



# AMERICANS FOR LIMITED GOVERNMENT FOUNDATION

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September 14, 2016

FOIA Officer  
National Telecommunications and Information Administration  
U.S. Department of Commerce  
14th Street and Constitution Avenue, N.W., Room 4713  
Washington, DC 20230

Via email to: [eFOIA@ntia.doc.gov](mailto:eFOIA@ntia.doc.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 Americans for Limited Government Foundation (ALGF) copies of the federal records described below.

This morning Assistant Secretary Lawrence E. Strickling testified before the U.S. Senate Committee on the Judiciary's Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts. The subcommittee hearing concerned the proposed relinquishment by the National Telecommunications and Information Administration (NTIA) of its responsibilities regarding the Internet Assigned Numbers Authority (IANA) functions. In his oral testimony Assistant Secretary Strickling stated regarding the proposed relinquishment that, "during this review the Department of Justice assessed whether the transition presented any competition issues."<sup>1</sup> Strickling, later in his oral testimony indicated that the Department of Justice had concluded that there are no competition issues.

Please provide the following records:

1. The "assessment" from the Department of Justice on "competition issues" regarding the relinquishment of IANA functions that Assistant Secretary

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<sup>1</sup> Oral testimony of Lawrence E. Strickling, Assistant Secretary for Communications and Information and Administrator, National Telecommunications and Information Administration, U.S. Senate Committee on the Judiciary's Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts hearing on "Protecting Internet Freedom: Implications of Ending U.S. Oversight of the Internet," September 14, 2016, hearing video at 47:50. Available online at: <http://www.judiciary.senate.gov/meetings/protecting-internet-freedom-implications-of-ending-us-oversight-of-the-internet> (accessed September 14, 2016).

Strickling referenced in his oral testimony; and

2. All communications by NTIA personnel regarding the assessment referred to above.

### **Procedure Regarding Records Exempt from Disclosure**

As the Department is aware, the issue of the NTIA relinquishing the responsibilities referenced above is of monumental importance, affecting the entire Internet. As such, the decision to relinquish these responsibilities and all surrounding records, including those relating to the Department's analysis of the competition issues should be subject to full transparency.

Further, the Department 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 anticipate that no records will be withheld. 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.

### Request for Fee Waiver

As an initial matter, it should be noted that, "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 information sought by ALGF in its FOIA request concerns the operations or activities of the Department because they relate solely to actions by governmental officials regarding the proposed relinquishment of the IANA functions. The records received will be used to better the public's understanding of how the Department is analyzing the competition issues referenced above. Also, disclosure of the information is not 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.

## I. Public Interest Standard

The FOIA at 5 U.S.C. § 552(a)(4)(A)(iii) provides the public interest standard that is to be used in determining whether a requestor has met the requirements for a fee waiver. This subsection provides for the fee waiver “if disclosure of the information 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.” As the U.S. Court of Appeals for the District of Columbia Circuit analyzed, there are three criteria under the statute that the disclosure of the records must satisfy in order for the fee waiver to apply. *Cause of Action v. Federal Trade Commission*, No. 13-2015 U.S. App. LEXIS 14934 (D.C. Cir. 2015). That court stated the criteria as follows:

- (1.) shed light on “the operations or activities of the government”;
- (2.) be “likely to contribute significantly to public understanding” of those operations or activities;
- (3.) and not be “primarily in the commercial interest of the requester.”

As discussed below, the records sought by ALGF meet this standard.

### A. Records Sought By ALGF Will Shed Light on the Operations or Activities of the Department

Under this criterion, the bar is low and one need only look to the nature of the records requested and then determine whether these records concern the operations or activities of the government. In the instance case, the records sought by ALGF relate solely to the Department’s actions regarding the proposed relinquishment referenced above. No records sought relate to any purely private sector activity. As such, ALGF’s FOIA request concerns the operations and activities of the government and disclosure of the records will shed light on these operations and activities.

### B. Records Sought By the ALGF are Likely To Contribute Significantly to Public Understanding of the Department’s Operations Or Activities

The records sought by ALGF’s FOIA request have not previously been released to the public domain. The assessment in question has not been made public. Additionally, in response to FOIA DOC-NTIA-2-16-001297 NTIA responded that it had no responsive records. That is inconsistent with the Assistant Secretary’s testimony this morning. Therefore releasing the requested records will clear up the matter. The request specifically excludes all records that have been released to the public. 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>2</sup> Therefore any disclosure of the records sought will increase the public's understanding of how the Department is performing its analysis regarding the proposed relinquishment of the IANA responsibilities. Upon receipt of the requested records ALGF will perform extensive analysis of these records. We have an experienced research and legal staff who will carefully scrutinize any responsive records provided. Our research work on NTIA and its activities have been quoted widely. Staff from ALGF and our sister organization Americans for Limited Government, Inc. have written numerous news stories on NTIA issues. Additionally, our staff have been quoted on NTIA issues in publications ranging from PC WORLD to THE WALL STREET JOURNAL, demonstrating our knowledge and experience in researching, analyzing, and advocating on these issues. As such, we are one of the few that have this type of experience and expertise. The universe of such persons is small. After completing our analysis ALGF will publish its findings using the media described below.

