

BEFORE THE GENERAL COUNSEL

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ON APPEAL FROM THE FOIA DIVISION

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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 Federal Trade Commission (FTC) on March 5, 2012. A copy of that FOIA request is attached as Appendix 1.

In its FOIA request Appellant sought production from the FTC of federal records regarding communications between Randall Long and any representative of the Microsoft Corporation. In its FOIA request Appellant specifically requested records in categories as follows:

Please provide copies of any records that exist in any of the following categories and that were created on or after January 1, 2009:

1. All records of communications and the communications themselves between Randall Long, Deputy Assistant Director in the Commission's Bureau of Competition and any official or personnel of the Microsoft Corporation; and
2. All records of meetings between Mr. Long and any official or personnel of the Microsoft Corporation.

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

Dione J. Stearns, Assistant General Counsel for the FTC, by letter, dated March 8, 2012, denied the fee waiver request on the grounds that Appellant's FOIA request "does not qualify for a fee waiver," and cited 5 U.S.C. § 552 (a)(4)(A)(i) and (iii).<sup>1</sup> A copy of

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<sup>1</sup> This statute only references the mandate that "each agency shall promulgate rules...establishing procedures and guidelines for determining when such fees should be waived or reduced."

that denial is attached as Appendix 2. Ms. Stearns did not cite any specific factor in the denial letter that was insufficiently met, nor was there any analysis of why she believes Appellant failed to meet such criteria.

### **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 Federal Trade Commission 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 16 C.F.R. § 4.8 (b)(2).

### **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 Federal Trade Commission 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 FTC 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>2</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>2</sup> Freedom of Information Act, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4,683 (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>3</sup>

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

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

The Federal Trade Commission's FOIA regulation at 16 C.F.R. § 4.8 (e)(2)(i) 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. 16 C.F.R. § 4.8 (e)(2)(i)(A) THE INFORMATION SOUGHT BY APPELLANT'S REQUEST CONCERNS THE OPERATIONS OR ACTIVITIES OF THE GOVERNMENT**

The FTC's regulation at 16 C.F.R. § 4.8 (e)(2)(i)(A) 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>3</sup> Freedom of Information Act, Attorney General Memorandum for Heads of Executive Departments and Agencies (March 19, 2009).

the Federal government.” The subject of ALG’s request relates solely to how the government, *i.e.*, the Federal Trade Commission, has been communicating with Microsoft Corporation. More specifically, ALG is interested in communications between Randall Long, former FTC official who was involved in the investigation of Google Inc., and Microsoft Corporation, who has subsequently hired Mr. Long. As such, the subject surrounding FTC’s Randall Long communications with Microsoft Corporation prior to his hiring concern the operations and activities of the Federal Trade Commission.

**B. 16 C.F.R. § 4.8 (e)(2)(i)(B) THE DISCLOSURE OF THE INFORMATION SOUGHT BY ALG IS LIKELY TO CONTRIBUTE TO AN UNDERSTANDING OF GOVERNMENT OPERATIONS OR ACTIVITIES**

These communications have not previously been reported on in the public domain. As such the public has little or no current understanding of these communications. Therefore any disclosure of these records will increase the public’s understanding of what exactly Randall Long, as an FTC official, and Microsoft Corporation were discussing. Upon receipt of the requested records ALG will perform extensive analysis of these communications (records). We have an experienced research and legal staff who will carefully scrutinize any responsive records provided. We will perform analysis of the timing of communications found in these records to better understand how these communications, given the close proximity of Randall Long’s hiring by the Microsoft Corporation, may have influenced FTC decisions and actions. 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 FTC in this area.

