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September 21, 2020

Via email FOIAAppeal@usps.gov

Thomas J. Marshall

General Counsel and Executive Vice President

U.S. Postal Service

475 L'Enfant Plaza SW

Washington, DC 20260

Re.: FOIA Case No. 2020-FPRO-01682

Dear Mr. Marshall:

This is an appeal under the Freedom of Information Act ("FOIA") of the U.S. Postal Service's ("USPS") August 24, 2020 denial of the request for a waiver of fees associated with the above-captioned requests as well as an appeal of the estimated fees associated with retrieving, reviewing and producing the requested records. A copy of the August 24, 2020 denial of request for a fee waiver is attached hereto as Exhibit "A".

The FOIA was submitted on August 16, 2020 and requested:

1. Records from the office of the Postmaster General, the Executive Leadership Team, and the USPS Board of Governors, since May 6, 2020, concerning the following topics:
 - (a) The removal or decommissioning of sorting machines from any USPS facility; and
 - (b) The removal or decommissioning of USPS mailboxes from any location.

2. Records reflecting communications by and between the White House and the Office of the Postmaster General, since May 6, 2020, concerning the handling of ballots by mail.

USPS referred the request to the Postmaster General and CEO, the Board of Governors, and the Information Catalog Program (“ICP”).

On September 2, 2020, the Senior Government Information Specialist responding to this FOIA request on behalf of the ICP, as related to records from the USPS Executive Leadership Team, estimated that the cost to process the FOIA request would exceed **\$57,179.06**. A copy of the September 2, 2020 correspondence containing the cost estimate is attached hereto as Exhibit “B”.

On September 9, 2020, the Executive Administrator to the Postmaster General estimated that the costs to process the FOIA request from that office would exceed **\$3,402.00**. A copy of the September 9, 2020 correspondence containing the cost estimate is attached hereto as Exhibit “C”.

As of the date of this appeal, the Board of Governors has not provided its estimate of the costs associated with responding to the request.

For reasons more fully stated below, the denial of the fee waiver request was an error that should be reversed. Apart from simply listing the factors for a fee waiver, USPS’s denial failed to offer any substantive justification in support of its conclusion that the petitioner failed to qualify for a fee waiver.

Under FOIA, fees must be waived or reduced 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). The burden is on the requester to show that the fee-waiver request satisfies the statutory requirements and that the request was made “with reasonable specificity and based on more than conclusory allegations.” *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (internal citations and quotations marks omitted). These fees, however, should “not be used as an obstacle to disclosure of requested information.” *Long v. Dep’t of Homeland Sec.*, 113 F. Supp. 3d 100, 103 (D.D.C. 2015) (quoting *Eudey v. CIA*, 478 F. Supp. 1175, 1177 (D.D.C. 1979)). Fee-waiver requests, accordingly, are liberally construed in favor of the requester. *See Nat’l Sec. Counselors v. DOJ*, 848 F.3d 467, 473 (D.C. Cir. 2017); *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Educ.*, 593 F. Supp. 2d 261, 268 (D.D.C. 2009).

To guide agencies in their determinations as to whether the requester has met the burden, the new fee waiver test provides a two-pronged analysis. One prong demands that the requester not have a commercial interest in the disclosure of the information sought. [] The other prong of the test requires that the disclosure of the information be “likely to contribute significantly to public understanding of the operations or activities of the government.”

Larson v. C.I.A., 843 F.2d 1481, 1483 (D.C. Cir. 1988) (citing 5 U.S.C. § 552(a)(4)(A)(iii) and *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir.1987)).

In its September 2, 2020 fee estimate, the USPS has acknowledged that there is no commercial interest in obtaining the requested information. (“We consider that you are within the category of ‘other requesters’ as defined by Postal Service FOIA fee regulations. This category applies to requesters who ***are not commercial use requesters...***” Ex. B, p. 1 (emphasis added).) Therefore, the first prong of this test is satisfied, leaving the second prong to be dispositive of whether the requester qualifies for a fee waiver.

In order for a request to meet the “public understanding” requirement, it must fulfill four criteria: “(1) the request must concern the operations or activities of government; (2) the disclosure must be ‘likely to contribute’ to an understanding of government operations or activities; (3) disclosure must contribute to an understanding of the subject by the public at large; and (4) disclosure must be likely to contribute significantly to such public understanding.” *Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1126 (D.C. Cir. 2004) (citing 28 C.F.R. § 16.11(k)(2), now codified in 28 C.F.R. § 16.10(k)(2)). The request at issue meets each and every one of these elements.

