



P.O. Box 30167
Seattle, Washington 98103

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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 # 2010-000126

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 disclose the requested items 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 pertaining to “written guidelines and/or rules given to the staff of each National Marine Fisheries Service Observer Program and the National Observer Program with regard to public access to fisheries observer data and information,” including “any updates sent to observer program staff regarding any clarification of the guidelines and/or rules.” 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 “records that concern NMFS’ current guidelines and/or rules that concern public access to fisheries observer data and information,” but denying a fee waiver for “historical records”:

NMFS has determined that a fee waiver is not warranted for historical records prior to the Magnuson Stevens Reauthorization Act that concern guidelines and/or rules for public access to fisheries observer data and information. 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 not demonstrated how

historical records would contribute significantly to public understanding of NMFS' policies for public access to 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 historical records prior to the Magnuson Stevens Reauthorization Act ("MSRA") will contribute to the understanding of a reasonably broad audience of persons interested in the subject

Our original response was:

Observer data is used by a wide variety of users throughout the public at large: in academia, non-governmental organizations and a wide spectrum of stakeholders. Observer data is used by the public 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, given the all-inclusive definition of "confidential" regarding public access restrictions to fisheries observer data and information in both the NAO [216-100] and the Magnuson-Stevens Fishery Conservation and Management Act.

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

- Release to the news media;
- Posting on the APO website www.apo-observers.org
- Publishing a summary article in the APO's quarterly newsletter, the *Mail Buoy*

The NMFS has admitted that records concerning current guidelines and rules concerning public access to fisheries observer data and information are entitled to a fee waiver. See NMFS letter of February 23, 2010 (attached). Records created before 2006 are not as contemporary as those created after 2006, but that has little bearing on their relevance to APO's general public interest in learning and disseminating guidelines and records relating to fisheries observer data and information.

APO is uniquely qualified to disseminate information relating to fisheries observer data 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.

It is clear that the requested historical records will contribute to the understanding not only of observers, but all stakeholders that have an interest in fisheries management. The historical records we request are relevant to establishing overall consistency and trends in fisheries observer program policies. It is in the interest of all stakeholders to know which stakeholders may have had prior access to observer data and which have had a more difficult time gaining access to the data, and to know how this varied from

region to region in relation to current NMFS guidelines. Likewise, it is in the general public's interest to know how historical access to observer data and information resulted in confidentiality problems for certain stakeholders and/or NOAA, and how this evolved into the currently more restrictive language of the MSRA. Over three years later, NMFS has yet to formulate national standards for public access to observer data and information and NMFS guidelines have generally been inaccessible to the public.

We hope to use such historical records to piece together and share with the public any trends or alterations in national and regional observer data dissemination policies. For example, using these records, we may find that the policies embodied in the MSRA represent a dramatic break from previous NMFS policies. If this is indeed the case, the public would certainly benefit from this knowledge.

2) Whether disclosure of requested historical records prior to the MSRA 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 and information requests are processed. 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 at large, 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 it might be helpful to know the guidelines each program follows currently, how this has changed over the years and how they are likely to change in the future.

The NMFS analysis in its February 23, 2010 letter for this section is based on an incorrect reading of FOIA regulations: "APO has not demonstrated how historical records would contribute significantly to public understanding of NMFS' policies for public access to 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 historical records 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 records concerning current guidelines and rules

concerning public access to fisheries observer data and information, and the public understanding of Government operations and activities will be contributed to significantly by release of these records, then it is clear that the historical records will 1) interest the same reasonably broad audience, and 2) newly illuminate the public understanding of how the Magnuson Stevens Reauthorization Act represents either a continuation of, or break from previous NMFS policies, guidelines and rules on fisheries observer data. Because the historical records further clarify the records relating to the Magnuson Stevens Reauthorization Act, they should not be considered for significance apart from the latter.

If the historical records can be judged as completely separated from the non-historical records, this is of little import, as FOIA places the same importance on past operations of the government as its current operations. Courts have found that a fee waiver request should be granted “if the information disclosed is new; supports public oversight of agency operations, including the quality of agency activities and the effects of agency policy or regulations on public health or safety; or, otherwise confirms or clarifies data on **past or present operations of the government.**” McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1284-1286 (9th Cir. 1987)(emphasis added).

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 the MSRA gives to different regions to make local, discretionary determinations as to what observer data to release, and what was stated in a conference 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 historical records to trace the trajectory of how decisions relating to the MSRA were made, and any important sources of influence behind the changes that the MSRA made to the Magnuson-Stevens Fishery Conservation and Management Act. The public has an obvious need for this 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,

Elizabeth Mitchell

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