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UNITED STATES DEPARTMENT OF COMMERCE
Office of the General Counsel
Washington, DC 20230

Via FOIAOnline

Hallie Templeton
Friends of the Earth
1101 15th St. NW 11th Floor
Washington, D.C. 20015

Re: Request No. DOC-NOAA-2018-000947
Appeal No. DOC-OS-2018-001100

Dear Ms. Templeton:

This responds to your administrative appeal under the Freedom of Information Act (FOIA) (5 U.S.C. § 552) which you submitted on April 2, 2018. Your appeal challenges NOAA's denial of your fee waiver request. As explained below, your appeal is denied.

Fee Waiver

FOIA provides for a waiver of all fees if disclosure of 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). Consistent with the statute, the Department's FOIA regulations provide, in pertinent part, that

> Records responsive to a request will be furnished without charge, or at a charge reduced below that established under paragraph (c) of this section, if the requester asks for such a waiver in writing and the responsible component determines, after consideration of information provided by the requester, that the requester has demonstrated that: (i) Disclosure of the requested 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 (ii) Disclosure of the information is not primarily in the commercial interest of the requester.

15 C.F.R. § 4.11(l).

Both prongs of this two-step test, the public interest prong and the commercial interest prong, must be satisfied by the requester before assessable fees are properly waived or reduced. *See S. Utah Wilderness Alliance v. U.S. Bureau of Land Mgmt.*, 402 F. Supp. 2d 82, 86-87 (D.D.C. 2005). Department regulations establish how these two prongs may be satisfied pursuant to the statutory standard. *See* 15 C.F.R. § 4.11(l).

FOIA fee waiver determinations are made on a case-by-case basis. *See Media Access Project v. Fed. Commc'ns Comm'n*, 883 F.2d 1063, 1065 (D.C. Cir. 1989). The requester has the burden of

demonstrating that it can meet the stated requirements and must meet that burden with "reasonable specificity" rather than by offering mere conclusory allegations. *Pub. Emps. for Envtl. Responsibility v. Dep't of Commerce*, 968 F. Supp. 2d 88, 98 (D.D.C. 2013).

In order to determine whether disclosure is in the public interest, the Department's FOIA regulations set forth four factors that must be met: (1) whether the subject of the requested records concerns the operations or activities of the government; (2) whether the disclosure is likely to contribute to an understanding of government operations or activities; (3) whether disclosure of the requested information 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; and (4) whether the disclosure is likely to contribute significantly to public understanding of government operations or activities. 15 C.F.R. § 4.11(l)(2). All four of these factors must apply for a request to be considered in the public interest. *Cause of Action v. Fed. Trade Comm'n*, 961 F. Supp. 2d 142, 154 (D.D.C. 2013) ("All four requirements must be met in order to demonstrate that the request is in the public interest."); *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004) (invoking the four-factor fee waiver test and stating that "[the] four criteria must be satisfied" in order "for a request to be in the 'public interest'").

Factor 1: Whether the Subject Matter of Records Sought Concern the Operations or Activities of the Government

Under this factor, the subject of the requested records must concern identifiable operations or activities of the government, with a connection that is direct and clear rather than remote or attenuated. 15 C.F.R. § 4.11(l)(2)(i).

The records you requested--records generated by NOAA or any of its IMFCs pertaining to correspondence received from a member of the public, concern an "identifiable operation or activity of the government," namely, how the agency handles incoming correspondence, and you therefore satisfy this factor.

Factor 2: Whether Disclosure of the Records Is Likely to Contribute to an Understanding of Government Operations or Activities

In order for disclosure to be likely to contribute to an understanding of specific government operations or activities, the disclosable portions of the requested documents must be meaningfully informative about government operations or activities. 15 C.F.R. § 4.11(l)(2)(ii). *See Citizens for Responsibility and Ethics in Washington v. Dep't of Health and Human Servs.*, 481 F. Supp. 2d 99, 109 (D.D.C. 2006) (requester must show how documents would increase public knowledge of the functions of the government with "reasonable specificity").

While you have asserted that the requested records "will be meaningfully informative" regarding the federal government's financial support for marine finfish aquaculture and the government's legal obligations to conduct environmental reviews, you failed to provide a convincing, reasonably specific argument showing how requesting records which would reveal how the

government handles correspondence from a member of the public would illuminate how the government handles financial support to aquaculture.

In the absence of information reasonably specifying how the requested information would increase the public's understanding of government operations, the second factor is not met in this appeal.

