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May 19, 2015

**VIA EMAIL** (foia@mail.house.gov)

Chairman Jason Chaffetz  
Committee on Oversight and Government Reform  
United States House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515-6143

Re: Request for Information on Processing of FOIA Requests

Dear Chairman Chaffetz:

Thank you for the opportunity to provide information about Public Citizen, Inc.'s experience with the Freedom of Information Act (FOIA).

Meaningful citizen participation in government depends on the public's ability to access information. For more than 40 years, Public Citizen—through its advocacy and research and the research, education, and litigation undertaken by its sister organization Public Citizen Foundation—has used FOIA in furtherance of its role as a government watchdog. Public Citizen attorneys have litigated more significant open government cases than any firm or organization in the country. Today, Public Citizen remains a frequent FOIA requester, and we continue to provide legal representation to a variety of organizations, community groups, journalists, academics, and other individuals seeking to obtain information under FOIA.

On his first full day in office, President Obama signed a memorandum on transparency, expressing a commitment "to creating an unprecedented level of openness in Government."<sup>1</sup> He also signed a memorandum on FOIA that explained that FOIA should be "administered with a clear presumption: In the face of doubt, openness prevails."<sup>2</sup> On March 19, 2009, Attorney General Holder issued a memorandum on FOIA encouraging agencies to discretionarily release records, rescinding a memorandum by former Attorney General Ashcroft that took a more narrow view of FOIA disclosure, and announcing that the Department of Justice would defend a

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<sup>1</sup> The memorandum is available at [https://www.whitehouse.gov/the\\_press\\_office/TransparencyandOpenGovernment/](https://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment/).

<sup>2</sup> The memorandum is available at [https://www.whitehouse.gov/the\\_press\\_office/Freedom\\_of\\_Information\\_Act/](https://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act/).

denial of a FOIA request only if the law prohibits disclosure or if “the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions.”<sup>3</sup>

At the time, Public Citizen applauded President Obama’s stated commitment to openness and his Administration’s policies in favor of transparency. In promoting transparency, however, the Administration has focused on proactive disclosure and tools for interaction between the government and the public, while often resisting disclosure in response to FOIA requests. Without downplaying the need for affirmative disclosure of records and, particularly, the usefulness of making more agency records readily available on agency websites, Public Citizen strongly believes that the FOIA request-and-response process plays an important role in ensuring that the public is informed about the government’s activities—particularly about those activities that the government would rather keep hidden. Moreover, we have found the implementation of the Administration’s open government goal in response to FOIA requests has been inconsistent, at best. We emphasize that agencies’ resistance to FOIA is not new; we have experienced it from our first FOIA requests in the early 1970s through today. In our experience, however, the difficulty receiving timely and appropriate responses is as acute today as ever. Indeed, in a U.S. Supreme Court argument in 2012, the government contested the longstanding understanding, stated repeatedly by the Court,<sup>4</sup> that FOIA’s nine exemptions from disclosure are to be narrowly construed.<sup>5</sup>

Below we discuss specific recent examples of problematic responses to FOIA requests submitted by Public Citizen or other requesters receiving assistance from Public Citizen attorneys. Many of these examples resulted in litigation, but likely thousands of requesters experience similar issues and do not have the benefit of counsel. Litigation is no substitute for consistent and good faith implementation of FOIA by the Executive Branch, with an eye toward disclosure, not toward withholding. We hope that by highlighting some of the problems that we have observed, we can provide the Committee with useful information to guide its future work in this area.

### **Example 1 – Inappropriate redactions; lengthy delay**

Our experience with a 2014 FOIA request to the Food and Drug Administration (FDA) offers a good example of an agency exhibiting a pro-withholding approach, rather than the pro-disclosure approach established by FOIA, as well as an example of lengthy delay.

In May 2014, Public Citizen requested from FDA the curriculum vitae of its advisory committee members. According to its website, “[t]he FDA has 33 advisory committees, one of which, the Medical Devices Advisory Committee, has 18 panels. The committees are established

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<sup>3</sup> Attorney General Holder’s memorandum is available at <http://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf>.

