



# AMERICANS FOR LIMITED GOVERNMENT

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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  
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