

BEFORE THE SOLICITOR OF LABOR

ON APPEAL FROM THE FOIA DIVISION, OFFICE LABOR-MANAGEMENT
STANDARDS

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 U.S. Department of Labor's Office of Labor-Management Standards (OLMS) on August 12, 2010. A copy of that FOIA request is attached as Appendix 1.

In its FOIA request Appellant sought production from OLMS of specifically described federal records regarding documents that reference the revocation of form "LM-30".

In its FOIA request Appellant specifically requested records in categories as follows:

1. All documents that refer to, reflect, or mention communications discussing revocation of the form LM-30.
2. All documents reflecting any meeting, phone call, e-mail, letter, or other communication regarding revocation of the form LM-30.

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

The OLMS FOIA Officer by letter dated August 16, 2010 and received by Appellant latter denied the fee waiver request on the grounds that "your FOIA request does not qualify for a fee waiver in accordance with the requirements set forth in the Department of Labor's FOIA regulation at 29 C.F.R. § 70.41(a)(2)." A copy of that denial is attached as Appendix 2. The denial of the fee waiver request held that Appellant had not met factors found in the U.S. Department of Labor's FOIA regulation to warrant a

fee waiver. However, no specific factor was cited in the denial letter, nor was there any analysis of why OLMS 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 OLMS 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 29 C.F.R. § 70.40(c)(3).

ARGUMENT

THE FEE WAIVER PROVISIONS FOUND IN THE FOIA EXIST TO FURTHER SIGNIFICANTLY 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 OLMS and will be used to better the public’s understanding of how the OLMS 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). 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 Appellant regularly provides to the public through its publications and website, 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 OLMS. 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).

I. APPELLANT’S REQUEST MEETS THE CRITERIA FOR A FEE WAIVER AS SET FORTH IN FOIA AND THE DOL’S REGULATIONS, THUS THE REQUEST FOR A FEE WAIVER SHOULD BE GRANTED

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

The Labor Department’s FOIA regulation at 29 C.F.R. § 70.41(a)(2) lists four factors that are to be used in determining whether a requestor has met the requirements for a waiver of fees under 29 C.F.R. § 70.41(a)(1)(i). Each of these four factors along with the reasons why Appellant’s request qualifies for the fee waiver are discussed below.

A. 29 C.F.R. § 70.41(a)(2)(i) EXPLANATION OF HOW THE APPELLANT’S REQUEST CONCERNS THE OPERATIONS OR ACTIVITIES OF THE FEDERAL GOVERNMENT.

The Department’s regulation at 29 C.F.R. § 70.41(a)(2)(i) contains the first factor to be used in determining whether a fee waiver should be granted. That factor is, “Whether the subject of the requested records concerns ‘the operations or activities of the government’.” The information Appellant requested specifically identifies the form “LM-30”, which implements section 202 of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 401 *et seq.*¹ The form LM-30 is used to fulfill a reporting requirement that is part of the LMRDA. The records sought by appellant

¹ See: <http://edocket.access.gpo.gov/2010/pdf/2010-19250.pdf>. (Accessed August 20, 2010.)

relate to the formulation of how OLMS is enforcing this statutory reporting requirement as well as how OLMS intends to modify the reporting requirements in the future. For instance, OLMS is currently in the process of modifying the reporting requirements, which includes rescinding form "LM-30."² The records sought by Appellant relate solely to how the government, *i.e.*, OLMS, is (1) operating on the issue of reporting, and (2) what activities, meetings, etc. have occurred in furtherance of the government's operations on this issue.

B. 29 C.F.R. § 70.41(a)(2)(ii) DESCRIPTION OF THE LIKELY IMPACT ON THE PUBLIC'S UNDERSTANDING OF THE SUBJECT AS COMPARED TO THE LEVEL OF PUBLIC UNDERSTANDING OF THE SUBJECT BEFORE DISCLOSURE

As stated above, the records sought are documents that reference to form "LM-30". These documents have not previously been reported on in the public domain. As such the public has little or no current understanding of these records. Therefore any disclosure of these records will increase the public's understanding of these records. Upon receipt of the requested records Appellant will perform extensive analysis of how those documents (records) have impacted the decision making processes of the OLMS. After completing that analysis Appellant will publish its findings using the media described below.

² See: http://www.dol.gov/olms/regs/compliance/LM30_NPRM2010.htm. (Accessed August 20, 2010.)

C. 29 C.F.R. § 70.41(a)(2)(iii) DESCRIPTION OF THE SIZE AND NATURE OF THE PUBLIC TO WHOSE UNDERSTANDING A CONTRIBUTION WILL BE MADE

Appellant speaks to a nationwide audience. Appellant maintains a daily news service that is read by tens of thousands of individuals. 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. For example, within two days one of Appellant's news story items was recently re-published by over 4,500 individual news sources.

D. 29 C.F.R. § 70.41(a)(2)(iv) EXPLANATION OF HOW REQUEST WILL CONTRIBUTE SIGNIFICANTLY TO THE PUBLIC UNDERSTANDING

As noted above, these documents 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 OLMS. We will perform analysis of the timing of communications found in these records to better understand how these communications, if any, impacted the OLMS's decision making

and implementation processes during the time period specified in the FOIA request. The records sought will significantly improve the understanding of the public as to the operation and activities of the OLMS in regards to how it decided to make changes to the form "LM-30".

II. APPELLANT SHOULD BE CONSIDERED A CATEGORY 3 REQUESTOR UNDER 29 C.F.R. § 70.40(c)(3), AND AS SUCH, APPELLANT'S REQUEST FOR A FEE WAIVER SHOULD BE GRANTED

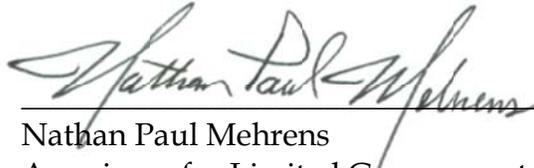
Appellant is cited as falling under a "Category 4 Requestor ["Other Requests"], pursuant to 29 C.F.R. § 70.40(c)(4)" by the Disclosure Officer in its denial of the fee waiver. Based on the nature of Appellant's work, and the previous arguments, Appellant should be considered a Category 3 Requestor, which is described as "representative of news media". As such, the Appellant's request for a fee waiver should be granted.

CONCLUSION

Based on the foregoing Appellant respectfully urges the Solicitor of Labor to reverse the decision of the OLMS FOIA Officer and to grant Appellant a waiver of fees for its FOIA request.

Dated this 20th day of August, 2010.

Respectfully Submitted,

A handwritten signature in cursive script, reading "Nathan Paul Mehrens", is written over a horizontal line.

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