<sup>4</sup> See, e.g., *U.S. Dep’t of Justice v. Landano*, 508 U.S. 165, 181 (1993); *U.S. Dep’t of Justice v. Julian*, 486 U.S. 1, 8 (1988); *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

<sup>5</sup> *FCC v. AT&T*, No. 09-1279, Transcript at 11, 14-15, available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/09-1279.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-1279.pdf).

to provide functions which support the FDA's mission of protecting and promoting the public health[.]”<sup>6</sup>

The FDA proactively posts the CVs of most of the advisory committee members online, which is helpful both to enable the public to understand the level of expertise of the individuals whose recommendations about substantive health matters the FDA takes so seriously and also to allow the public to assess the perspective, including potential biases, from which an advisory committee member may approach the issues before his or her committee.<sup>7</sup>

Unfortunately, we were surprised to see that many of the members' CVs had significant redactions. Of the 180 CVs posted for members of Center for Drug Evaluation and Research advisory committees as of January 29, 2014, 93 percent had redactions. Similarly, between 80 and 100 percent of the CVs posted for members of each of five other FDA Centers had redactions. Although some CVs (including *all* CVs from device-related advisory committees) show redactions with *no* indication of the basis for them, the other redactions included the notation (b)(4) or (b)(6), referring to the FOIA exemptions from disclosure that protect confidential commercial information and personal privacy, respectively.

Almost by definition, the fact that information is included on a CV disqualifies it from falling within the scope of exemption 4, because information included on a CV—a document created to share one's accomplishments and qualifications with other people—cannot conceivably be a “trade secret” or “confidential.” Likewise, the notion that a rational person would include on her CV information “the disclosure of which would constitute a clearly unwarranted invasion of personal privacy,” as required to meet the exemption 6 standard, is hard to fathom. We found some of the CVs elsewhere online (for example, on the website of a member's employer), and comparing the FDA versions with those showed that one redaction hid the fact that the advisory committee member once worked as a lifeguard, and others hid professional license numbers (such as medical and pharmacy licensing numbers) that are publicly available, including online, from state licensing entities. We saw names of publications redacted, and the amounts of grants received, even grants received more than a decade ago.

Accordingly, on May 19, 2014, Public Citizen requested *unredacted* copies of the advisory committee member CVs. Although the FDA pleasantly surprised us by calling to discuss the request, the call seemed primarily an effort to try to discourage us from pursuing it. The FDA also made clear that the unwarranted redactions were not the result of poor training or inexperienced staff, but the agency's considered decision. To date, exactly one year since we made the request, only two of the five FDA Centers have sent any response to our FOIA request, both after the FOIA deadline for response but relatively promptly in comparison to the other three Centers. Even those two responses were non-responsive: One of the two sent us copies of the CVs exactly as they appear online, and the other directed us to a page on the FDA website where the CVs were posted (with the same redactions as when we made our request).

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<sup>6</sup> FDA, Committees and Meeting Materials, at <http://www.fda.gov/AdvisoryCommittees/CommitteesMeetingMaterials/default.htm>.

<sup>7</sup> Materials related to this FOIA request are available at <http://www.citizen.org/documents/fda-cv-foia-correspondence.pdf>.

In September 2014, we appealed the denial by the two Centers that responded to our request. One of the two sent us a set of CVs, still with some unwarranted redactions, but neither has sent us a formal response to the appeal. And again, although the material requested is discrete and requires *no* search time to locate, the other Centers have not responded at all to the May 19, 2014, request.

Another detail further highlights that the agency seems to look for reasons to withhold, rather than to respect the pro-disclosure policy embodied in FOIA. Last fall, the FDA asked one of my Public Citizen colleagues, Dr. Michael Carome, to join an advisory committee. Dr. Carome accepted the position, and, when he emailed his CV as requested, he specified that he had no objection to the CV being posted online “without redactions.” He was nonetheless told that the CV would be “forward[ed] for redaction review by agency staff.” His CV was later posted online with redactions: U.S. military awards and service were blacked out, as well as the dollar amount of a National Kidney Foundation grant from 1996.<sup>8</sup>

