rather than the requestor is the primary beneficiary of the release of the information. "The statute indicates that the issue to be considered by the agency is whether furnishing the information will primarily benefit the public at large or whether any benefit will inure primarily to the specific individual requesting the documents." *Id.* In the instant case the records sought will be used to further the public's understanding of the operations of the EPA. The records sought will be disseminated widely to parties interested in the workings of the government and as such will not

inure primarily to the benefit of the requestor. Therefore the request for waiver of fees should be granted pursuant to 5 U.S.C. § 552(a)(4)(A)(iii).

In the event that a fee waiver is not granted, please inform me before taking any action that would result in the incurrence of fees by ALG.

### **Conclusion**

Pursuant to 5 U.S.C. § 552(a)(6)(A)(i) please provide the requested documents within 20 days. If for some reason all of the requested documents cannot be provided within 20 days I request that documents that are available within the 20 day time period be provided first and that when the remaining documents subsequently become available that they be provided at that time.

I request that any records disclosed pursuant to this request be indexed, to the extent feasible, in such a way as to enable the reader to readily ascertain to which number listed above the responsive records relate. If reasonably possible I request that responsive records be provided in electronic form on either unencrypted CDs or DVDs. If you have any questions as to the medium on which responsive records are to be provided please contact me in advance to sending the medium.

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the act. I will also expect you to release all segregable portions of otherwise exempt material. I, of course, reserve the right to appeal your decision to withhold any information or to deny a waiver of fees.

Please send the requested records to the following address:

Nathan Paul Mehrens  
General Counsel  
Americans for Limited Government  
9900 Main Street  
Suite 303  
Fairfax, VA 22031

If you have any questions regarding this FOIA request please contact Nathan Paul Mehrens at 703.383.0880 or [nathan@getliberty.org](mailto:nathan@getliberty.org).

I look forward to your reply within 20 business days, as the statute requires. In the event that processing this request will take longer than 10 business days I request that you immediately provide me with an individualized tracking number for my request.

Thank you in advance for your assistance.

Sincerely,

A handwritten signature in blue ink, appearing to read "William Wilson".

William Wilson

President

Ref# ALGFOIA2012-021



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

Appendix 2

May 18, 2012

OFFICE OF  
ENVIRONMENTAL INFORMATION

Mr. William Wilson  
President  
Americans for Limited Governments  
9900 Main Street  
Suite 303  
Fairfax, VA 22031

RE: Request Number HQ-FOI-01327-12

Dear Mr. Wilson:

This is in response to your request for a waiver of fees in connection with your Freedom of Information Act (FOIA) request to the U.S. Environmental Protection Agency (EPA) seeking a copy of records regarding meetings between EPA's Office of Resource Conservation and Recovery, or the Office of Solid Waste and Emergency Response (OSWER) and representatives of the organizations listed in your request, from January 21, 2009 through the present.

We have reviewed your fee waiver justification and based on the information provided, we are denying your request for a fee waiver. You have not expressed a specific intent to disseminate the information to the general public. As a result of you failing to meet the above criteria, accordingly, there is no need to address the remaining prongs of the fee waiver criteria. If the estimated cost exceeds \$25.00, OSWER will contact you regarding the cost of processing your request and seek an assurance of payment. They will be unable to process your request until they receive your written assurance of payment.

Under the FOIA, you have the right to appeal this determination to the National Freedom of Information Office, U.S. EPA, FOIA and Privacy Branch, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460 (U.S. Postal Service Only), FAX: (202) 566-1684, E-mail: [hq.foia@epa.gov](mailto:hq.foia@epa.gov). Only items mailed through the United States Postal Service may be delivered

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to 1200 Pennsylvania Avenue, NW. If you are submitting your appeal via hand delivery, courier service or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20004. Your appeal must be made in writing, and it must be submitted no later than 30 calendar days from the date of this letter. The Agency will not consider appeals received after the 30 calendar day limit. The appeal letter should include the FOI number listed above. For quickest possible handling, the appeal letter and its envelope should be marked "Freedom of Information Act Appeal."

Should you choose to appeal this determination, please be sure to fully address all factors required by EPA's FOIA Regulations, located at 40 C.F.R. § 2.107(l) in your appeal. If you have any questions concerning this determination please contact me at (202) 566-1667.

Sincerely,



Larry F. Gottesman  
National FOIA Officer



# AMERICANS FOR LIMITED GOVERNMENT

Appendix 3

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June 11, 2012

Wanda McLendon  
National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460

Via email to: [mclendon.wanda@epa.gov](mailto:mclendon.wanda@epa.gov)

**Re: Clarification of EPA # HQ-FOI-01327-12 Freedom of Information Act (FOIA) Request**

Dear Ms. McLendon:

I am writing in response to your phone call to clarify our May 16, 2012 FOIA, #HQ-FOI-01327-12, and narrow the search to all records of meeting regarding the topic of “coal-ash regulation.”

