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Via Electronic Mail & Certified Mail Return Receipt Requested

June 11, 2015

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Re: FOIA Request On Behalf of Concerned Citizens of the Yakama Reservation & Friends of Toppenish Creek, FOIA Case No. 15-090

Dear Shirina,

This letter concerns a FOIA request that I submitted on behalf of Friends of Toppenish Creek and Concerned Citizens of the Yakama Reservation that was received by your agency on May 6, 2015. The same day, I received an email from Eris Pinto asking for my business address so he could send me an acknowledgment letter. I responded to Mr. Pinto the same day, providing my address. Also on May 6, I also had another telephone call with a different Indian Health Service employee requesting the attachment that I omitted to send with my original request, which I subsequently provided to Mr. Pinto and the other employee I spoke with on the telephone.

On June 4, 2015, twenty business days after I submitted my original FOIA request, I sent another letter informing your agency that you had failed to meet the 20-day response deadline set by FOIA, as well as 45 C.F.R. § 5.35(b)(1), which states that decisions whether to release records will be made "within 10 working days after your request reaches the appropriate FOI office." 45 C.F.R. § 5.35(b)(1). I asked that the agency provide me with the records requested within five business days of the date of the letter, or June 11. On June 4, Mr. Eris Pinto, Indian Health Service Office Automation Clerk sent me an email stating "pardon me for the wait I am sending over the acknowledgement letter right away."

On or about June 8, I received a certified letter from Janet Ingersoll, Freedom of Information Staff providing me with an “interim response to acknowledge receipt” of my FOIA request. For reasons unknown, this letter is dated May 6, 2015 even though it was not mailed to me until June 5, 2015. Yet again, the Indian Health Service has failed to comply with the mandates of FOIA and its own regulations. Your regulations plainly state that “we will decide whether to release records within 10 working days after your request reaches the appropriate FOI office, as identified in § 5.31 of this part.” 45 C.F.R. § 5.35(b)(1). My FOIA request reached the appropriate office on May 6, 2015, which is now twenty-four business days ago, yet you have not stated whether or not you will release the records requested, let alone when the records will be produced.

Furthermore, you incorrectly categorize the type of requester for purposes of duplication, search and review time. This request is being submitted on behalf of two non-profit, community organizations, Friends of Toppenish Creek and Concerned Citizens of the Yakama Reservation (“Requesters”). We requested a waiver of fees in our original FOIA request but you have never responded to that fee waiver request. We interpret your decision to assign our FOIA request to Category I, Commercial Use Requester, as a denial of our request for a fee waiver. We hereby appeal that incorrect and illegal decision for the reasons below. Notwithstanding the fact that Requesters’ initial fee waiver information was more than sufficient to qualify under FOIA, the Requesters provide supplemental documentation that can leave no question but that they have satisfied every applicable criteria for a fee waiver under FOIA.

IHS’s determination that Requesters are not entitled to a fee waiver is contrary to law. In enacting FOIA, Congress was “principally interested in opening administrative processes to the scrutiny of the press and public.” *Renegotiation Bd. v. Bannercrest Clothing Co.*, 415 U.S. 1, 17 (1974). To further this policy, FOIA now requires that documents must be provided without charge or at a reduced charge “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); 45 C.F.R. § 5.45.

In 1974, FOIA was amended to require that “documents shall be furnished without charge or a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public” 5 U.S.C. § 552(a)(4)(A) (1974), *amended by* 5 U.S.C. § 552(a)(4)(A)(iii) (1986). The original fee waiver provision was intended to ensure that “fees should not be used for the purposes of discouraging requests for information or as obstacles to disclosure or requested information.” S. Rep. No. 93-1200, 93d Cong., 2d Sess., at 7-8, *reprinted in* 1974 U.S. Code Cong. & Ad. News, 6267, 6287 (1974).

In 1986, Congress underscored its commitment to public access of agency information by again amending the fee waiver provision “to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers . . . under the FOIA.” 132 Cong. Rec. S16496

(daily ed. Oct. 15, 1986) (Sen. Leahy); *see also* 132 Cong. Rec. H9464 (Reps. English and Kindness) (amendments “specifically intended to make it easier for more requesters . . . to qualify for fee waivers.”). A review of the Act’s legislative history demonstrates that the amended fee waiver language contained in the 1986 FOIA amendments was designed “to be liberally construed in favor of waivers for noncommercial requesters.” 132 Cong. Rec. S14298 (Sen. Leahy); *see also McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987); *Ettlinger v. FBI*, 596 F.Supp. 867, 872-74 (D.C.Mass., 1984); S. Rep. No. 854, 93d Cong., 2d Sess. 12 (1974) (same). Congress thus “explicitly recognized the importance and the difficulty of access to governmental documents for such typically under-funded organizations and individuals when it enacted the “public benefit” test for FOIA fee waivers.” *Better Gov't Ass'n v. Department of State*, 708 F.2d 86, 94 (D.C. Cir. 1986). The “legislative history of the fee waiver provision indicates special solicitude for . . . public interest groups (among others).” *National Treasury Employees Union v. Griffin*, 811 F.2d at 649 (citations omitted). “Congress explicitly recognized the importance and the difficulty of access to governmental documents for under-funded organizations and individuals.” *Coalition for Safe Power v. U.S. Dep't of Energy*, Civ. No. 87-1380PA, slip op. at 7 (D.Or. July 22, 1988) (*citing Better Gov't Ass'n v. Department of State*, 708 F.2d at 94).