### **Examples 2-3 – Inappropriate redactions for information deemed “non-responsive”**

We have also found that agencies attempt to avoid disclosure obligations by redacting pages, paragraphs, or portions of sentences in responsive records and labeling those redactions “non-responsive” or “out of scope.” This practice is impermissible under FOIA, which requires agencies to disclose responsive records in their entirety, unless portions of those records fall within one of FOIA’s nine exclusive exemptions. *See Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

(a) For example, in November 2012, the American Immigration Lawyers Association requested from the Executive Office for Immigration Review at DOJ “complaints” against immigration judges and a variety of “records” relating to those complaints. The FOIA request sought in part to determine whether the government was adequately responding to public complaints about abusive, hostile, and other improper conduct of immigration judges, who are executive branch employees. DOJ denied the request for a fee waiver and did not provide a substantive response to the request. In December 2012, AILA appealed the denial of the fee waiver. After waiting until June 2013 for a response to the appeal, AILA filed suit.<sup>9</sup>

After the lawsuit was filed, DOJ began producing records but redacted extensive portions marked as “non-responsive.” The district court judge ultimately ordered the agency to release such information, and the subsequent releases reveal that many of the redactions were made to shield information that was plainly responsive to the plaintiff’s request but embarrassing to the

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<sup>8</sup> For example, the information “Army Achievement Medal, 1992” and “Public Health Service Bicentennial Unit Commendation, 1998” was blacked out on the ground that it fell within exemption 6, meaning that disclosure would constitute “a clearly unwarranted invasion of personal privacy”—ridiculous on its face, but even more so where the person who submitted the CV specifically informed the FDA that the CV could be posted without redactions. The CV as posted on the FDA’s website is at <http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/Drugs/PharmacyCompoundingAdvisoryCommittee/UCM426988.pdf>.

<sup>9</sup> Materials related to this request are available at <http://www.citizen.org/litigation/forms/cases/getlinkforase.cfm?cID=827>.

agency.<sup>10</sup> For instance, the government initially released an email from an Assistant Chief Immigration Judge that concerned remedial training for an immigration judge at the center of a complaint, but redacted most of the email as “non-responsive” because it purportedly included “[i]nformation concerning a matter unrelated to the complaint and its resolution.” The version released after the court ruled shows that the government had redacted an in-depth description of the training that took place and the trainer’s stated concern that the immigration judge’s “lack of mastery of the most basic skills of an [Immigration Judge] is jeopardizing the cases [redacted name] is completing.”

**(b)** The issue of redacting “non-responsive” portions of documents also arose in response to Public Citizen’s request for information pertaining to the United States’ practice of rendition. As discussed in more detail in Example 8, below, in 2006, Public Citizen and Professor Alan Morrison sent a number of agencies FOIA requests for information about the U.S. practice of rendition. In its February 2010 response on behalf of the Offices of the Attorney General and the Deputy Attorney General, DOJ’s Office of Information Policy withheld part of a responsive record, not because it was exempt from disclosure, but on the ground that text in the responsive record was “non-responsive.” The letter accompanying the record stated that the withheld information contained Department of Justice responses to questions from the Senate Judiciary Committee.<sup>11</sup>

#### **Examples 4-6 – Lengthy delays**

Lengthy delays in receiving FOIA responses are a longstanding problem. To offer two particularly outrageous examples, the National Security Agency wrote us in July 2007 to ask whether we were still interested in a response to a request made in September 1997 (FOIA #11220), and the Defense Information Systems Agency wrote in April 2010 to ask whether we were still interested in a response to a request made in February 1997 (FOIA #05-108).<sup>12</sup> More recent examples abound.

**(a)** In a case notable primarily for the ordinariness of the delay, Public Citizen filed a FOIA request in November 2009 seeking annual reports submitted to the Department of Health and Human Services (HHS) by Purdue Pharma L.P. and Pfizer, two pharmaceutical companies, to comply with those companies’ Corporate Integrity Agreements with the agency. The agency took six months and nearly nine months respectively to respond to Public Citizen’s request with respect to each company. Public Citizen filed timely administrative appeals. One languished for more than nine months before being denied. The other languished for nearly eleven months

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<sup>10</sup> *AILA v. EOIR*, No. 13-840, 2014 WL 7356566 (D.D.C. Dec. 24, 2014). The parties continue to litigate about the scope of the court’s order as it applies to the government’s obligations to disclose material redacted as “non-responsive,” and the government continues to withhold as “non-responsive” portions of more than sixty pages of records. See Doc. 35, Motion to Enforce, *American Immigration Lawyers Ass’n v. Executive Office for Immigration Review*, No. 13-840, filed Apr. 30, 2015.