Also, I have included in this clarification a more detailed fee waiver request in response to the May 18, 2012 letter from Larry F. Gottesman, denying our fee waiver. We ask that it be reconsider based on our arguments starting on page four.

Pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, please provide copies of any records that exist regarding meetings between EPA’s Office of Resource Conservation and Recovery, or the Office of Solid Waste and Emergency Response and representatives of the organizations listed below **on the topic of coal-ash regulation** from January 21, 2009 through the present:

- Appalachian Voices
- Chesapeake Climate Action Network
- Environmental Integrity Project
- Kentuckians For the Commonwealth
- Montana Environmental Information Center
- Moapa Band of Paiutes
- Prairie Rivers Network
- Physicians for Social Responsibility
- Southern Alliance for Clean Energy

- Sierra Club
- Western North Carolina Alliance

If reasonably possible I request that responsive records be provided in electronic form on either unencrypted CDs or DVDs.

### **Further Definition of Records Sought**

The term "record" should be construed to mean any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, interoffice and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone calls, meetings or other communications, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, voicemails, microfiche, microfilm, videotape, recordings and motion pictures), and electronic and mechanical records or representations of any kind (including, without limitation, tapes, cassettes, disks, computer server files, computer hard drive files, CDs, DVDs, memory sticks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind of nature. A record bearing any notation not a part of the original text is to be considered a separate record. A draft of a non-identical copy is to be construed as a separate record.

The term "relating" and "regarding" with respect to any given subject, should be construed to mean anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is in any manner whatsoever pertinent to that subject.

The inclusion and description of particular records in this request should not be construed to eliminate other records that are not described in particular detail if they should exist in another format.

### **Procedure Regarding Records Exempt from Disclosure**

Given the nature of the records requested I anticipate that the vast majority of any responsive records will be of the type required to be released under FOIA. However, in

the event that records exist that FOIA does not require to be released I request that they be released regardless unless the failure to release such records can be justified based upon sound reasoning related to one of the statutory exemptions or exceptions in FOIA and there is a patently manifest danger of significant harm that would occur from release of such records, *e.g.*, danger to health or safety of an individual.

Further, the Environmental Protection Agency should be reminded of the policy in favor of disclosure mandated by President Barack Obama on January 26, 2009. President Obama instructed the executive departments and agencies to operate with a presumption towards disclosure. On this point the President stated as follows:

A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, "sun-light is said to be the best of disinfectants." In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public. Freedom of Information Act, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4,683 (January 26, 2009.)

These instructions from the President were followed up by further instructions from Attorney General Eric Holder on March 19, 2009. The Attorney General stated as follows:

First, an agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.



Second, whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure. Agencies should always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information. Even if some parts of a record must be withheld, other parts either may not be covered by a statutory exemption, or may be covered only in a technical sense unrelated to the actual impact of disclosure. The Freedom of Information Act (FOIA), Attorney General Memorandum for Heads of Executive Departments and Agencies, March 19, 2009.

Based on this policy I believe that there will be no records sought that the Federal Trade Commission will withhold. However, in the event that records are withheld I request to be provided with the following information:

1. Reason each record is not being produced;
2. Type of record withheld;
3. Subject matter of record withheld; and
4. Date, author, and addressee, if applicable of the record.

Further, I request that the above information be indexed by individual record and comply with *Vaugh v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), by providing information sufficient for a reasonable person to be able to ascertain whether the record sought is actually exempt from disclosure.

### **Request for Waiver of Fees**

#### **I. 40 C.F.R. § 2.107 (k)(2) The Information Sought By ALG's Request Concerns The Operations or Activities of the Government**

The Environmental Protection Agency's FOIA regulation at 40 C.F.R. § 2.107 (k)(2) lists four factors that are to be used in determining whether a requestor has met the requirements for a waiver of fees, *i.e.* contributes to the public understanding. As discussed below, ALG meets these factors, and as such qualifies for a fee waiver.

#### **A. 40 C.F.R. § 2.107 (k)(2)(i) The Information Sought in ALG's Request Concerns The Operations or Activities of the Government**

The EPA's regulation at 40 C.F.R. § 2.107 (k)(2)(i) contains the first factor to be used in determining whether a fee waiver should be granted. That factor is, "Whether the subject matter of the requested information concerns the operations or activities of the Federal government." The subject of ALG's request relates solely to the EPA's interaction without outside organizations prior to a suit. As such, this subject concerns

the operations and activities of the EPA.

