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

February 5, 2020

IN RESPONSE REFER TO
NRC-2020-000111 (NRC-2020-000056)
NRC-2020-000110 (NRC-2020-000008)
NRC-2020-000109 (NRC-2020-000060)
NRC-2020-000108 (NRC-2020-000086)
NRC-2020-000107 (NRC-2020-000085)
NRC-2020-000106 (NRC-2020-000057)
NRC-2020-000105 (NRC-2020-000059)
NRC-2020-000104 (NRC-2020-000058)
NRC-2020-000103 (NRC-2020-000024)
NRC-2020-000102 (NRC-2020-000023)

Donn C. Meindertsma, Esq.
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Washington, D.C. 20036

Dear Mr. Meindertsma:

On behalf of the U.S. Nuclear Regulatory Commission (NRC), I am responding to your letter dated January 7, 2020, in which you appealed the agency's December 23, 2019, denial of your omnibus fee waiver request in the above-referenced FOIA requests.

Acting on your appeal, I have considered the matter, and determined that, for the reasons set forth below, the FOIA Officer's fee waiver denial was appropriate. Accordingly, your appeal is denied.

The FOIA provides for a fee waiver or reduction "if disclosure of the 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 is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). As reflected in the NRC's regulations, the FOIA fee waiver standard requires the requester to show not only that disclosure is of significant public interest but also that the requester's commercial interest in disclosure is less than the public interest in disclosure. 10 C.F.R. § 9.41(d). You have not satisfied your burden under this standard.

Regarding benefit to the public, your position, essentially, is that the statutory public interest standard is met here because disclosure will result in more information being made available to the public than if the information were not disclosed. But that is likely to be true for most agency records released in response to a FOIA request. The fact that the public will potentially have access to additional information through a FOIA response, in and of itself, does not demonstrate that there is a *significant* public benefit and interest in disclosure of the NRC Office of Investigation (OI) information you have requested, beyond what the NRC already makes available to the public. In point of fact, the NRC already makes available a wealth of information

intended to educate the public about the NRC's operations and activities in the enforcement area. These include, for example:

The NRC's Enforcement Policy:
https://www.nrc.gov/about-nrc/regulatory/enforcement/enforce-pol.html

The NRC's Enforcement Manual:
https://www.nrc.gov/about-nrc/regulatory/enforcement/guidance.html#manual

NRC Public Website (link) to Significant Enforcement Actions:
https://www.nrc.gov/reading-rm/doc-collections/enforcement/actions/

The NRC's application of its enforcement standards is necessarily case-specific. Despite your claim that the released records "will clarify the operations and activities of the agency in this field," you have not demonstrated that there would be a significant increase in public understanding to be gained through fact-specific reports when the NRC already makes public an abundance of information about its enforcement program. Two of the ten FOIA requests for which you request a fee waiver involve substantiated discrimination allegations. I strongly disagree with your claims that NRC does not sufficiently make public its rationale for taking enforcement action in *substantiated* cases of discrimination. In substantiated cases, the NRC routinely publishes notices of violation and orders that contain the rationale and bases for its decision.

In contrast, unsubstantiated discrimination allegations by their nature do not result in any kind of public order against the licensee, because the allegation was not substantiated by the NRC. For these types of allegations, you fail to demonstrate how public access to the case-specific facts underlying OI's investigations will significantly increase the public's understanding of the NRC's enforcement process beyond the existing publicly available information about the NRC's investigation and enforcement program. Nor have you demonstrated that there is significant public interest in cases finding no discrimination. You have not, for example, pointed to any other agencies that routinely employ the substantial resources necessary to redact and publish their findings in unsubstantiated enforcement cases. Indeed, the fact that federal agencies generally publish details only for substantiated cases reflects that there is far more public interest in substantiated enforcement cases.

Moreover, you have not shown that you will "disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.'" *Cause of Action v. FTC*, 799 F.3d 1108, 1116 (D.C. Cir. 2015) (citation omitted). While you state several times that your OI-report analyses will be available to anyone who wants to see them, you fail to give a sense of the audience. For example, the primary audience for the analyses could be the relatively narrow group of lawyers who represent clients before the NRC. The D.C. Circuit has held that "[f]ee-waiver applicants must support their claims with 'reasonable specificity.'" *Id.* (citation omitted.) Here, however, you say simply that there will be "no anticipated limitation" on the "size and nature of the public"—you give no indication of the size of the audience. While you claim that "all individuals and entities subject to the jurisdiction of the NRC" will benefit from release of the OI reports, this is a vague statement, and it does not give a sense of how many individuals or entities will actually be interested in the subject. Again, the interested audience may largely consist of lawyers who routinely represent clients before the NRC, in which case the audience can hardly be considered "reasonably broad." Furthermore, you do not provide any information regarding how much traffic your firm's website currently receives, who regularly visits the site, or how broad the audience for the information posted on your firm's website is likely to be.

You also have not demonstrated why disclosure of the requested OI reports would not be primarily in your commercial interest or that of your law firm—or, put another way, why your commercial interest in disclosure is less than the public interest in disclosure. In your request, you essentially disclaim having any commercial interest whatsoever in obtaining the requested information. You instead state simply that you have a "general and genuine interest in understanding the operations and activities of the NRC" with "no remuneration or private profit . . . expected to be derived from [your firm's] analysis [of disclosed information] or its publication." Likewise, in your appeal letter, you vigorously take issue with the FOIA Office's statement that the records may aid your firm in representing and attracting clients. You state that "we have no reason to believe we will receive any income or monetary benefit as a result of our review, analysis, and public disclosure of the requested records."

Your disclaimers significantly overlook your own commercial interest in disclosure. The fact that you will provide information for free on your firm's public website and that you are not requesting the records on behalf of any specific client is not sufficient to demonstrate that you lack a commercial interest in obtaining the information. You acknowledge that you have "substantial experience . . . in NRC discrimination and enforcement activity." Given that the OI reports relate directly to an area of your legal practice, it stands to reason that you and your law firm will benefit from the disclosures. For example, the disclosures may allow you to better represent clients before the NRC, and they could perhaps help you better decide which individuals to take on as clients. In addition, while you state that you will analyze the OI reports and post these analyses for free on your website, you overlook that these summaries could provide a marketing benefit by directing individuals to a law firm that, upon visiting your firm's website, they will find has "substantial experience" in the same field in which they are interested.

In sum, while you claim that a fee waiver will benefit the public because the release of OI reports will provide "enhanced public understanding" of the NRC's discrimination regulations, it is reasonable to conclude that you will *particularly* benefit from the disclosures, because you derive income from representing individuals who are subject to enforcement actions under those regulations. As the requester, you have the burden of showing that your commercial interest is less than the public interest in disclosure. I fail to see how you have carried that burden here.

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

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) 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. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740
Email: ogis@nara.gov
Telephone: 202-741-5770
Toll-free: 1-877-684-6448
Fax: 202-741-5769

Sincerely,

David J. Nelson
Chief Information Officer
Office of the Chief Information Officer