<sup>11</sup> Materials relevant to this FOIA request are available at <http://www.citizen.org/documents/cia-doj-foia-correspondence-rosenbaum.pdf>.

<sup>12</sup> These letters are available at <http://www.citizen.org/documents/nsa-foia-response-rosenbaum-2007.pdf> and <http://www.citizen.org/documents/department-defense-tankersley-foia-response-2010.pdf>.

before Public Citizen filed suit. Unfortunately, this case offers an example, not of unusual delay,<sup>13</sup> but of typical delay.

(b) In another instance, on March 12, 2008, Center for Science in the Public Interest (CSPI) requested eleven categories of documents related to the Organic Foods Production Act from the United States Department of Agriculture (USDA). When Public Citizen filed suit on CSPI's behalf on February 2, 2011—almost three years later—USDA had not responded to the request with regard to six of the categories of documents, and CSPI's appeal of the denial of records in three of the other categories had been pending for almost two and a half years.<sup>14</sup>

(c) Delay can cause concrete harm, not just by hindering the public's right to know, but by injuring the economic and liberty interests of individuals. For instance, time and again, veterans who have requested from the Department of Veterans Affairs (VA) copies of their claims files through FOIA and the Privacy Act have experienced lengthy delay. A veteran's claims file contains documents necessary for applications for certain military disability benefits, such as benefits to service members with combat injuries. When the VA sends the files, it typically does so without redactions. In a recent case, attorneys at Public Citizen sued the VA on behalf of seven veterans, all of whom had been waiting a year or more (in one instance, 26 months) for a response to their claims file requests. Within three days of the lawsuit being filed, the VA produced the claims file for a plaintiff whose request had been pending for over 471 working days. Within three weeks of the filing of the lawsuit, the VA had produced the claims files for five out of the seven plaintiffs. Plainly, the material was readily available, and the delay both inexplicable and harmful to the veterans.<sup>15</sup>

#### **Example 7 – Lengthy delay, administrative closure, and frivolous assertion of exemption**

A pending FOIA case shows multiple delays suggesting a blatant refusal to comply with FOIA, in one instance, even after a successful administrative appeal. Lawyers at Public Citizen represent Susan Long and David Burnham, directors of the Transactional Records Access Clearinghouse (TRAC), in a number of FOIA cases. Their experience in attempting to obtain records concerning case management databases maintained by Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) has involved several of the problems listed in the Committee's letter.

TRAC seeks data concerning federal law enforcement, and other agencies (such as the Department of Justice) have for a number of years routinely made much of their case management data, including information concerning the structure of their databases, available to TRAC on a regular basis, with redactions only of information in the databases that is claimed to be subject to specific exemptions. With increasing government computerization of records, such

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<sup>13</sup> The complaint in *Public Citizen v. HHS*, No. 11-cv-01681 (D.D.C.), which describes the timeline of the administrative process, is available at <http://www.citizen.org/documents/PC-v-HHS-Complaint.pdf>.

<sup>14</sup> The complaint in *CSPI v. USDA*, No. 11-CV-00288 (D.D.C.), which describes the request and agency response in greater detail, is available at <http://www.citizen.org/documents/CSPI-v-USDA-Complaint.pdf>.

