



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
131 5 East-West Highway
Silver Spring, Maryland 20810
THE DIRECTOR

FEB 23 2010

Ms. Elizabeth Mitchell
Association for Professional Observers (APO)
P.O. Box 933
Eugene, OR 97440

RE: FOIA Request # 2010-00126

Dear Ms. Mitchell:

This letter is in response to the Association for Professional Observer's (APO) Freedom of Information Act (FOIA) request # 2010-00126 dated December 25, 2009, and received by our office on January 5, 2010. APO specifically requested written guidelines and/or rules given to the staff of each National Marine Fisheries Service (NMFS) Observer Program and the National Observer Program (NOP) with regard to public access to fisheries observer data and information.

On January 26, 2010 NMFSINOP held a conference call with APO to clarify issues associated with APO's request. APO originally requested records created prior to 1990. During this conference call, APO agreed to narrow the request to records created during the following timeframes: 1990 - 2006; and 2007 to the present.

You requested that all fees associated with processing this request be waived. In order to determine whether this request qualifies for a fee waiver or reduction in fees, pursuant to 5 C.F.R. § 4.11 (k) (2010), we must evaluate whether disclosure of the requested information is: 1) in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government, and 2) not primarily in the commercial interest of the requester.

In determining whether your request meets the first fee waiver requirement, we considered the following factors:

1. Whether the subject of the requested records concerns the operations of activities of the Government.
2. Whether the disclosure is "likely to contribute" to an understanding of Government operations or activities.
3. Whether disclosure of the requested information will contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester.
4. Whether the disclosure is likely to contribute "significantly" to public understanding of Government operations or activities.

In determining whether your request meets the second fee waiver requirement, we considered the following factors:



1. Whether the requester has a commercial interest that would be furthered by the requested disclosure.
2. Whether any identified commercial interest of the requester is sufficiently great, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."

Based on the above criteria, NMFS has determined that a partial fee waiver is warranted for APO's request. NMFS will waive fees associated with processing APO's request for records that concern NMFS' current guidelines and/or rules that concern public access to fisheries observer data and information. These materials include the NAO 216-100 (which is available at http://www.corporateservices.noaa.gov/~ames/NAOs/Chap___216/naos_216_100.html) and guidance memos sent to staff pertaining to new observer data confidentiality requirements under the Magnuson Stevens Reauthorization Act (2006).

NMFS has determined that a fee waiver is not warranted for historical records prior to the Magnuson Stevens Reauthorization Act that concern guidelines and/or rules for public access to fisheries observer data and information. The APO has not demonstrated that these records would contribute to the understanding of a reasonably broad audience of persons interested in the subject. Furthermore, APO has not demonstrated how historical records would contribute significantly to public understanding of NMFS' policies for public access to fisheries observer data and information.

Under 15 C.F.R. § 4.11(a) (2010), the National Marine Fisheries Service shall charge for processing requests under the FOIA based on the requester's classification and amount of the cost associated with responding to the request. Under 15 C.F.R. § 4.11(c)(1)(iv) (2010), the APO falls under the "All Other Requesters" Category. Your chargeable fees for this FOIA are: search and duplication (excluding the cost of the first 2 hours of search and 100 pages).

The fee estimate for historical guidelines and/or rules given to the staff of each NMFS Observer Program and the NOP with regard to public access to fisheries observer data and information is as follows:

Search:	\$4,155.85
Duplication:	\$ <u>376.80</u>
TOTAL	\$4,532.65

Pursuant to 15 C.F.R. § 4.11(e) (2010), because the cost to process your request exceeds \$250, we need your agreement to pay fees before we proceed. Please make your check or money order payable to the "Treasury of the United States" and send your payment and your signed copy of this letter to:

*National Oceanic and Atmospheric Administration
Public Reference Facility (OFA56)
1315 East West Highway (SSMC3)
Room 10730
Silver Spring, Maryland 20910*

Please note that in compliance with our FOIA regulations, the 20-business-day time frame for completing your request is tolled pending our receipt of the completed enclosed fee agreement. Once your agreement is received, our office will process your FOIA request.

If we do not receive your reply within 30 days, we will assume you do not wish to proceed and will administratively close your request. If you have any questions concerning this process, please contact Chris Rilling, National Observer Program Manager, at 301 713-2363 x171.

