



November 14, 2014

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U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of the Chief Information Officer
High Performance Computing and Communications
NOAA Freedom of Information Officer
Public Reference Facility (SOU1000)
1315 East-West Highway (SSMC3)
Room 9719
Silver Spring, Maryland 20910

Attn: Mr. Gerald Fox
Mr. Bruce Gibbs
Ms. Wendy Schumacher

Re: FOIA Request No. DOC-NOAA-2014-001694
Tranche/Cache of Clearly and Obviously Identified NOAA Files

Dear Mr. Fox:

The nonprofit Institute for Trade, Standards and Sustainable Development (“ITSSD”) is in receipt of the apparently draft undated, unsigned and letterhead-free draft correspondence entitled, “DOC-NOAA-2014-001694 - Fee Letter 11 12 2014.doc” that you dispatched to ITSSD on Wednesday, November 12, 2014.

This draft correspondence was apparently sent as a follow-up to the November 7, 2014 email dispatched by Bruce Gibbs of NOAA-OCIO that expressed gratitude for ITSSD’s simplification of the above-referenced FOIA request.

To recall, said simplification had been prompted by NOAA-OCIO’s adverse fee waiver determination, dated October 10, 2014, which had concluded, without explanation (and which we submit, was without foundation) that ITSSD’s “fee waiver justification was insufficient in detail to enable me to grant [its] fee waiver request. [...] NOAA is still without the clarity and information required to grant you a fee waiver.”

ITSSD subsequently spoke with OCIO official Bruce Gibbs by telephone on October 21, 2014, during which it was agreed that ITSSD would simplify the above-referenced FOIA request by separating the files for which disclosure was sought into two distinct tranches/caches. In exchange therefor, Bruce Gibbs agreed that NOAA-OCIO would expeditiously and in good faith endeavor to fulfill that request.

ITSSD confirmed this agreement by dispatching to NOAA-OCIO a letter correspondence dated, October 27, 2014, which provided a list of files comprising the first of these two tranches/caches of FOIA request files. The first tranche/cache “consist[s] of those documents in said FOIA request that already provide clear and obvious identification of documents for which immediate uncensored disclosure is sought.” In particular, the “clear and obviously identified” files, which pertain to ten (10) listed NOAA-developed scientific assessments (p. 2), consist of those files that include and focus on the following publicly unavailable information:

1. Selection criteria and identities of each member of five (5) listed NOAA-established federal advisory committees involved with the development and/or peer review of five (5) of the ten (10) listed NOAA-developed scientific assessments (p. 3);
2. Six (6) contracts issued by NOAA (*or* on NOAA’s behalf) commissioning the National Research Council/National Academy of Sciences to undertake the peer review of seven (7) of the ten (10) listed NOAA-developed scientific assessments (p. 4);
3. Three (3) contracts issued by NOAA (alone or jointly with another federal agency) commissioning the National Research Council/National Academy of Sciences to develop three new climate science-related reports (p. 4);
4. Thirty-nine (39) grant contracts/awards identified by alpha-numeric reference NOAA had issued to seventeen (17) universities and nonprofit institutes during 2004-2010 (pp. 5-6); *and*
5. One (1) or more unidentified grant contract(s)/award(s) NOAA issued to Oregon State University’s Cooperative Institute for Oceanographic Satellite Studies (CIOSS) during said period (p. 6).

You also may recall that ITSSD’s October 27 correspondence indicated how, following NOAA-OCIO’s expedited delivery of the first tranche/cache of documents in fulfillment of the segmented/simplified FOIA request, ITSSD would work collaboratively with your offices to better identify the second tranche/cache of documents for which ITSSD’s FOIA request has sought disclosure which is currently identified by subject matter and issue.