<sup>15</sup> The complaint in the case, *Ball v. Department of Veterans Affairs*, is available at <http://www.citizen.org/documents/ball-v-department-of-veterans-affairs-complaint.pdf>.

databases have become the official source of information on what the government is actually doing. Descriptions of the databases' structure—which provide specifics on the nature of their contents—are essential to an understanding of what data exist and therefore can be requested, as well as of how to interpret any data once received.<sup>16</sup>

TRAC encountered barrier after barrier when it made several FOIA requests seeking data from ICE and CBP, as well as information concerning the structure of their databases that is necessary to make the data comprehensible. As set forth in greater detail in the plaintiffs' motion for summary judgment in the litigation that has ensued, ICE purported to "administratively close" a FOIA request on the ground that it had already provided responsive records, although the request sought a different set of records. After TRAC successfully appealed the attempted closure of its request, ICE took no further action on the request; it simply did not produce the material.

In related requests, TRAC filed successful administrative appeals of the scope of ICE's search for records, but, again, the agency provided no further response to the requests after the agency FOIA offices remanded the requests back for FOIA processing. In still other requests seeking extracts of data maintained by ICE and/or CBP, the agencies never responded to the requests at all.

After waiting months for responses, Ms. Long and Mr. Burnham filed suit. The agencies then sought to block access to the records in their entirety by making the extraordinary assertion in their motion for summary judgment that information showing the *structure* of its databases was protected by FOIA exemption 7 because disclosure would reveal "law enforcement methods" and would risk "circumvention" of the law by enabling cyber-attacks on its databases—this despite the facts that other law enforcement agencies (including the Department of Justice) have routinely disclosed the structure of their case management databases and that the ICE databases are effectively insulated against cyber-attack because they are maintained on servers with no internet or other avenue of external access.

In their final reply brief, the agencies went even further by claiming a statutory exemption based on a statute repealed before they filed their brief. The claim was doubly frivolous, because both the repealed statute and the one with which Congress replaced it explicitly provided that nothing in them affected disclosure of records under FOIA.

The case remains pending in the district court.

#### **Example 8 – Lengthy delay followed by denial of right to appeal**

A FOIA request Public Citizen made on behalf of itself and Professor Alan Morrison helps demonstrate the long delays and procedural hurdles that can be placed in front of requesters. On July 14, 2006, we sent a FOIA request to several agencies asking for records related to rendition. The request was based on a public statement by a CIA official indicating that

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<sup>16</sup> Materials related to this FOIA request are available at <http://www.citizen.org/litigation/forms/cases/getlinkforcase.cfm?cID=860>.

the CIA had determined that the practice was legal, and it specifically asked for copies of records that discussed the legality of rendition.<sup>17</sup>

We received written responses over a period of years, but the responses often said only that our request had been referred from one agency to another. For example, on May 16, 2011, we received a letter from the DOJ's Office of Information Policy (OIP) informing us that, on July 27, 2009, DOJ's Criminal Division had referred 35 documents totaling 569 pages to it for processing, and that OIP had determined that 4 pages were responsive but exempt, that some records were duplicative of material previously referred by OIP to the FBI for processing, and that three documents (372 pages) would now—almost five years after we made the request—be referred to the FBI for processing.

Aside from delay, the CIA's eventual substantive response demonstrates another tactic to avoid adequate processing and a complete response. On July 24, 2007, the CIA informed us that some aspects of our request might overlap with an earlier request on a similar topic from another organization and that, if the agency determined that the requests overlapped, it would provide the same releasable records to us, after responding to the first requester. On July 26, 2013—seven years after we filed our request—we received a substantive response from the agency. That letter stated that, in the course of litigation, the other organization's request had been resolved. The letter enclosed 20 documents in their entirety and 67 redacted documents, and it stated that the agency was withholding additional material in its entirety pursuant to FOIA Exemptions 1, 3, 5, and 6.

Only two of the documents released to us mentioned rendition.

Although FOIA specifically provides requesters with the right to appeal denials, the CIA's letter stated that, because the other organization's request had been the subject of litigation (to which we were not a party and which the CIA's letter did not specifically identify), we were not entitled to administratively appeal the determination. Instead, the letter said, "You may submit another FOIA request on this topic[.]" In other words, after seven years, the agency invited us to start over.

On March 27, 2014, Professor Morrison submitted a new FOIA request for records related to the legality of rendition, beginning the process all over again. One year later, having received no substantive response, he filed a lawsuit.