ALGF 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 ALGF regularly provides to the public through its publications, email and social media distributions, and news website, [netrightdaily.com](http://netrightdaily.com). By way of example, on a typical day our materials are published to over 100,000 individuals. Many of these 100,000 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, ALGF's staff are frequent guests on national media outlets speaking to hundreds of thousands of individuals at a time regarding the activities of the federal government. As such, even though not required in order to obtain a fee waiver, ALGF publishes its editorial content to a broad audience.<sup>3</sup> The records received from the NTIA will be made part of unique editorial content, as further discussed below, and disseminated through these distribution channels. As such, the disclosure of the requested information will contribute to the public understanding of the operations and activities of the NTIA.

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<sup>2</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 ALGF would simply use a public domain source to review the records which it seeks.

<sup>3</sup> As the D.C. Circuit has held, "The statute requires only that the disclosure be likely to contribute significantly to 'public' understanding." *Cause of Action, supra*, at 16. "To the contrary, we have held that 'proof' of the ability to disseminate the released information to a broad cross-section of the public is not required." *Id.*, quoting *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004). Regardless, ALGF does regularly publish to a wide audience.

On the issue of whether the increase in public understanding will be significant, one court has observed, 'these two criteria [public understanding and significance 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, the requested records have not been reported in the public domain. ALGF has an experienced research and legal staff who will carefully scrutinize any responsive records provided. ALGF will perform analysis of the information found in these records to better understand how the Department is performing analysis of its planned relinquishment of the IANA responsibilities. Since the public has little, if any, present understanding of how these issues, any further information published via the methods described above will constitute a significant increase in the public understanding of these issues when compared with the level of public understanding currently existing.

### **C. Disclosure of the Information Requested Is Not Primarily In the Commercial Interest of ALGF**

The two 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 records, and as such should be granted a fee waiver.

#### **i. ALGF Does Not Have A Commercial Interest In The Disclosure Of The Requested Documents**

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 NITA as described above. We are a nonprofit organization, offering free expert analysis on a variety of policy 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. Further, the records sought have no market value. While certain types of

records, such as technical data that is not easy to obtain, may have some market value, that is not the case with the records ALGF requested.

Therefore, we have no commercial interest in the disclosure of the records.

ii. **Any Identified Commercial Interest is Sufficiently Small In Comparison With the Public's Interest In Disclosure**

Even if ALGF should be found to have a commercial interest in the requested records, its interest would be minimal in comparison to the magnitude of the public's interest knowing how the NTIA is performing the analysis discussed above.

II. **ALGF Is a Representative of the News Media, and as such, ALGF's Request for a Fee Waiver Should be Granted**

Based on the previous arguments, the nature of ALGF's work, and the description given in the FOIA at 5 U.S.C. § 552(a)(4)(A)(ii)(II), 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 disseminates 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).

It was this definition from the D.C. Circuit that was codified by Congress when it amended the FOIA in 2007, giving us the language that is currently in this section of the statute.

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 requests with every federal executive department, numerous independent agencies, and as well as numerous state and local agencies. These FOIA requests have resulted in ALGF gathering tens-of-thousands of pages of responsive records. Additionally ALGF has 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, as described in detail above, ALGF regularly publishes these unique editorial pieces on the activities, structure, and operations of the federal government.

The fact that ALGF utilizes 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 Department will be reviewed, analyzed, made part of unique editorial content, and published through the distribution channels described above. As such, ALGF meets the “publishes” element.

Therefore, the ALGF’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 ALGF.

### **Request to Expedite**

Given the limited timeframe between the present and the planned relinquishment it is imperative that the public be given all relevant information on the Department’s activities in this area immediately. As such I request that the request be expedited.



**Conclusion**


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 either unencrypted CDs or DVDs and mailed to me at the following address:

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

If you have any questions regarding this FOIA request 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 initial "N".

Nathan Paul Mehrens  
President and General Counsel

Ref# ALGFOIA2016-019