



AMERICANS FOR LIMITED GOVERNMENT

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November 3, 2011

FOIA Officer
Federal Communications Commission
445 12th Street, S.W., Room 1-A836
Washington, DC 20554

Via email to: FOIA@fcc.gov

Re: Freedom of Information Act (FOIA) Request

Dear FOIA Officer:

Americans for Limited Government (ALG) on December 7, 2010 submitted a FOIA request to the FCC. As part of its FOIA request ALG requested a fee waiver because the statutory and regulatory criteria for granting a fee waiver were met by ALG's request. However, on December 29, 2010 Joel Kaufman, Associate General Counsel and Chief, Administrative Law Division, within the Office of General Counsel informed ALG that the FCC would not grant the fee waiver because in Mr. Kaufman's opinion ALG had not provided sufficient information on how the public interest would be furthered by release of the records requested. Subsequently, on January 28, 2011 ALG filed an appeal of that decision and provided additional facts and analysis showing why ALG is entitled to a fee waiver. In a September 30, 2011 decision¹, the FCC chose not to consider additional facts provided by the ALG in its fee waiver appeal, stating "We give no weight to the additional facts set forth in ALG's application for review but not provided to OGC in ALG's request." Thus, ALG's request for a fee waiver was denied because the Commission refused to consider all the facts provided by ALG.

In response, ALG is today refiling its FOIA request, including the additional facts. As an initial matter, the FCC should be reminded that the FOIA process was not designed to be an adversarial process but rather as a check on government by those being governed. As President Obama stated in his January 21, 2009 Memorandum,

A democracy requires accountability, and accountability requires transparency.

¹ This FCC decision was not received by ALG until October 26, 2011, sent by email to a generic account on ALG's website rather than mailed to ALG's counsel of record.

...The Freedom of Information Act should be administered with a clear presumption: when in doubt, openness prevails. ...In responding to requests under the FOIA, executive branch agencies should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.²

Pursuant to the FCC's regulations implementing the Freedom of Information Act, 47 C.F.R. § 0.441 *et seq.*, I request on behalf of Americans for Limited Government (ALG) copies of the federal records described below. These records pertain to communications to or from any Commissioner of the Federal Communications Commission (FCC) or their immediate staff and the following individuals on the topic of internet policy (i.e., "net neutrality"):

1. Alan Davidson
2. Frannie Wellings
3. Harry Wingo
4. Jennifer Taylor
5. Johanna Shelton
6. Pablo Chavez
7. Richard Whitt
8. Seth Webb
9. Will DeVries

Please provide copies of all records of communications and the communications themselves between any FCC Commissioner or their immediate staff and the persons named above on the topic of "net neutrality." Please provide copies of any such records that were created on or after January 20, 2009.

At the time FCC was considering the "net neutrality" regulation, these above named individuals were employed by internet giant, Google Inc., as either employees or lobbyists. All of these named individuals are also former employees of prominent government agencies. Communications between these named individuals and the FCC Commissioners likely focused on the discussion of FCC internet policy, such as the "net neutrality" regulations considered by the FCC.

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,

² Executive Office of the President, *Freedom of Information Act*, 74 Fed. Reg. 4683 (January 21, 2009).

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 FCC 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 FCC 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 FCC's FOIA regulation at 47 C.F.R. § 0.470(e)(2) lists three factors that are used in determining whether disclosure is in the public's interest and likely to contribute significantly to public understanding of the operations or activities of the government. As discussed below, ALG has met these factors, and therefore qualifies for a waiver of fees.

47 C.F.R. § 0.470(e)(2)(i) The Information Sought By ALG In Its FOIA Request Concern The Operations or Activities of the FCC

The subject of ALG's request relates solely to how the government, *i.e.*, FCC is (1) operating on the issue of internet regulations, and (2) what activities, meetings, etc. have occurred in furtherance of the government's operations on this issue. The FCC has been in the process of developing internet policy (*i.e.*, "net neutrality") that will affect the future of internet use, something that Google Inc. is heavily invested in. It is no secret that Google has been strongly lobbying the Commission on this topic, going as far as to issue a joint legislative proposal with Verizon on August 8, 2010. As noted above, the nine individuals named were formerly employed by prominent government agencies and are now lobbyists and employees of Google Inc. It is curious then how a December 21, 2010 news release by the FCC (Appendix 1) reads a lot like Google's joint proposal with Verizon formerly mentioned (Appendix 2).

Given this strong reflection and the fact that Google has been very active in lobbying on the "net neutrality" issue, using former government agency employees, the requested communications concern the operations or activities of the Commission's development of its internet policy, and in particular, the effect of Google's lobbying efforts.

47 C.F.R. § 0.470(e)(2)(ii) The Disclosure of the Information Sought By ALG Is Likely To Contribute To An Understanding Of Government Operations or Activities

The disclosure of the FCC's communications with the named Google affiliates will shed

light on their interactions and contribute to the understanding of how the Commission is or is not being influenced in its policy.

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 Google's influence on the FCC's regulations. 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 compare how statements made in these communications line up with official policy positions of the FCC. We will perform analysis of the timing of communications found in these records to better understand how these communications, if any, impacted the FCC's decision making and implementation processes during the time period specified in the FOIA request. 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 FCC.

47 C.F.R. § 0.470(e)(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 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. 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 FCC 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 to an individual understanding of ALG or a narrow segment of interested persons.

As such, ALG qualifies for a fee waiver.

47 C.F.R. § 0.470(e)(3) ALG Does Not Have A Commercial Interest In The Disclosure Of The

Requested Documents And Should Therefore Be Granted a Fee Waiver

The FCC's FOIA regulation lists two factors at 42 C.F.R. § 0.470(e)(3) that are used in determining whether disclosure is primarily in the commercial interest of the requester. These factors are 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.

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 of the FCC. We operate as a nonprofit, offering free expert analysis on a variety of political issues, and welcome republication of its 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 the we have no commercial interest and in the disclosure of the records. Even if we had a commercial interest in the disclosure of the requested records, that interest would be insignificant compared to the benefit inured in the public and the public interest that would be furthered by distribution of these records. Therefore the request for waiver of fees should be granted pursuant to 42 C.F.R. § 0.470(e)(3).

47 C.F.R. § 0.470(a)(2) ALG Is a Representative of the News Media, And As Such Should Therefore Be Granted a Fee Waiver

Based on the nature of ALG's work as described, supra, and the previous arguments, ALG is a representative of the news media. As such its 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 47 C.F.R. § 0.461(g)(1), 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. Also, should the FCC fail to comply with this time

limit and no unusual or exceptional circumstances apply, ALG would remind the Commission that no fees may be assessed for the cost of reproduction.

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
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. 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