



P.O. Box 30167
Seattle, Washington 98103

March 19, 2010

Assistant General Counsel for Administration
U.S. Department of Commerce
Room 5875
14th and Constitution Avenue, NW
Washington, DC 20230
Fax: (202) 482-2552
FOIAAppeals@doc.gov

Re: Appeal of Freedom of Information Act Request # 2010-000153

Dear Assistant General Counsel for Administration:

This is an appeal pursuant to 5 U.S.C. § 552(a)(6), concerning the refusal of the National Marine Fisheries Service (“NMFS”) to disclose certain documents within its control. The Agency's refusal to approve the requested documents for a fee waiver violates the federal Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.*, as amended.

On December 25, 2009, the Association for Professional Observers (“APO”) requested documents under FOIA “from the National Marine Fisheries Service (NMFS) meetings and/or workshops on data confidentiality of fisheries observer data and information that took place in April 2003 and again in January 2008.” On February 23, 2010, we received a letter responding to our request in a letter signed by Eric C. Schwaab, Assistant Administrator for Fisheries granting a partial fee waiver for “agendas, list of attendees, PowerPoint presentations, and handouts given to attendees,” but denying a fee waiver for relevant emails:

NMFS has determined that a fee waiver is not warranted for e-mails from participants of the workshops. The APO has not demonstrated that these records would contribute to the understanding of a reasonably broad audience of persons interested in the subject. Furthermore, APO has failed to demonstrate how e-mails would contribute significantly to public understanding of NMFS policies concerning data confidentiality of fisheries observer data and information.

We respectfully disagree and believe that we are entitled to a full waiver of fees. Under 15 C.F.R. § 4.10(a) (2010), we have the right to appeal this denial determination to you. As required, this appeal includes a copy of the original request, the response to the request. Our response containing a statement of the reasons why withheld records should be made available for free and why denial of the fee waiver was in error is below:

1) Whether disclosure of email records will contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester

Our original response was:

Observer data is used by a wide variety of users throughout the public at large: in academia, various public agencies, and a wide spectrum of stakeholders who use observer data to analyze effectiveness of a variety of fishery management decisions. The public at large has an interest in knowing how NMFS releases fisheries observer data.

The APO intends to provide the requested information to the general public through:

- Release to the news media;
- Posting on the APO website
- Summary article in the APO's quarterly newsletter, the *Mail Buoy*

NMFS has admitted that a list of the 1993 and 1998 NMFS workshop attendees is entitled to a fee waiver. See NMFS letter of February 23, 2010 (attached). Because the emails we request are those relevant to the two meetings, it logically follows that they will contribute to the understanding of the same reasonably broad audience as the list of attendees.

It is our understanding that the 1993 NMFS workshop was not publicly accessible. The information posted on the National Observer Program website¹ does not contribute to the public's understanding of the purpose for or results of the meeting except in extremely vague and uncertain terms. The subsequent 2008 NMFS workshop was also unavailable to the public, and furthermore is not even listed on the NOP website as having occurred. Because the 1993 and 2008 workshops respectively guided NMFS observer data policy prior to and after the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 (Magnuson Stevens Reauthorization Act, or "MSRA") was passed, we are anxious to obtain information relevant to these workshops, including e-mails.

APO is uniquely qualified to disseminate information relating to fisheries observer data access policies through its email/postal mailing list of over 900 members and its quarterly newsletter, as stated above. Specifically, APO has an ongoing project called Public Access to Observer Data, which focuses on advocating for public access to fisheries observer data and information. APO's membership reaches a variety of stakeholders, including fisheries observers, media organizations, fishing industry, public interest groups, labor organizations, various governmental agencies, conservation groups, academia, as well as interested members from the general public.

¹ Available at: <http://www.st.nmfs.noaa.gov/st4/nop/workshops.html>

It is clear that the requested emails will contribute to the understanding not only of observers, but also the wide variety of stakeholders mentioned above that have a stake in fisheries management and their access to monitoring data.

2) *Whether disclosure of requested email records is likely to contribute “significantly” to public understanding of Government operations or activities*

Our original response was:

NMFS currently has only guidelines on how individual FOIA requests for fishery observer data are handled. This appears to vary from region to region and on a case-by-case basis, which can potentially lead to inequities between stakeholders, including the public, regarding how NMFS is managing the nation’s fisheries data. There is no indication that there is currently any agency-wide standard for handling FOIA requests and the results and discussions that emerged from these two meetings may shed some light on the problems that NMFS faces in dealing with observer data confidentiality and guidance given to agency personnel.