**B. 40 C.F.R. § 2.107 (k)(2)(ii) The Disclosure of the Information Sought By ALG Is Likely To Contribute To An Understanding of Government Operations Or Activities**

These expenditures have not previously been reported on in the public domain. As such the public has little or no current understanding of them. Therefore any disclosure of these records will increase the public's understanding of how the EPA has been interacting with the named organizations above. Upon receipt of the requested records ALG will perform extensive analysis of these records. We have an experienced research and legal staff who will carefully scrutinize any responsive records provided. After completing that analysis ALG will publish its findings using the media described below. The records sought will significantly improve the understanding of the public as to the operation and activities of the EPA in this area.

**C. 40 C.F.R. § 2.107 (k)(2)(iii) The Disclosure of the Requested Information Will Contribute To the Public Understanding As Opposed To the Individual Understanding of the Requester Or A Narrow Segment of the Interested Persons**

We regularly publish information on the activities, structure, and operations of the federal government. This information is distributed to a large number of diverse individuals across the entire nation. The records sought are of the type which ALG regularly provides to the public through its publications and website, [www.getliberty.org](http://www.getliberty.org). By way of example, on a typical day our materials are read by over 70,000 individuals. Included in that number are 9,000 editors and publishers, 8,000 bloggers, 4,000 T.V. staff, 5,000 radio talk show personnel, 3,000 political journalists, and 3,000 key individuals in positions within Washington, DC. Many of these 70,000 individuals and their respective entities republish our materials which we provide free of charge and without copyright restriction, allowing for wide dispersal of these materials. Additionally, ALG's staff are regular guests on national T.V. and radio media outlets speaking to hundreds of thousands of individuals at a time regarding the activities of the federal government. The records received from the Federal Trade Commission will be disseminated through these distribution channels. As such, the disclosure of the requested information will contribute to the general public understanding as opposed to an individual understanding of ALG or a narrow segment of interested persons.

**D. 40 C.F.R. § 2.107 (k)(2)(iv) The Disclosure of the Requested Information Will Contribute Significantly to the Public Understanding**

As noted above, records of these interactions have not been reported in the public

domain. We have an experienced research and legal staff who will carefully scrutinize any responsive records provided. We will perform analysis of the expenditures found in these records to better understand how the EPA is interacting with these organizations and what policy comes out as a result of these interactions. Since the public has little, if any, present understanding of how the EPA is interacting is conducting these interactions, any further information published via the methods described above will constitute a significant increase in the public understanding of this issue.

## **II. The Disclosure of the Information Requested Is Not In the Commercial Interest of ALG Under 40 C.F.R. § 2.107 (k)(3)**

In addition to meeting the criteria in 40 C.F.R. § 2.107 (k)(2), the ALG also qualifies for a fee waiver under 40 C.F.R. § 2.107 (k)(3), used to determine whether the requester has a primarily commercial interest in the disclosure of material. The factors here consider whether the requester has a commercial interest in the requested information and if so whether the magnitude of the commercial interest, if any, is sufficiently small in comparison to the public interest in disclosure. As discussed below, the ALG does not have a commercial interest in the disclosure of the material, and as such should be granted a fee waiver.

### **A. 40 C.F.R. § 2.107 (k)(3)(i) ALG Does Not Have A Commercial Interest In The Disclosure Of The Requested Documents and Should Therefore Be Granted a Fee Waiver**

The central focus of the analysis in determining whether the fee waiver is in the public interest is whether the public rather than the requestor is the primary beneficiary of the release of the information. "The statute indicates that the issue to be considered by the agency is whether furnishing the information will primarily benefit the public at large or whether any benefit will inure primarily to the specific individual requesting the documents." *Eudey v. Central Intelligence Agency*, 478 F.Supp. 1175, 1177 (D.D.C. 1979). In the instant case the records sought will be used to further the public's understanding of the operations and activities of the EPA. We operate as a nonprofit, offering free expert analysis on a variety of political issues, and welcome republication of our materials in order to get the information to as wide an audience as possible. The records sought will be disseminated widely to parties interested in the workings of the government and as such will not inure primarily to the benefit of the requestor. Therefore, we have no commercial interest in the disclosure of the records.

### **B. 40 C.F.R. § 2.107 (k)(3)(ii) Any Identified Commercial Interest is Sufficiently Small In Comparison With the Public's Interest In Disclosure**

Lastly, the EPA must balance the requester's commercial interest against that of the public's interest to determine which is greater. Even if ALG should be found to have a commercial interest in the disclosure, its interest would be minimal in comparison to the magnitude of the public's interest in the records sought by ALG. Therefore, the request for waiver of fees should be granted.

### **Conclusion**

Based on the previous arguments, the nature of ALG's work, and the description given in 40 C.F.R. § 2.107 (c)(iii), ALG is a "representative of the news media." As such, ALG's request for a fee waiver should be granted.