Factor 3: Whether Disclosure of the Requested Information Contributes to an Understanding of a Reasonably Broad Audience of People Interested in the Subject, and Not Merely the Individual Understanding of the Requester

Under the third factor, requesters who are not members of the news media must substantiate their intention and ability to disseminate information to the public in order to show that the requested information will contribute to the understanding of the subject by the public. 15 C.F.R. § 4.11(l)(2)(iii); *see also Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309 (D.C. Cir. 2003) (requester must include details regarding its general methods for publicizing disclosed information).

In your fee waiver appeal, you state that "once the records are made available" Friends of the Earth will provide the information to its many members and activists, and the general public and you provide details about the expertise and capability of Friends of the Earth to "contribute to the understanding" of a "reasonable broad audience." Although Friends of the Earth convincingly argues that they are capable of publicizing the requested records to a broad audience, this factor is more focused on whether the records sought are of *inherent* interest to a reasonably broad audience or, instead, of specific interest to the requester alone or a small audience. NOAA reasoned in its denial of a fee waiver that the documents requested narrowly sought records generated in response to correspondence co-signed by the requester itself. "As such, the interest served through disclosure would primarily be to the benefit of the requester(s), rather than to a segment of interested individuals."

In your appeal you state:

> Disclosure of the requested records will allow Appellant to convey widely to the public information about the amount and specific application of federal funds to support bringing industrial ocean fish farming to domestic waterways, as well as what review processes the government has taken to protect coastal communities and prevent impairment to the environment, including endangered and threatened species, from this support. How the government generally evaluates the impacts of its funding decisions; the amount and specific application of federal funds to support certain industries; and what review processes the government has taken to protect coastal communities and prevent impairment to the environment, including endangered and threatened species, are all areas of interest to a reasonably-broad segment of the public.

Again, we find a logical gap between records that would reveal how the government handles correspondence from a member of the public and records which would show how the government

handles financial support to aquaculture. The organization's ability to publish information to millions of its own members and members of the public about how correspondence was addressed is unrelated to whether the documents requested would contribute to an understanding of government support of aquaculture.

Your appeal does not address whether the requested documents are of interest to a reasonably broad audience beyond yourself, and you have therefore not satisfied the third public interest factor.

Factor 4: Whether Disclosure of the Requested Records Will Significantly Contribute to an Understanding of Government Operations or Activities

Under the fourth and final factor of the public interest analysis, the disclosure of the requested documents must be likely to contribute significantly to the public understanding of government operations or activities. 15 C.F.R. § 4.11(l)(2)(iv). The public's understanding of the subject in question prior to the disclosure must be significantly enhanced by the disclosure. This factor focuses on whether the information that is already available to the public is such that it would not be in the public's interest to fund a search for further materials that would reveal little that is new about the matter in question. This invites a comparison of the information sought to that which already is publicly available. For example,

> in some instances, it may be appropriate to deny a fee waiver because the requested records are available from public sources. If, for example, at the time of the request the requested records are readily available from other sources, then it is logical to conclude that further disclosure by the agency will not significantly contribute to the public's understanding.

Carney, 19 F.3d at 815. As a result, fee waiver requests have been denied where the information to be sought is already in the public domain. *See Judicial Watch v. DOJ*, 365 F.3d at 1127 (upholding denial of fee waiver request where plaintiff failed to counter government's representations that requested information "was already in the public domain").

As discussed under the second and third factor, you did not adequately explain how a broader public understanding of NOAA's activities with regard to aquaculture could be significantly enhanced by requesting records regarding NOAA's handling of correspondence from your organization. Despite conclusory claims that

> the requested records will help reveal more about what steps the government has taken to prevent impairment to the environment, including endangered and threatened species, from federal funding and other support for the industry's expansion. The records may also reveal whether the federal government has been fulfilling its legal duties for previous grants or awards of funding assistance, as well as whether the government was already planning on undertaking these duties for the specific grants and awards at issue. ... The records are [also] certain to shed light on NOAA's compliance with NEPA, ESA, and other environmental protection and conservation laws.

you did not provide a convincing argument or analysis that the records requested would shed light on any of those subjects. Therefore, the fourth factor is not met.

Since all four factors must be met to satisfy the public interest prong, and since you did not make a showing sufficient to satisfy three of the four factors, your request does not meet the standard for the public interest prong.

Because the request does not satisfy the public interest prong, you did not meet the burden of showing that the disclosure of information in response to this request is in the public interest. The fee waiver was therefore properly denied.

This is the final decision of the Department of Commerce. You have the right to obtain judicial review of this decision as provided in 5 U.S.C. § 552(a)(4)(B).

Sincerely,

Brian D. DiGiacomo
Assistant General Counsel
for Employment, Litigation, and Information