



AMERICANS FOR LIMITED GOVERNMENT

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June 10, 2010

FOIA Officer
United States Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585

Via fax to: 202.586.0575

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 (ALG) copies of the federal records described below. These records pertain to the communications to or from Cathy Zoi, Assistant Secretary of Energy for Energy Efficiency and Renewable Energy and the corporation Serious Materials, Inc. and its officers and employees.

Please provide copies of federal records that exist in any of the following categories and that were created on or after January 20, 2009:

1. All records of communications and the communications themselves between Assistant Secretary Zoi and Serious Materials, Inc. including any officers, employees, or directors of Serious Materials, Inc.; and
2. All records of meetings held between Assistant Secretary Zoi and any officers, employees, or directors of Serious Materials, Inc.

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 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. 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 Department 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 information sought by ALG in this FOIA request will be used to better the public's understanding of how the Department 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).

Additionally, the FOIA request of ALG fits within the regulatory criteria for a fee waiver as found at 10 C.F.R. § 1004.9(a)(8). An analysis of the relevant subsections of this regulatory section follows.

10 C.F.R. § 1004.9(a)(8)(i)(A) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government;"

ALG in its FOIA request seeks "copies of federal records." These federal records relate to official communications to and from Assistant Secretary Zoi and individuals involved with an outside company. We anticipate that these federal records will shed light on the decision making process used by the Assistant Secretary when making decision on official government business.

In recent months there has been many actions taken by the Assistant Secretary's office as concerns the energy efficiency policy of the United States. This is both an "operation" as well as "activity" of the government. The records sought will shed light on the decision making process that went into making decisions in this area. Thus the records sought concern "the operations or activities of the government."

It should be noted again that ALG seeks only "federal records" and not records that may be in possession of the Department that are not subject to the FOIA.

10 C.F.R. § 1004.9(a)(8)(i)(B) The informative value of the information to be disclosed: Whether the disclosure is “likely to contribute” to an understanding of government operations or activities;

As stated above, the records sought are communications between named persons. These communications 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 ALG will perform extensive analysis of the communications showing how those communications (records) have impacted the decision making processes of the Department. After completing that analysis ALG will publish its findings using the methods and media described below.

10 C.F.R. § 1004.9(a)(8)(i)(C) The contribution to an understanding by the general public of the subject likely to result from disclosure, taking into account your ability and intent to disseminate the information to the public in a form that can further understanding of the subject matter;

We have an experienced research, legal, and communications staff who will carefully scrutinize any responsive records provided. The records sought will improve the understanding of the public as to the decision making process of the Department and how communications from persons outside the Department affect those decisions. Our research and legal staff will carefully scrutinize any responsive records of communications between the named Department personnel and outside individuals. We will compare statements made in these communications with other statements made by the individuals. We will also compare how these statements line up with official policy positions of the Department. We will perform analysis of the timing of communications and compare the timing of communications with contemporaneous events all to better understand how these communications, if any, impacted the Department’s decision making processes during the time period specified in the FOIA request.

Our communications staff speaks to a nationwide audience. We maintain 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 ALG’s news story items was recently re-published by over 4,500 individual news sources.

10 C.F.R. § 1004.9(a)(8)(i)(C) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities;

As stated above, the records sought are communications between named persons. The fact that communications may have occurred is likely as probative to ALG’s research into the decision making process of the Department as is the substantive content of any such communications. Given the positions of the named persons for which communications to and from are sought the responsive records are not likely to be technical in nature but are likely to be advocacy for a particular action. ALG is researching how this advocacy for a particular action may have influenced decisions that were made by the Department. Also, as stated above, these communications are not currently in the public domain. As such the general public is unaware of the existence of these communications. The simple fact that these communications are not in the public domain means that disclosure of them will greatly increase public understanding of how the decision making process works. As such disclosure of these records “is likely to contribute ‘significantly’ to public understanding of government operations or activities.”

10 C.F.R. § 1004.9(a)(8)(ii)(A) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

Our organization is a non-profit research organization. There is no commercial interest in the records sought. To the contrary we will provide these records free of charge to interested individuals.

10 C.F.R. § 1004.9(a)(8)(ii)(B) The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is “primarily in the commercial interest of the requester.”

As stated above, ALG has no commercial interest in the records sought. The records sought are of the type which ALG regularly provides to the public free of charge 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 Department. The records sought will be disseminated widely to parties interested in the workings of the government and as such will not inure 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) and 10 C.F.R. § 1004.9(a)(8).

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 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.

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