**C. 16 C.F.R. § 4.8 (e)(2)(i)(C) 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. 16 C.F.R. § 4.8 (e)(2)(i)(D) THE DISCLOSURE OF THE REQUESTED INFORMATION WILL CONTRIBUTE SIGNIFICANTLY TO THE PUBLIC UNDERSTANDING**

As noted above, communications between FTC's Randall Long and Microsoft Corporation have not been reported on in the public domain. Appellant has an experienced research and legal staff who will carefully scrutinize any responsive records provided. We will compare how statements made in these communications line up with official policy positions of the FTC. We will perform analysis of the timing of communications found in these records to better understand how these communications, if any, impacted FTC employee Randall Long's decision to go work for Microsoft Corporation during the time period specified in the FOIA request. Given Mr. Long's heavy involvement in the investigation of Google, Inc., should communications be disclosed that show this gained expertise was part of the discussions, this would be significant.

**II. THE DISCLOSURE OF THE INFORMATION REQUESTED IS NOT IN THE COMMERCIAL INTEREST OF THE APPELLANT UNDER 16 C.F.R. § 4.8 (e)(2)(ii)**

In addition to meeting the criteria in 16 C.F.R. § 4.8 (e)(2)(i), the Appellant also qualifies for a fee waiver under 16 C.F.R. § 4.8 (e)(2)(ii), 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. 16 C.F.R. § 4.8 (e)(2)(ii)(A) 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 FTC with the Microsoft Corporation. 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. 16 C.F.R. § 4.8 (e)(2)(ii)(B) ANY IDENTIFIED COMMERCIAL INTEREST IS SUFFICIENTLY SMALL IN COMPARISON WITH THE PUBLIC'S INTEREST IN DISCLOSURE**

Lastly, the Federal Trade Commission 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 communications sought here between FTC's Randall Long and Microsoft Corporation 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 16 C.F.R. § 4.8 (b)(2) , 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 16 C.F.R. § 4.8 (b)(2), 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 Office of General Counsel to reverse the decision of the Assistant General Counsel Stearns, and to grant Appellant a waiver of fees for its FOIA request.

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

Respectfully Submitted,



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Nathan Paul Mehrens



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# 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

March 5, 2012

Freedom of Information Act Request  
Office of General Counsel  
Federal Trade Commission  
600 Pennsylvania Ave., N.W.  
Washington, D.C. 20580

Via email to: [foia@ftc.gov](mailto:foia@ftc.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 in any of the following categories and that were created on or after January 1, 2009:

1. All records of communications and the communications themselves between Randall Long, Deputy Assistant Director in the Commission's Bureau of Competition and any official or personnel of the Microsoft Corporation; and
2. All records of meetings between Mr. Long and any official or personnel of the Microsoft Corporation.

## **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 Federal Trade Commission 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 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**

The information sought by ALG in this FOIA request will be used to better the public's understanding of how the Federal Trade Commission 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 Federal Trade Commission. 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,



William Wilson  
President



United States of America  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

APPENDIX 2

MAR 08 2012

William Wilson  
Americans for Limited Government  
9900 Main Street, Suite 303  
Fairfax, VA 22031

Re: FOIA-2012-00640  
Microsoft Correspondence

Dear Mr. Wilson:

This is in partial response to your March 5, 2012, request under the Freedom of Information Act for access to (1) all correspondence between Randall Long and any representative of the Microsoft Corporation, and (2) records of any meetings between Mr. Long and any representative of the Microsoft Corporation. In that request, you asked the Commission to grant a fee waiver for your request. We received your request in our FOIA office on March 5, 2012.

We are denying your request for a fee waiver because you do not qualify for a fee waiver. *See* 5 U.S.C. § 552 (a)(4)(A)(i) and (iii). If you wish to establish a fee agreement, please contact Andrea Kelly at (202) 326-2836, within 10 days of the date on this letter. Once a fee agreement is made, we will continue with the processing of your request.

If you are not satisfied with our denial of your request for a fee waiver, you may appeal by writing to Freedom of Information Act Appeal, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580, within 30 days of the date of this letter. Please enclose a copy of your original request and a copy of this response.

If you have any questions about the way we are handling your request or about the FOIA regulations or procedures, please contact Andrea Kelly at (202) 326-2836.

Sincerely,

Dione J. Stearns  
Assistant General Counsel