FOIA's fee waiver provision was expanded to facilitate access to agency records by citizen “watchdog” organizations, such as Requesters, that utilize FOIA and other laws to monitor and mount challenges to governmental activities. *See Better Gov't Ass'n v. Department of State*, 708 F.2d at 88-89 (fee waiver intended to benefit public interest watchdogs); *National Treasury Employees Union v. Griffin*, 811 F.2d 644, 649 (D.C. Cir. 1987) (same); *Ettlinger v. FBI*, 596 F.Supp. at 873 (same). 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. . . .

This 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,” in a clear reference to requests from journalists, scholars and, *most importantly for our purposes, nonprofit public interest groups.*

Better Gov't Ass'n, 780 F.2d at 93-94 (quoting *Ettlinger*, 596 F.Supp. at 872) (citations omitted) (emphasis added).

The public interest test is not intended to be a difficult one to satisfy. The Ninth Circuit has held a requester meets the public interest standard when “they identified why they wanted the

[requested information], what they intended to do with it, to whom they planned on distributing it. . .” *Friends of the Coast Fork v. BLM*, 110 F.3d 53, 55 (9th Cir.1997).

As described in great detail in the original FOIA request, the Requesters are all non-profit environmental education, advocacy and “watchdog” organizations. The Requesters have filed this FOIA request in order to fulfill their respective missions, as set forth in the original FOIA request and below. Specifically, the information requested will provide the Requesters with data and scientific information gathered regarding contamination of drinking water wells on the Yakama Indian Reservation. This kind of information should not be withheld from the public, given the grave consequences associated with drinking contaminated water.

The request falls squarely within the exception for 45 C.F.R. § 5.45(b). That exception creates a four-part test. Requesters unquestionably meet each of those four parts.

First the “subject of the request” deals with the “operation or activities of the government” because it concerns scientific data and information that was collected by or on behalf of the federal government. Requesters are concerned that the Indian Health Service has gathered information that indicates that there are toxins that have caused, and continue to cause water quality violations of the Clean Water Act, Safe Drinking Water Act among other federal, state and tribal statutes. Requesters are not able to ascertain whether the Indian Health Service, Bureau of Indian Affairs, EPA or other agencies are properly exercising their own investigation and enforcement authority against potential violations of drinking water contamination unless their FOIA request is fulfilled. Requesters believe that Concentrated Animal Feeding Operations (CAFOs) located within the boundaries of the Yakama Indian Reservation, and outside the boundaries as well, are causing and contributing to widespread drinking water contamination throughout the Reservation. Requesters are not able to ascertain whether these CAFOs are operating in a manner that is consistent with the law unless they are able to review the data that has been requested. In addition, the information requested will provide data and information regarding the extent of water pollution emanating from CAFOs on the Yakama Indian Reservation and whether there is a need for Reservation residents to obtain alternative sources of drinking water.

Second, Requesters also seek information that will clearly be “likely to contribute to” an understanding of government operations or activities.” The requested information will be meaningfully informative to the public’s understanding of the extent and scope of Indian Health Service’s investigation of drinking water contamination on the Yakama Indian Reservation.

The request also meets the third prong of the exception: the information will contribute to the public’s understanding of [the extent of Indian Health Service’s efforts to monitor drinking water wells on the Yakama Indian Reservation]. Both of the Requesters’ missions include the public dissemination of important information about government activities to enforce federal and state laws that protect public health, the environment, and the rights of citizens to be aware of the quality

of the water that they are consuming. The outreach and public education activities of the Requesters includes dissemination of information they obtain through FOIA requests and other means.

As described in great detail in the original FOIA request, Friends of Toppenish Creek (FOTC) is an all-volunteer, nonprofit, community organization that works through agency advocacy, legislative advocacy, public outreach and collaboration. FOTC's volunteers are ably equipped to analyze relevant data produced in response to a FOIA request and then disseminate it to a larger public through public outreach, conferences, and agency advocacy. FOTC also regularly works with and provides information procured via FOIA and state public disclosure requests to federal, state and local governmental decision-makers thereby assisting policy making. FOTC also has used information procured from FOIA and state public disclosure requests in its publications, newsletters, press releases, and conferences consistent with FOTC's advocacy programs. FOTC has no financial interest in the requested information and will not use the information for financial gain.

