



AMERICANS FOR LIMITED GOVERNMENT

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September 13, 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

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 ALG copies of the federal records described below. Please provide records identifying the following information for those serving as full-time “official-time,” personnel, *i.e.*, those working full time for an exclusive representative (union) in dealing with the EPA regarding terms and conditions of employment:¹

1. Name;
2. Agency or Department;
3. Present and past position titles and occupational series from January 20, 2012 and after;
4. Present and past grades from January 20, 2012 and after;
5. Present and past annual salary rates (including performance awards or bonuses, incentive awards, merit pay amount, Meritorious or Distinguished Executive Ranks, and allowances and differentials) from January 20, 2012 and after; and
6. Present and past duty stations (includes room numbers, shop designations, or other identifying information regarding buildings or places of employment).

This information “is available to the public” pursuant to 5 C.F.R. § 293.311. If possible I request that responsive records be provided in electronic form on either unencrypted CDs or DVDs.

¹ See, 5 U.S.C. § 7131.

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. 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 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.

Summary of the Request for Waiver of Fees

Americans for Limited Government 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 in its interaction with outside groups and thus granting the fee waiver is in the public interest. Further, ALG does not have a commercial interest in the records and is a "representative of news media" under 40 C.F.R. § 2.107(c)(1)(iii).

The information sought by ALG 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 through allocation of resources to those serving as full-time "official-time," personnel, *i.e.*, those working full time for an exclusive representative (union) in dealing with the EPA regarding terms and conditions of employment. 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.

Request for Waivers of Fees: Increases Public Understanding of EPA Operations or Activities

The EPA's FOIA regulation at 40 C.F.R. § 2.107(l)(2) lists four factors that are to be used in determining whether a requester 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.

40 C.F.R. § 2.107(l)(2)(i) The Information Sought By ALG'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(l)(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 with outside organizations prior to a lawsuit. As such, this subject concerns the operations and activities of the EPA.

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

The expenditures in the nature of resources paid to full-time "official-time" personnel, as described above, that are the subject of this FOIA request have not previously been reported on in the public domain. As such the public has little or no current understanding of them. The key factor to determining whether disclosure of the records sought is likely to contribute to the public understanding of government operations or activities is whether these records are currently in the public domain. *Judicial Watch, Inc. v. Department of Justice*, 365 F.3d 1108 (D.C. Cir. 2004).² Therefore any disclosure of the records sought 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 them. 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.

40 C.F.R. § 2.107(l)(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

Americans for Limited Government regularly publishes information on the activities, structure, and operations of the federal government. This information is published to a large number of diverse individuals across the entire nation every business day. We take information received from agencies, perform extensive analysis, and then present unique editorial content regarding that information and analysis to our subscribers. The records sought are of the type which the ALG regularly reviews, analyzes, and

² As an aside, if the records sought were in the public domain then the present FOIA request would be unnecessary and would not have been filed as ALG would simply use a public domain source to review the records which it seeks.

editorializes on to the public through our publications, including our websites, www.getliberty.org and www.netrightdaily.com. Our daily news service is published to over 150,000 individuals. Included in that number are 8,500 newspaper editors and publishers, 7,000 bloggers, 3,000 T.V. staff, 5,000 radio talk show personnel, 3,500 political journalists, and 3,000 key individuals in positions within Washington, DC. Many of these 150,000 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 sought from the EPA will be reviewed, analyzed, made part of unique editorial content, and published 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.

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

This element is closely related to the second element, whether the requested records are likely to contribute to a public understanding of government operations and activities. "As one court has observed, 'these two criteria [are] hopelessly intertwined.'" *National Resources Defense Council, Inc. v. United States Environmental Protection Agency*, 581 F.Supp.2d 491, 8 (S.D.N.Y. 2008), quoting *Project on Military Procurement v. Dep't of Navy*, 710 F.Supp. 362, 5 n.8 (D.D.C. 1989).

As noted above, records of the interactions which are the subject of this FOIA request pursuant to 5 C.F.R. § 293.311 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 much taxpayer money the EPA is spending on full-time "official-time" personnel.

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 when "compared with to the level of public understanding existing prior to the disclosure."