The NMFS analysis in its February 23, 2010 letter for this section is based on an incorrect reading of FOIA regulations: “APO has failed to demonstrate how e-mails would contribute significantly to public understanding of NMFS policies concerning data confidentiality of fisheries observer data and information.” Under FOIA, APO does not have to demonstrate how the emails would contribute to understanding of NMFS **policies**. All APO must show for a successful fee waiver under this factor of a FOIA fee waiver request is that disclosure is likely to contribute “significantly” to public understanding, and that this public understanding is of Government **operations or activities**. See 5 C.F.R. § 4.11(k)(2)(iv).

APO has a strong prima facie case for the requested emails contributing significantly to public understanding of NMFS operations and activities. A prima facie showing of entitlement which is not satisfactorily rebutted by the government must be granted a fee waiver. Friends of the Coast Fork v. Dep’t of Interior, 110 F.3d. 53 (9th Cir. 1997). “A requester is likely to contribute significantly to public understanding if the information disclosed is new; supports public oversight of agency operations; or otherwise confirms or clarifies data on past or present operations of the government.” 132 Cong. Rec. H9464 (Reps. English and Kindness).

If, as NMFS has admitted, a reasonably broad audience interested in the subject will increase their understanding from a list of the NMFS workshop attendees, and the public understanding of Government operations and activities will be contributed to significantly by the release of this list, then it is clear that the emails to, from, and between these participants will 1) interest the same reasonably broad audience, and 2) even further illuminate the public understanding of how these participants influenced and were influenced by the workshop agenda, presentations, and handouts.

For example, associated e-mails before the meetings may reveal specific problems that led to the necessity for the meetings. Likewise, specific FOIA requests may have presented confidentiality problems that needed clarification and resulted in subsequent changes in NMFS policy. Associated e-mails could show how

participants' opinions ultimately changed the workshop's content and agenda. The emails can only further clarify the other workshop materials as to their selection and possible bias, and cannot be considered for significance apart from the other requested records. The emails may also show who was involved and instrumental to the NMFS debate around the time of the workshops, whom outside the government was communicating with the workshop attendees about NMFS policies, and the factors taken into account in making the determinations that eventually lead to the current NMFS policies on public access to monitoring data and information.

APO has noticed an overall secrecy exhibited by NMFS in relation to its implementation of the MSRA regarding public access to fisheries observer data and information. How NMFS plans to respond to FOIA requests and any changes to related internal administrative orders or national standards have been thus far extremely opaque to the non-governmental public. Specifically, we are also troubled by the conflict between the flexibility that MSRA gives to different regions to make local, discretionary determinations as to what observer data to release, and what we were told in a recent phone call with the NMFS on January 26, 2010, when Samantha Brookes of the National Observer Program stated that there is now a federal standard for what kind of observer data is released. Ms. Brookes did not clarify as to what the federal standard is or how it has been codified or consolidated.

Because of these inconsistencies and unknowns, APO sees an urgent need for these email records to trace the trajectory of how decisions relating to the MSRA were made, and the primary sources of influence behind these changes to the Magnuson-Stevens Fishery Conservation and Management Act. If outside sources were influential to the MSRA as it is written, then the public has an obvious need for that information in order to understand the NMFS decision-making process.

3) FOIA's fee waiver provision was expanded to facilitate access by public interest groups like APO and the government has a presumption of openness in FOIA cases

FOIA's expanded fee waiver provision was intended specifically to facilitate access to agency records by non-profit public interest groups, which utilize FOIA to monitor and mount challenges to governmental activities. Better Gov't Ass'n v. Dep't of State, 780 F.2d 86, 88-89 (D.C. Cir. 1986). Fee waivers are essential to such groups, which:

[R]ely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities - publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions...The waiver provision was added to FOIA in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests.

780 F.2d at 93-94.

In reviewing this appeal we would also like to draw your attention to the January 21, 2009 memo by President Barack Obama declaring the following policy for the Executive Branch:

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... All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.

The public trusts NMFS to reasonably manage their marine resources, and therefore have the right to knowledge concerning the agency's functions. One of the APO's main goals is to educate the public about observer data use and to advocate for the fair and unbiased monitoring of the nation's marine living resources and associated ecosystems, which is in the general public interest. The public's access to fisheries observer data and information is a vital component of this, as is knowing how the government controls data access. Thus, we respectfully reiterate our fee waiver request.

If you still require additional information relative to our Freedom of Information request, please do not hesitate to let me know. Thank you for your consideration of this appeal.

Sincerely,

Ms. Elizabeth Mitchell

Association for Professional Observers
P.O. Box 933
Eugene, OR 97440
Tel: 541-344-5503
APO@apo-observers.org