



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

February 3, 2014

Jessica Azulay  
Alliance for a Green Economy (AGREE)  
2013 E. Genesee St.  
Syracuse, NY 13210

IN RESPONSE REFER TO  
FOIA/PA-2014-0006A  
(FOIA/PA-2014-00078)

Dear Ms. Azulay:

On behalf of the U.S. Nuclear Regulatory Commission (NRC), I am responding to your letter, received December 13, 2013, in which you appealed the agency's December 6, 2013 decision related to your December 5, 2013, Freedom of Information Act/Privacy Act (FOIA/PA) request (FOIA/PA-2014-0078). You appealed the denial of your request for a fee waiver. The NRC addresses fee waiver requests under the pertinent NRC regulation (Section 9.41, "Requests for Waiver or Reduction of Fees," of Title 10, "Energy," of the *Code of Federal Regulations* (10 CFR 9.41)), which implements the FOIA fee waiver standard (5 U.S.C. 552(a)(4)(A)(iii)).

Acting on your appeal, I have carefully reviewed the record in the case and have determined that the result of the initial administrative determination was correct because not all elements necessary for obtaining a fee waiver have been met. Therefore, your appeal is denied.

The enclosure identifies the administrative record of the case. Document 1 contains your initial request, including your request for a fee waiver. Document 2 includes the administrative denial of your request for a fee waiver, which was based on your responses to the eight factors listed in the NRC's regulations at 10 CFR 9.41(b)—each of which requesters are required to address when seeking a fee waiver from the NRC. The NRC assesses the information a requester provides regarding these eight factors to determine whether to grant a fee waiver request under the criteria set forth at 10 CFR 9.41(d). Document 3 includes your appeal and your argument in favor of reversing the agency's denial of your fee waiver request.

In the present case, the initial request sought a fee waiver and provided arguments within Document 1 addressing the eight factors listed at 10 CFR 9.41(b).<sup>1</sup> At the administrative level, the original request was found not to have provided sufficient basis with respect to 10 CFR 9.41(b)(3) and (b)(8) to support granting a fee waiver. These two factors are at issue in the present administrative appeal.

The first requirement at issue, 9.41(b)(3), is that a fee waiver requester must provide the requester's qualifications for using the information for the intended use specified in the request.

<sup>1</sup> As a preliminary matter, the requester initially provided only conclusory statements in response to 10 CFR 9.41(b)(8), which asks fee waiver requesters to "[d]escribe any commercial or private interest the requester or any other party has in the agency records sought." We note that conclusory allegations are insufficient to support a fee waiver request. See *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003). See also *Sierra Club Legal Defense Fund v. Bibles*, 34 F.3d 1073 (Table), 1994 WL 465881, 1 (9<sup>th</sup> Cir. 1994).

In conjunction with the information provided in response to 9.41(b)(2), this information helps the NRC determine if disclosing the requested information to the particular requester who is seeking it would contribute significantly to the public's understanding of the governmental operations or activities involved.<sup>2</sup> The original request indicated that the requester, and other entities, would examine the records obtained. However, the experience of other co-petitioners was provided, and the explanation then diverged and explained again the use to which the records would be put. No information was provided explaining the experience and qualifications of the actual requester to whom the records would be provided. Accordingly, the original request did not support a finding that releasing the requested information to the requester would contribute significantly to the public's understanding of the issues involved—a finding that would be necessary to support a fee waiver.<sup>3</sup>

For the first time on appeal, the requester provides significant additional information, including the requester's experience in research on nuclear economics and the NRC's financial qualifications regulations. The requester also indicates that they regularly speak as an expert at public events, at NRC hearings, and to media organizations, and that the requester's expert staff is qualified with decades of experience regarding nuclear regulatory issues.

In sum, while the original appeal did not satisfy the qualifications requirements under 10 CFR 9.41(b)(3), the appeal did provide additional information to supplement the original request's position, and the appeal provided sufficient specifics to allow the NRC to determine that disclosure of the requested documents to this particular requester would likely contribute significantly to the public's understanding of the issues involved.

The denial decision at the administrative level also identified deficiencies in the information the requester provided in response to 9.41(b)(8), which requires the requester to identify any commercial or private interests that the requester or any other party has in the requested records.

Regarding the requester's interests in the matter, the original request that the requester submitted specified that the requester is specifically seeking information related to their petition. The requester also specified that "the requested information pertains to our petition and will help facilitate a better understanding of how the agency has dealt with our petition." In the appeal, the requester argued again that Alliance for a Green Economy is a not-for-profit entity. The requester also argued that furthering the mission of a nonprofit organization should not be considered a commercial interest. Even assuming that relying, without a more substantial basis, on Alliance for a Green Economy's status as a "public interest advoca(te)" is appropriate, we must first reach the issue of whether the requester has a commercial interest and, if so, whether the public interest in disclosure outweighs it.

