



# AMERICANS FOR LIMITED GOVERNMENT FOUNDATION

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January 12, 2016

Larry F. Gottesman  
National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460

Via email to: [foia\\_hq@epa.gov](mailto:foia_hq@epa.gov)

**Re: Freedom of Information Act (FOIA) Request**

Dear Mr. Gottesman:

Pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552 et seq., I request on behalf of Americans for Limited Government Foundation (ALGF) copies of the federal records described below. Please provide the following records from the EPA's Office of Water:

Communications between the Communications Director for the Office of Water and the Natural Resources Defense Council (NRDC) and the Surfrider Foundation.

Please provide any such records that were created during fiscal years 2014-2015.

**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 Foundation 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.

On December 14, 2015 the U.S. Government Accountability Office (GAO) sent a letter to Sen. James M. Inhofe, Chairman of the U.S. Senate Committee on Environment and Public Works.<sup>1</sup> In that letter the GAO detailed violations of appropriations laws that have been committed by the EPA. In particular, the GAO found that the EPA's Director of Communications for its Office of Water violated the law through promotion of materials from the NRDC and Surfrider Foundation.<sup>2</sup> Communications between these groups and the EPA were apparently outside the scope of the GAO's investigation. It is those communications we seek in order to provide the public with the full background of how these violations were committed.

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, ALGF 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).

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<sup>1</sup> *Environmental Protection Agency-Application of Publicity or Propaganda and Ant-Lobbying Provisions*, GAO Letter to Chairman Inhofe, December 18, 2015.

<sup>2</sup> See GAO Letter, *supra*, starting at page 7.

### **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, ALGF meets these factors, and as such qualifies for a fee waiver.

#### 40 C.F.R. § 2.107(l)(2)(i) The Information Sought By ALGF'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 ALGF's request relates solely to the EPA's operations and activities, and nothing else, in how it is interacting with outside entities and individuals. 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 ALGF Is Likely To Contribute To An Understanding of Government Operations Or Activities

The communications discussed above, for the period requested, 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).<sup>3</sup> Therefore any disclosure of the records sought will increase the public's understanding of how the EPA has been interacting with the entities discussed above.

Upon receipt of the requested records ALGF 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 ALGF 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.

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<sup>3</sup> 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.

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 Foundation 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 ALGF regularly reviews, analyzes, and editorializes on to the public through our publications, including our websites, [www.getliberty.org](http://www.getliberty.org) and [www.netrightdaily.com](http://www.netrightdaily.com). Our daily news service is published to over 100,000 individuals. Many of these 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, ALGF'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 ALGF 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 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's interactions with outside entities and individuals influences its decision making process.

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 Fee Waiver: Information Requested Is Not In the Commercial Interest of ALGF**

In addition to meeting the criteria in 40 C.F.R. § 2.107(l)(2), ALGF 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, ALGF 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) ALGF 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 ALGF 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 ALGF, *i.e.*, how the EPA is using communications with outside entities to conduct the public’s business. Therefore, the request for a fee waiver should be granted.

**ALGF 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 ALGF’s work, and the description given in 40 C.F.R. § 2.107(c)(1)(iii), ALGF 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, ALGF clearly meets all three elements.

First, ALGF uses its FOIA program and other resources to gather information. We have filed hundreds of FOIA requests. These requests have been filed with every federal department, numerous independent agencies, and many state agencies. These FOIA requests have resulted in ALGF 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, ALGF meets the “gathers” element.

Second, ALGF 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 ALGF concern a wide variety of issues and are created to inform the public on these issues. As such, ALGF meets the “uses editorial skills to create distinct work” element.

Third, ALGF 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 ALGF regularly reviews, analyzes, and editorializes on to the public through our publications, including our websites, [www.getliberty.org](http://www.getliberty.org) and [www.netrightdaily.com](http://www.netrightdaily.com). Our daily news service is published to over 100,000 individuals.

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, ALGF meets the "publishes" element.

Therefore, ALGF 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 ALGF.

### **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.

If reasonably possible I request that responsive records be provided in electronic form and emailed to me at [nathan@getliberty.org](mailto:nathan@getliberty.org) If the files are too large to email I request that they be provided on an unencrypted thumb drive, CD, or DVD. 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.

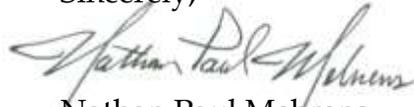
Please send the requested records to me at the following address:

Americans for Limited Government Foundation  
10332 Main Street  
No. 326  
Fairfax, VA 22030

If you have any questions regarding this FOIA requests please contact me at [nathan@getliberty.org](mailto:nathan@getliberty.org).

Thank you in advance for your assistance.

Sincerely,

A handwritten signature in black ink that reads "Nathan Paul Mehrens". The signature is written in a cursive style with a large, sweeping initial "N".

Nathan Paul Mehrens  
President and General Counsel

Ref# ALGFOIA2016-002