(1) The requester’s FOIA obviously has the operations or activities of the government as its subject. The request asks for records concerning the decommissioning of sorting machines and mailboxes from USPS facilities following the appointment of the current Postmaster General, as well as communications by and between the current Postmaster General and the White House on the subject of mailed ballots. The requested records would provide insight into the USPS’s decision-making process regarding the removal of sorting machines and mailboxes; and it involves communications between the USPS and the White House.

(2) The FOIA request at issue seeks information with high potential for contribution to public understanding. Courts have found that information has more of this potential for contribution to public understanding to the degree that it is new and supports the public’s oversight of agency operations. *McClellan*, 835 F.2d 1286

(9th Cir. 1987). In this case, the request is specifically limited to records created *after* May 6, 2020, implicating only newly created records. The requested information will likely contribute to public understanding because the records could inform citizens of the reasons for the removal or decommissioning of high-speed sorting machines and mailboxes in the months preceding the 2020 general election. The information would further inform the public of whether these actions were politically motivated, and whether the USPS satisfied its internal policies, guidelines, and regulations prior to decommissioning the sorters and mailboxes.

(3) Requester also satisfies the third element of the public interest test because it can demonstrate that the requested information would increase understanding of the public at large. 16 C.F.R. §4.8(e)(2)(i)(C). “To show the requested information would increase understanding of the public at large, Plaintiff must demonstrate ‘in detailed and non-conclusory terms,’ that it has the intent and ability to effectively convey the information to a broad segment of the public...” *Cause of Action v. Fed. Trade Comm’n*, 961 F. Supp. 2d 142, 157 (D.D.C. 2013). “Although requestors are not required to explain their dissemination plan with ‘pointless specificity’ to satisfy this element, they must identify several methods of disseminating the information and provide some concrete basis upon which the agency can conclude that those methods are adequate to convey the requested information to a wide audience.” *Id.*, 961 F. Supp. 2d at 157 (citing *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C.Cir.2003)).

The requester is a civil rights attorney who issued the request in response to well-documented public outrage, and, more specifically, a plea on social media by noted bestselling author Don Winslow (www.don-winslow.com) for records that could shed light on USPS’ decision to decommission sorters and mailboxes. Mr. Winslow, who has written 21 novels and published numerous short stories in anthologies and magazines, has committed to helping the requester digest and disseminate the records that are produced in response to this FOIA. More recently, Mr. Winslow has created and published videos in a better attempt to inform the public about perceived abuses of power, particularly by government officials. Mr. Winslow has earned 450,000 followers on Twitter (@donwinslow) and each of his videos received more than 2 million views after publication.

The requester, working with Mr. Winslow, will review any produced records and make pertinent ones available to the public both through links through Mr. Winslow’s widely viewed social media accounts and videos. The requester also intends to use press releases to further disseminate critical information contained in the records to the public. Through these methods, it is anticipated that requester,

working with Mr. Winslow, will reach in excess of 2 million members of the public who have engaged on this issue.

After being advised of the estimated fees, requester posted about it on his Twitter account (@garenmeguerian), where the posts received over a million impressions and 250,000 engagements. Requester was asked to start a GoFundMe (www.gofundme.com/f/usps-foia-fundraiser) to raise funds to pay for records in the event that this appeal was unsuccessful. In a relatively short period of time, 232 donors contributed to the GoFundMe¹, including several journalists, each of whom has expressed an interest in being kept apprised of any developments in this matter. Any records obtained through this FOIA will also be shared with the individuals who contributed through the GoFundMe portal.

Requester, particularly through the engagement of Mr. Winslow in this request, has shown that the information will be widely disseminated and that the requested information would increase understanding of the public at large.

(4) The fourth element is also satisfied since requester can show the information will contribute significantly to public understanding. “To show that information will contribute significantly to public understanding, Plaintiff must demonstrate that the requested information has not met a threshold level of public availability.” *Id.* (citing *Campbell v. U.S. Dep’t of Justice*, 164 F.3d 20, 36 (D.C.Cir.1998)). “When the requested information is not publicly available, it will more likely contribute significantly to public understanding.” *Id.* (citation omitted). Although it has been reported that the House Oversight Committee has issued subpoenas for similar records sought by this FOIA, to date, the public has no information pertaining to these records. Therefore, the requested information, although in the significant public interest, is not yet in the public domain. Production of these records would most certainly contribute to public understanding.

For the reasons set forth above, we respectfully request reconsideration of the decision denying the fee waiver request.

Sincerely,

/s

Garen Meguerian

- c. Brenda L. Rahe (via email)
- Emily Saunders (via email)

¹ In the even that this appeal is successful, the donations will be returned in full.