The Concerned Citizens of the Yakama Reservation (CCYR) is an all-volunteer, non-profit grassroots organization based in Washington State that is composed of concerned community members. Its mission is to inform Washington State residents, specifically residents of the Yakama Indian Reservation about activities that endanger the health, welfare, and quality of life for current and future Reservation residents through education and citizen empowerment. CCYR's organizational purposes to protect the environment, natural resources, and quality of life on behalf of the Reservation residents are adversely affected by the pollution of drinking water that can be and has been linked to CAFOs. These violations have caused significant environmental contamination of the soil and groundwater that the Reservation residents depend upon for their livelihood. CCYR is actively engaged and equipped to inform citizens of the health risks that can be caused by operations like CAFOs. CCYR has no financial interest in the requested information and will not use the information for financial gain.

The information described above speaks to the large scope of public information dissemination undertaken by the Requesters in fulfilling their respective missions. In sum, the public information dissemination activities include, but are not limited to public outreach, conferences, citizen communication, agency and tribal government advocacy, administrative oversight, intervention, judicial review and enforcement, and distribution of information through publications, newsletters, press releases, and conferences.

Fourth, the information requested that will be disseminated by the Requesters will contribute *significantly* to public understanding of government operations or activities. First, the mere dissemination of the information obtained in the manners described above will accomplish this goal in and of itself. By virtue of the Requesters' distribution of the information, the public will be able to ascertain the extent and scope of Indian Health Service's investigation of drinking water contamination on the Yakama Indian Reservation. The public will also be able to learn about the scope and extent of pollution that comes from CAFOs, and what, if anything, their government is

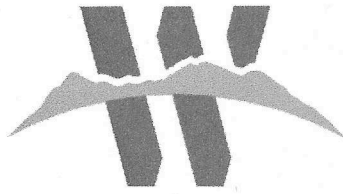
doing about it. Finally, the public will be able to learn whether Indian Health Service is engaged in addressing the drinking water contamination problem. The EPA has raised the alarm that pollution from CAFOs can constitute a threat to public drinking water sources and human health in the Yakima area. Is there a similar concern on the Yakama Indian Reservation? Only the Indian Health Service is in possession of scientific information and data that can shed light on this problem and the Reservation community is entitled to that information. In light of the EPA's actions in Lower Yakima Valley, it is completely unjustified for the Indian Health Service to now claim that the public dissemination of scientific information and data on drinking water contamination on the Yakama Indian Reservation is not likely to contribute significantly to public understanding of government operations or activities. The public has a right to this information and it is fully within the missions and capabilities of the Requesters to disseminate this information.

It is important to note that Requesters' volunteer staff are highly trained and qualified in interpreting the information requested from the Indian Health Service. Not only do the requesters have a proven ability to disseminate the information to a broad public audience, they also have a proven ability to digest the kind of information requested and communicate the information in a way that makes sense to the public.

In short, the Indian Health Service erred in categorizing Requesters as "Commercial Use Requesters." Not only did the Indian Health Service fail to respond to Requesters' original fee waiver request, there is absolutely no basis for classifying non-profit, all-volunteer community organizations as "commercial users." For the reasons stated above, the information Requesters seek more than meets each of the four prongs of 45 C.F.R. § 5.45 that warrants fee waivers.

Requesters would like to provide more information to refute the Indian Health Service's fee waiver denial, but it is difficult to know what additional information to provide since the Indian Health Service provided absolutely no reasons supporting the determination that the Requesters are "commercial users." The Requesters have more than met their burden under the law. They have identified why they want the information, what they intend to do with it and to whom they plan on distributing the information. *Friends of the Coast Fork v. U.S. Dept. of Interior*, 110 F.3d 53, 55 (9th Cir. 1997). However, the Indian Health Service has not met its burden to show the Requesters why their fee waiver request was deficient. *Friends of the Coast Fork*, 110 F.3d at 55 ("the government's denial letter must be reasonably calculated to put the requester on notice as to the deficiencies in the Requesters' case."). The Indian Health Service provided no reasons whatsoever and therefore a "full fee waiver is in order." *Id.* The information provided above, in addition to the information in the original FOIA request provides a sufficient basis to justify a fee waiver under FOIA.

At this time, my clients are not exercising their legal option under the FOIA to file suit to compel compliance with the time limits of the FOIA, even though they are within their legal rights to do so given Indian Health Service's continued violation of the FOIA and its own regulations. The information that we have requested relates directly to the immediate public health threat that



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Yakama reservation residents are facing due to nitrate-contaminated drinking water and thus time is of the essence in responding to this request. Please be advised that we will file a lawsuit against the Indian Health Service in Federal District Court for failure to provide a timely determination on this FOIA request unless this office receives an actual determination within five business days of today's date. Please let me know if you have any questions and we look forward to your response.

Sincerely,

A handwritten signature in black ink that reads "Andrea K. Rodgers". The signature is fluid and cursive.

Andrea K. Rodgers
On Behalf of CCYR & FOTC
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cc: Clients