Request for Waiver of Fees: Information Requested Is Not In the Commercial Interest of ALG

In addition to meeting the criteria in 40 C.F.R. § 2.107(l)(2), 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, ALG does not have a commercial interest in the disclosure of the material, and as such should be granted a fee waiver.

40 C.F.R. § 2.107(l)(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 requester 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 requester. Therefore, we have no commercial interest in the disclosure of the records.

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 ALG should be found to have a commercial interest in the disclosure, its interest is minimal in comparison to the magnitude of the public's interest in records sought by ALG, *i.e.*, the number and cost of full-time "official-time" personnel employed by the EPA. Therefore, the request for waiver of fees should be granted.

ALG is a "Representative of the News Media" Under 40 C.F.R. § 2.107(c)(1)(iii)

Based on the previous arguments, the nature of ALG's work, and the description given in 40 C.F.R. § 2.107(c)(1)(iii), ALG is a "representative of the news media."

The definition of the phrase "representative of the news media" was described by Sen. Leahy, a sponsor of the bill that put this language in the U.S. Code as, "any person or organization which regularly publishes or disseminated information to the public ... should qualify for waivers as a 'representative of the news media'." *National Security Archive v. U.S. Department of Defense*, 880 F.2d 1381, 6 (D.C. Cir. 1989), quoting 132 Cong.

Rec. S14298 (daily ed. September 30, 1986) (statement of Sen. Leahy). As further stated by the D.C. Circuit,

A representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into distinct work, and distributes that work to an audience.

National Security Archive v. U.S. Department of Defense, 880 F.2d 1381, 7 (D.C. Cir. 1989).

Under the holding in this case there are three elements to being a representative of the news media: (1) gathering information; (2) using editorial skills to create distinct work; (3) and distribution of that distinct work to an audience. As demonstrated below, ALG clearly meets all three elements.

First, ALG uses its FOIA program and other resources to gather information. We have filed over 160 FOIA requests with over 50 offices in over 25 federal departments and agencies as well as several state agencies. These FOIA requests have resulted in ALG gathering thousands of pages of responsive records. Additionally we have a full time research staff that actively gathers information using methods other than the FOIA process. As such, ALG meets the “gathers” element.

Second, ALG uses its editorial skill to take the raw material received from its FOIA and other research efforts and turn it into unique editorial content. We create several pieces of unique editorial content every business day. The unique editorial pieces created by ALG concern a wide variety of issues and are created to inform the public on these issues. As such, ALG meets the “uses editorial skills to create distinct work” element.

Third, ALG regularly publishes these unique editorial pieces on the activities, structure, and operations of the federal government. This information is published to a large number of diverse individuals across the entire nation every business day. We take information received from departments and agencies, perform extensive analyses, and then present unique editorial content regarding that information and analyses to our subscribers. The records sought are of the type which the ALG regularly reviews, analyzes, and editorializes on to the public through our publications, including our websites, www.getliberty.org and www.netrightdaily.com. Our daily news service is published to over 150,000 individuals. Included in that number are 8,500 newspaper editors and publishers, 7,000 bloggers, 3,000 T.V. staff, 5,000 radio talk show personnel, 3,500 political journalists, and 3,000 key individuals in positions within Washington, DC.

The fact that we utilize electronic means as the primary vehicle for distribution of our unique editorial content does not change the analysis. See, *Electronic Privacy Information*

Center v. Department of Defense, 241 F.Supp.2d 5, 14 (D.D.C. 2003), "The fact that EPIC's newsletter is disseminated via the Internet to subscribers' e-mail addresses does not change the analysis."

The records sought from the EPA will be reviewed, analyzed, made part of unique editorial content, and published through these distribution channels. As such, ALG meets the "publishes" element.

Therefore, ALG is a member of the news and the 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.

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. In the event that processing this request will take longer than 10 business days we request that you immediately provide me with an individualized tracking number for my request.

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 these FOIA requests please contact Nathan Paul Mehrens at Nathan@getliberty.org or Mark Wohlschlegel, Mark@getliberty.org by email. They may also be reached by phone at 703.383.0880.

Thank you in advance for your assistance.

Sincerely,

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

William Wilson
President

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