### **Example 9 – Inappropriate redactions; delayed response to appeal**

In April 2013, Public Citizen sent a FOIA request to the National Institutes of Health (NIH). NIH released responsive records over a period of months and sent a final response partially denying the request in March 2014. In April 2014, we appealed. To date, we have had no response to the administrative appeal.<sup>18</sup>

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<sup>17</sup> Materials relating to this FOIA request are available at <http://www.citizen.org/documents/cia-doj-foia-correspondence-rosenbaum.pdf>.

<sup>18</sup> The appeal letter, which sets forth the FOIA request and the agency's response, is available at <http://www.citizen.org/documents/foia-administrative-appeal-nih.pdf>.

Our appeal challenged NIH's extensive redactions in several respects. First, exemption 5 covers only certain inter-agency or intra-agency records, yet NIH withheld under exemption 5 correspondence that was from or shared with non-governmental individuals. Moreover, where a record contains both exempt and non-exempt material, FOIA requires agencies to produce the non-exempt portions. NIH withheld hundreds of pages in full, however, which strongly suggests that it failed to segregate disclosable material. Second, NIH relied on exemption 6, which protects personal privacy, to redact what appears to be a list of medical centers that participated in a study, although the U.S. Supreme Court has already rejected the notion that exemption 6 applies to corporations. *See FCC v. AT&T*, 562 U.S. 397 (2010). Third, the agency withheld portions of many responsive records without noting any exemption, instead saying "outside scope." The request, however, sought "documents ... regarding" and "records related to" the subject matter identified, not "excerpts regarding" that subject matter. As discussed above (at pages 4-5), "non-responsive" is not one of FOIA's nine exemptions and, therefore, is not a proper basis for redacting text from a responsive record.

#### **Example 10 – Agency attempt to coerce requester to forgo responsive records**

In another instance, an agency tried to coerce a requester to stop pursuing certain records. In a July 2011 FOIA request, Professor William Aceves of California Western School of Law requested from the Department of Defense (DOD) records relating to the selection of military members for service on military commissions. Fourteen months later, DOD informed Professor Aceves by email that it had located responsive records but that two of those records were documents signed by Deputy Secretaries of Defense and therefore would require processing through a higher level of review. The email asked whether Professor Aceves would accept the responsive records without those two documents. It stated that DOD would otherwise "continue processing and send the documents for higher level review," which could "take an extensive amount of time, approximately a year or more because of the number of items that are currently in the queue for higher level review."

Professor Aceves responded the same day and asked to receive the responsive documents that the agency had said could be released immediately and that he would also like the remaining two documents to undergo the additional review. In response, the agency stated that "a significant amount of processing time [could] be saved" if Professor Aceves accepted the records without the two that required higher review and that it would not release the other records right away unless he agreed to forego those two documents: "All of the records found along with the two [] letters would have to make the rounds of higher level review as an entirety, a process that . . . may take a year or more." Professor Aceves declined to waive his request as to the two documents. DOD then stated that it would send all of the records for higher review and that the office would respond to Professor Aceves when the review was finished.

When we filed suit on Professor Aceves's behalf in November 2012, he had not yet received any records in response to his request. Two months after we filed suit, DOD released all of the responsive records—including the two letters.<sup>19</sup>

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<sup>19</sup> The district court complaint, which sets forth the facts in more detail, is available at <http://www.citizen.org/documents/aceves-v-department-of-defense.pdf>.

### **Example 11-14 – Unreasonable denials of fee waiver and resulting delay**

Increasingly, in our experience, meritorious requests for fee waivers are denied. The result is delay and, too often, unnecessary litigation. In addition, although since 2007 FOIA has precluded the assessment of search and duplication fees in certain cases where an agency fails to meet the statutory deadlines for a response, it has been our experience that agencies routinely ignore this limitation on their ability to assess fees.<sup>20</sup> Our cases offer several examples.

(a) The Natural Resources Defense Council (NRDC), in October 2008, made a FOIA request to the Federal Maritime Commission (FMC) for records related to FMC's review of the Clean Trucks Programs administered by the California ports of Los Angeles and Long Beach. NRDC requested a full waiver of fees and provided extensive information about the public's interest in the Clean Trucks Programs, the ways in which the records would contribute to public understanding of FMC's review, and NRDC's ability to disseminate information.