The threshold question of whether or not Alliance for a Green Economy has a commercial interest can be determined by examining the established case law. First, we know that while nonprofit organizations and public interest groups often are capable of disseminating information, they do not presumptively qualify for a fee waiver. Rather, they must, like any

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<sup>2</sup> See McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1286 (9<sup>th</sup> Cir. 1987) (observing, in affirming an agency's denial of a fee waiver request and holding that the contribution to public understanding would not be significant, that "the request gives no indication of the requesters' ability to understand and process [the] information").

<sup>3</sup> See 10 CFR 9.41(d)(2).

requester, meet the statutory requirements for a full waiver of all fees<sup>4</sup>. As to whether a nonprofit organization or public interest group is pursuing a commercial interest, "commercial interest" in this context is defined as whether the records will further the commercial, trade, or profit interest as those terms are commonly understood.<sup>5</sup> Further, nonprofit organizations, when pursuing their public interest advocacy, have a commercial interest in the records that further that organization's objective.<sup>6</sup> Public advocacy in the field of nuclear financial regulatory issues is not only a trade, but, as argued on appeal, is claimed to be the very expertise of the requester, with decades of practicing, arguing, and presenting on that topic.

In the present case, the requester certainly has an interest in the furtherance of the petition it filed, and the records were acknowledged to be intended to be put to that use. The requester argued on appeal, however, that "when the mission of an organization is public information and public interest advocacy . . . it will inevitably further the mission of the organization to gain access to and publicly disseminate information related to the topics that the organization works on." The distinction in the present case, however, can be made in an analysis of the use to which the records will be put. The requester is not a representative of the news media, so the use to which the records will be put is central in how the public will gain a furthered understanding, and how that interest is weighed against the commercial interests of the organization.

The requester indicates, in their initial request, that they would release the information to the public, to elected officials, and to the media. The requester also indicates that they will add the information to the public record being built around nuclear finances.

However, the requester also indicated, in the first phrase of its purpose for the records being sought, that it is "a co-petitioner in a 2.206 petition concerning Entergy's financial qualifications... and will help facilitate a better understanding of how the agency has dealt with our petition itself," and it later indicates, in the first phrase of the qualifications fee waiver factor, that, "Alliance for a Green Economy will work with the other co-petitioners in the 2.206 process to use this information." Lastly, in the explanation of the intent to extract and analyze the information, the requester indicates that it will "thoroughly read every document for information related to our petition." From the original request, the primary purpose appears to be the advancement of the requester's petition, as well as to thereby gain an advantage for itself and its co-petitioners, rather than the primary objective of informing the public. No mention is made of which public record will be enhanced through disclosure, or to what media entity the records would be sent or how the media will receive the records.

In the present case, because the requester did not establish that disclosing the commercial interest of the requester is outweighed by the public interest in disclosure, a total fee waiver is not proper. In the present case, the search for the records will primarily benefit the commercial interest of the requester. However, there remains a public interest in disclosure, as indicated in the appeal language of the requester, and if the requester does ultimately distribute the records to the media and add them to the public record, that public interest will be furthered. Because there is a public interest in the disclosure generally, and the records themselves will significantly

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<sup>4</sup> See Forest Guardians v. DOI, 416 F.3d 1173, 1178 (10<sup>th</sup> Cir. 2005).

<sup>5</sup> See OMB Fee Guidelines, 52 Fed. Reg. at 10,017-18.

<sup>6</sup> See, e.g., VoteHemp v. DEA, 237 F. Supp. 2d 55, 65 (D.D.C. 2002); See also, Critical Mass Energy Project v. NRC, 830 F.2d 278, 281 (D.C. Cir. 1987), (finding that an entity's "nonprofit" status is not determinative of commercial status).

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further that interest, a partial waiver (or reduction of the fee) is appropriate<sup>7</sup>. The cost of searching for the records, however, should be borne by the requester whose primary interest is served by the disclosure, after the first 2 free hours of search under 10 CFR 9.39(b). I conclude that denial of the fee waiver request was the correct result as to the search costs, but reverse the administrative decision in part with respect to the denial of the waiver of duplication costs, and remand for processing consistent with this opinion.

This is the NRC's final decision. As set forth in the FOIA (5 U.S.C. 552(a)(4)(B)), judicial review of this decision is available in a district court of the United States in the district in which you reside or have your principal place of business. Judicial review can also be had in the district in which the agency's records are situated or in the District of Columbia.

As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a nonexclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. You may contact OGIS in any of the following ways:

Office of Government Information Services  
National Archives and Records Administration  
Room 2510  
8601 Adelphi Road  
College Park, MD 20740-6001  
E-mail: [ogis@nara.gov](mailto:ogis@nara.gov)  
Telephone: 301-837-1996  
Facsimile: 301-837-0348  
Toll-free: 1-877-684-6448

Sincerely,



Darren B. Ash  
Deputy Executive Director  
for Corporate Management  
Office of the Executive Director for Operations

Enclosure:  
As stated

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<sup>7</sup> See 10 C.F.R. § 9.41(d).