In the event that a fee waiver is not granted, please inform me before taking any action that would result in the incurrence of fees by ALG.

Thank you in advance for your assistance.

Sincerely,

A handwritten signature in black ink that reads "Mark A. Wohlschlegel II". The signature is written in a cursive style with a stylized flourish at the end.

Mark A. Wohlschlegel II  
Staff Attorney  
Americans for Limited Government  
9900 Main Street  
Suite 303  
Fairfax, VA 22031

ALG Ref: ALGFOIA2012-021



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

Appendix 4

June 19, 2012

OFFICE OF  
ENVIRONMENTAL INFORMATION

Mr. Mark A. Wohlschlegel II  
Americans For Limited Government  
9900 Main Street, Suite 303  
Fairfax, VA 22031

RE: Request Number HQ-FOI-01327-12

Dear Mr. Wohlschlegel II:

This is in response to your request for a reconsideration of the U.S. Environmental Protection Agency (EPA) May 18, 2012 fee waiver determination. This was regarding Mr. William Wilson's fee waiver request in connection with his Freedom of Information Act (FOIA) request seeking a copy of records regarding meetings between EPA's Office of Resource Conservation and Recovery, or the Office of Solid Waste and Emergency Response and representatives of the organizations listed in his request.

We have reviewed your justification and based on the information provided, we are affirming our denial of your fee waiver request. If you have any questions concerning this determination please contact me at (202) 566-1667.

Sincerely,

A handwritten signature in black ink, appearing to read "Larry F. Gottesman".

Larry F. Gottesman  
National FOIA Officer

**Mark Wohlschlegel**

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**From:** Mark Wohlschlegel <mark@getliberty.org>  
**Sent:** Wednesday, June 27, 2012 2:03 PM  
**To:** warden.vivian@epamail.epa.gov  
**Cc:** Nathan Mehrens  
**Subject:** FOIA No. HQ-FOI-01327-12 clarification

Ms. Warden,

Just wanted to send an email confirming our discussion of FOIA No. HQ-FOI-01327-12.

Based on our phone conversation today, it is our understanding that our June 11, 2012 clarification was taken as a request for "reconsideration" rather than an "appeal" to the May 18, 2012 fee waiver denial since it did not include the word "appeal" in the communication.

As such, you stated that we still have a right to appeal the fee waiver decision of Larry Gottesman, even though his June 19, 2012 letter in which he reaffirmed his earlier decision, does not have "right to appeal" language included in the letter, which he specifically instructed be left out.

Thank you for your help in this matter.

Sincerely,

Mark A. Wohlschlegel II  
*Staff Attorney*

Americans For Limited Government  
9900 Main Street  
Suite 303  
Fairfax, Virginia 22031  
703.383.0880 (ext. 125)  
703.383.5288 (fax)

**Mark Wohlschlegel**

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**From:** Vivian Warden <Warden.Vivian@epamail.epa.gov>  
**Sent:** Friday, June 29, 2012 10:08 AM  
**To:** Mark Wohlschlegel  
**Cc:** Nathan Mehrens; Larry Gottesman  
**Subject:** Re: FOIA HQ-FOI-01327-12 clarification

**Importance:** High

Mr. Wohlschlegel,

Please note that in our conversation I explained that your June 11, 2012 letter was processed as a clarification of the information request and forwarded to the Office of Solid Waste and Emergency Response (OSWER). I also explained that it was not read as an appeal but as a reconsideration of the fee waiver denial because of your second paragraph which states "Also, I have included in this clarification a more detailed fee waiver request in response to the May 18, 2012 letter from Larry F. Gottesman, denying our fee waiver. We ask that it be reconsider based on our arguments starting on page four".

Please call if you have any questions. Thank you.

Vivian Warden  
FOIA Specialist  
(202) 566-1663

FOIA and Privacy Branch  
(202) 566-1667 (main FOIA phone)  
[hq.foia@epa.gov](mailto:hq.foia@epa.gov)

▼ Mark Wohlschlegel ---06/27/2012 02:03:10 PM---Ms. Warden,

From: Mark Wohlschlegel <[mark@getliberty.org](mailto:mark@getliberty.org)>  
To: Vivian Warden/DC/USEPA/US@EPA  
Cc: Nathan Mehrens <[nathan@getliberty.org](mailto:nathan@getliberty.org)>  
Date: 06/27/2012 02:03 PM  
Subject: FOIA No. HQ-FOI-01327-12 clarification

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Ms. Warden,

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Thank you for your help in this matter.

Sincerely,

Mark A. Wohlschlegel II  
*Staff Attorney*

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9900 Main Street  
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703.383.0880 (ext. 125)  
703.383.5288 (fax)

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