FMC denied NRDC's request for a full fee waiver, instead granting only a 20 percent reduction in fees. NRDC appealed, providing additional documentation about its interest in the records and intent to use them. FMC denied the appeal as well. FMC's denial stated that the requested records would duplicate information already publicly available. The records that FMC identified as public, however, were not the same as the requested records. FMC also claimed that NRDC had a commercial interest in the documents because it was involved in a coalition with unions and others in advocating for provisions of the Clean Trucks Programs, including for an "employee mandate." That mandate, which would require truck drivers authorized to enter the ports to be employees of the trucking companies rather than independent contractors, was part of a broader goal to reduce the emissions from trucks at the ports. Nonetheless, FMC's letter stated that the requested records appeared to be "intended primarily to advocate the commercial or financial interests" of NRDC's coalition partners rather than NRDC's environmental goals and that therefore "NRDC has a commercial interest that outweighs any public interest" in the records.

In May 2009, Public Citizen filed suit on NRDC's behalf. After summary judgment motions were fully briefed, FMC agreed to waive the fees and produced the records.<sup>21</sup>

(b) AILA's request (see Example 2, above) concerning complaints against immigration judges also illustrates improper agency action with respect to requests for a fee waiver. The agency wrongly denied a public interest fee waiver request, failed to timely respond to an administrative appeal of the denial, and suggested one year after litigation commenced—after the government had released thousands of pages of records—that the government might still attempt to charge AILA fees.<sup>22</sup>

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<sup>20</sup> See 5 U.S.C. § 552(a)(4)(A)(viii).

<sup>21</sup> The complaint in *NRDC v. FMC*, No. 09-0935, is available at <http://cms.citizen.org/documents/NRDCvFMCComplaint.pdf>.

<sup>22</sup> Materials related to this request are available at <http://www.citizen.org/litigation/forms/cases/getlinkforcase.cfm?cID=827>.

Specifically, AILA submitted a six-page FOIA request, more than half of which was devoted to a request for a public interest fee waiver. The request addressed in detail each factor identified by the agency as relevant to the public interest fee waiver inquiry, but the agency denied the waiver request without explanation. In December 2012, AILA submitted an eight-page administrative appeal and 188 pages of supporting exhibits. In June 2013, more than five months after filing its administrative appeal and having not received any response, AILA filed suit, at which time the agency began producing more than 16,000 pages of records, without requesting fees or moving for summary judgment on the fee-related claim.

In July 2014, during the course of briefing on summary judgment, the agency suggested in its opposition to our summary judgment motion that it might attempt to assess fees after-the-fact—despite failing to meet FOIA’s time limits in responding to the requester’s administrative appeal, and despite an agency regulation (28 C.F.R. § 16.11(e)) that precludes an assessment of fees at that point.

(c) In 2014, numerous news reports discussed the possibility that a design defect in the ET-Plus guardrail end terminal was responsible for many highway deaths and injuries. In November 2014, Advocates for Highway and Auto Safety (Advocates) sent a FOIA request to the Federal Highway Administration seeking records regarding ET-Plus (FOIA No. HSST/2015-0061). Advocates requested six categories of documents, including three categories regarding communications among agency employees and between the agency and the manufacturer of ET-Plus.

Citing the importance of ET-Plus safety to the public and Advocates’ extensive activities as a non-profit organization that specifically focuses on vehicle and highway safety issues and disseminates related information to the public, the media, Congress, and other organizations, Advocates requested a public-interest fee waiver. The agency granted the waiver for three categories of information, but it denied the fee waiver for categories related to employee communications on the basis that it was not clear how the materials would contribute to the public’s understanding of federal government operations. The agency stated that the fee for searching for and copying responsive records for those categories would be \$9,250.