It is ITSSD’s understanding, in light of the October 21 ITSSD-Bruce Gibbs phone discussion, ITSSD’s October 27 letter correspondence, Bruce Gibb’s November 7 email correspondence, and your undated, unsigned and letterhead-free draft November 12 correspondence, that NOAA has accepted and construed the modified/simplified contents of ITSSD’s FOIA request as effectively bifurcating said FOIA Request and tolling the original 30 calendar day period for appealing NOAA-OCIO’s adverse fee waiver determination. Such treatment is appreciated considering how said fee waiver determination warrants an ITSSD response tailored to reflect only the first tranche/cache of files contained within the ‘as-modified/simplified’ FOIA request.

ITSSD plans, thereafter, to identify the second tranche/cache of documents its FOIA request currently describes by subject matter and issue, and to respond simultaneously to NOAA-OCIO's fee waiver determination in a similarly tailored manner.

Please note that, consistent with NOAA-OCIO's tolling of the 30-day calendar period for filing an appeal, ITSSD reserves all of its rights under the FOIA statute and applicable NOAA FOIA fee regulations to appeal any subsequent NOAA-OCIO adverse fee waiver determination issued in response these filings.

Moreover ITSSD wishes to draw your attention to the most recent FOIA fee estimate. We must admit surprise having received from NOAA-OCIO a \$4,000 fee estimate to perform a search for the limited number of "clearly and obviously identified" files described above and listed in ITSSD's October 27 letter correspondence, after NOAA-OCIO had previously provided an initial fee estimate of \$7,500 to conduct a search for ALL files identified in the *entire* FOIA request. How is this possible?

ITSSD trusts that NOAA-OCIO and other NOAA offices/lines are fully aware of their obligation under 15 C.F.R. 4.11(b)(8) to "ensure that searches are done in the most efficient and least expensive manner reasonably possible." Nevertheless, to become "fully informed" about and to confirm NOAA-OCIO's projected efficiency and the accuracy and reasonableness of its estimates, ITSSD requests an itemized breakdown of each of these estimated costs, consistent with 15 C.F.R. 4.11(c)(2), (c)(3)(i)-(ii), and (c)(4), and as subject to the limitations imposed by 15 C.F.R. 4.11(d)(1)-(3). In addition, ITSSD requests an explanation of why NOAA-OCIO would even need to impose a fee for duplication when all files are likely available in digital format.

When providing an itemized breakdown for each of these estimates, NOAA-OCIO should address the following factors, computations and costs:

- the manual and computer (electronic) record search times estimated at the prescribed applicable rates for each estimated prescribed time increment, for each said search;
- the actual salary rates of each type of personnel (clerical, professional, managerial, etc.) who would be involved in the proposed document search, multiplied by the number of each such personnel anticipated to work on each said search;
- the anticipated direct and indirect search costs and times for each said search; *and*
- the duplications costs for each said search, apart from the above costs.

Lastly, ITSSD would appreciate your identifying what provision(s) in NOAA's FOIA fee regulations authorized: 1) Wendy Schumacher, in her October 10, 2014 fee waiver determination, to state that, "If payment is not received by October 31, 2014, your FOIA request will be considered 'closed;'" and 2) you, in your November 12, 2014 undated, unsigned and letterhead-free draft correspondence, to state that, "If payment or other communication is not received by November 28, 2014, your FOIA request will be considered 'closed.'"

We of course responded by letter correspondence dated October 27, 2014 to Ms. Schumacher's fee waiver determination, and by this letter, have responded before November 28, 2014; but we have done so voluntarily and not because we believe or believed NOAA possesses the authority to deem our FOIA request as "closed" if we had not met these arbitrarily imposed deadlines. In this regard, ITSSD notes that, "an agency may not impose any additional requirements on a requester beyond those prescribed in its regulations."¹

ITSSD looks forward to receiving your informative and prompt response.

Very truly yours,

Lawrence A. Kogan

Lawrence A. Kogan
CEO
ITSSD

¹ See United States Department of Justice, *Freedom of Information Act Guide* (May 2004), available at: http://www.justice.gov/oip/procereq.htm#N_79, quoting *Zemansky v. EPA*, 767 F.2d 569, 574 (9th Cir. 1985).