Advocates appealed the denial, explaining that the requested information directly relates to how a federal agency performed its oversight duties relating to a lethal piece of highway equipment. In February 2015, the agency denied the appeal.<sup>23</sup>

(d) In 2011, we provided assistance to the Center for Auto Safety regarding a FOIA request to the National Highway Traffic Safety Administration (NHTSA). The Center filed its request to obtain information about NHTSA’s agreements with states for the sharing of police accident reports. The agency failed to respond within FOIA’s statutory time limit, but it then sent the Center a letter denying the Center’s fee waiver request and estimating that the Center would owe \$250 in search fees. The agency indicated that it would take no further action on the request until the Center agreed to pay the estimated fees and that, if the Center did not agree, the agency would close the request. *Id.* Only after the Center filed an administrative appeal did the agency

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<sup>23</sup> Materials related to this request are available at <http://www.citizen.org/documents/advocates-FHWA-foia-fee-waiver-denial.pdf>.

concede that it would not charge search fees due to “the tardiness of NHTSA’s initial FOIA reply.”<sup>24</sup>

### **Example 15 – Another barrier: FDA’s “minor deletions policy”**

The FDA’s so-called “minor deletions policy” is a barrier, perhaps unique to FDA, that imposes an extra step, not authorized by statute, in the FOIA process. More than two decades ago, the U.S. General Accounting Office (now, the Government Accountability Office) concluded that this FDA policy runs counter to FOIA and urged the agency to rescind it. In September 2012, Public Citizen filed a citizen petition with FDA seeking revocation of the policy. Seventeen organizations concerned with open government filed a comment supporting that change. Yet two and a half years later, FDA has not provided Public Citizen with a substantive response to the petition.<sup>25</sup>

Specifically, under 21 C.F.R. § 20.49(d), FDA does not consider “minor deletions” from otherwise disclosable records to constitute a partial denial of a FOIA request. Instead, in a cover letter accompanying records with redactions that FDA deems to be “minor deletions,” the agency states that the release is only a “preliminary determination” and that the requester must advise the FDA within 30 days (by letter sent by mail, although the rest of the FDA FOIA process can be done by email) whether the requester wants the FDA to reconsider this preliminary determination. The FDA does not at this point advise the requester of a right to an immediate administrative appeal. Rather, under this policy, the requester may receive a formal denial of the request and notice of appeal rights only after asking the FDA for reconsideration. If after reconsideration the agency still withholds the information, it then issues a denial letter that advises the requester of the right to appeal. A requester who does not send a letter asking for reconsideration is never apprised of the right to appeal the withholding. Based on Public Citizen’s experience as a frequent FDA FOIA requester and discussions with FDA, Public Citizen believes that FDA heavily utilizes the policy.

The “minor deletions policy” violates FOIA. Under 5 U.S.C. § 552(a)(6)(A)(i), an agency must determine whether to comply with a request within twenty working days and notify the requester of a right to appeal an adverse determination. Nowhere does FOIA’s scheme suggest an exception under which redactions from responsive records—so long as they are “minor”—do not constitute a partial denial and, thus, do not trigger an immediate right to administrative appeal. Moreover, FOIA does not countenance “preliminary determination” letters for “minor deletions” that add a layer of agency “reconsideration” before a requester has a right to administrative appeal. And nothing in the text of the statute allows an agency to close an otherwise proper request after releasing only a portion of requested records without first making a final determination whether or not to release the rest.

It is important also to mention that “minor deletions policy” is a misnomer. We have seen the FDA withhold whole pages of material and significant portions of responsive records under this policy.

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<sup>24</sup> Documents related to this request are available at <http://www.citizen.org/documents/cas-foia-and-response.pdf>.

<sup>25</sup> The petition and supporting appendices, along with all other materials in the administrative docket, are available at <http://www.regulations.gov/#!docketDetail;dct=FR+PR+N+O+SR;rpp=10;po=0;D=FDA-2012-P-1007>.

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The examples above illustrate some of the problems we have identified with agency processing of FOIA requests. We see an anti-disclosure approach in stark contrast to the pro-disclosure policy of FOIA. We appreciate the Committee looking into this important issue and inviting our input.

Sincerely,

A handwritten signature in blue ink that reads "Robert Weissman". The signature is fluid and cursive, with "Robert" on top and "Weissman" below it.

Robert Weissman  
President  
Public Citizen, Inc. and  
Public Citizen Foundation, Inc.