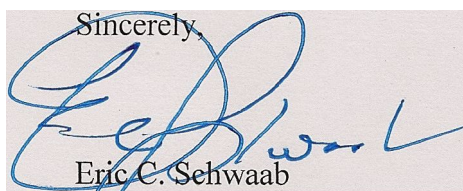
Under 15 C.F.R. § 4.10(a) (2010), you have the right to appeal this denial determination. The Assistant General Counsel for Administration must receive your appeal within **30 calendar days** of the date of the initial denial letter. Address and send your appeal to the following office:

Assistant General Counsel for Administration
U.S. Department of Commerce
Room 5875
14th and Constitution Avenue, NW
Washington, DC 20230

You may also send your appeal by-mail to FOIAAppeals@doc.gov or by facsimile (fax) to **(202) 482-2552**. The appeal must include a copy of the original request, the response to the request, and a statement of the reasons why withheld records should be made available and why denial of the records was in error. The submission (including e-mail and fax submissions) is not complete without the required enclosures. The appeal, the envelope, the e-mail subject line, and the fax cover sheet should be clearly marked "Freedom of Information Act Appeal." The e-mail, fax machine, and Office of the General Counsel are monitored only on working days during normal business hours (8:30 a.m. to 5:00 p.m., Eastern Time, Monday through Friday). FOIA appeals posted to the e-mail box, or sent to the fax machine, or received by the Office of General Counsel after normal business hours will be deemed received on the next normal business day.

If you have any questions regarding this request, please contact Chris Rilling at 301 713.2363 x171.

Sincerely,



Eric C. Schwaab
Assistant Administrator
for Fisheries

Enclosure

Responsive Documents to FOIA #2010-00126

- 1) Memo on Observer Information pursuant to FOIA
- 2) Memo on Data Aggregation and Summarization Guidelines

1)

Original Message -----

Subject: Release of Observer Information pursuant to FOIA

Date: Fri, 14 Mar 2008 13:45:58 -0400

From: Samuel Rauch <Samuel.Rauch@noaa.gov>

To: _NMFS All - RDs SDs ODs Deputies Secretaries

<NMFS.All.DirectorsDeputiesSec@noaa.gov>, Carrie Selberg

<carrie.selberg@noaa.gov>, Lisa Desfosse <Lisa.Desfosse@noaa.gov>, Tonya

Woods <Tonya.Woods@noaa.gov>, Brian Brown *FIMB*

<Brian.Brown@noaa.gov>, Becky Rootes <Becky.Rootes@noaa.gov>, Diana

Avery <Diana.Avery@noaa.gov>

To: All ForA Coordinators and Observer Program Managers:

NMFS has received several FOIA requests for observer information since passage of the Magnuson Stevens Reauthorization Act (MSRA). MSRA section 402(b) (2) states that any observer information shall be confidential and shall not be disclosed, except in accordance with the requirements of subparagraphs (A) through (H) of paragraph (1), or subparagraphs (A) through (C) of section 402(b) (2).

NMFS is currently developing national standards for aggregation of confidential information that will assist in responding to these ForA requests. Until these national standards are approved, if you identify a need to release observer information for any reason, even in aggregate form, please contact Dr. Lisa Desfosse, Acting Deputy Director, Office of Science and Technology, at (301) 713-2367.

2)

Subject:

Data Aggregation and Summarization Guidelines

From:

Ned Cyr <Ned.Cyr@noaa.gov>

Date:

Thu, 02 Jul 2009 17:15:56 -0400

To:

_NMFS Science Directors <NMFS.Science.Directors@noaa.gov>, _NMFS Regional

Admins <NMFS.Regional.Admins@noaa.gov>, _NMFS HQ Office Directors

<NMFS.HQ.Office.Directors@noaa.gov>, _NMFS Deputy Directors

<NMFS.Deputy.Directors@noaa.gov>, Samuel Rauch <Samuel.Rauch@noaa.gov>,

Steve Murawski <Steve.Murawski@noaa.gov>

CC:

Steve Koplín <Steve.Koplín@noaa.gov>, Samantha Brooke

<Samantha.Brooke@noaa.gov>, David Detlor <David.Detlor@noaa.gov>

NMFS Science Directors, Regional Administrators and Office Directors,

Further to my message of June 24, 2009 on this subject which was subsequently retracted. Please use the guidelines below.

The Magnuson-Stevens Fishery Conservation and Management Act requires NMFS to maintain the confidentiality of any information submitted in compliance with the Act and any observer information. The Act does, however, authorize the release of confidential information in aggregate or summary form that does not directly or indirectly disclose the identity or business of any person.

NOAA General Counsel, Fisheries (GCF) presented three legally defensible options for the release of confidential information in aggregate or summary form to the Leadership Council at its May 2009 meeting in Silver Spring. The Leadership Council recommended moving forward with completing the rulemaking and revisions to NAO 216-100 using the option consistent with the methodology developed by the Fishery Dependant Data Collection Working Group's Data Aggregation Standards. This email outlines data aggregation and summarization techniques consistent with the recommended option that may be used by NMFS staff as guidelines until revisions and review of the NAO are complete.

1. Information from at least three participants in the fishery must be aggregated/summarized at a temporal and spatial level to protect not only the identity of a person or a business, but also any business information.

* Specific business information is not releasable. Business information must be aggregated even if it would not directly or indirectly reveal the identity of a business or person.

* Business information is defined as "any operational or financial, or economic information about any corporation, partnership, association or other entity."

* Operational information includes fishing locations, landings, gear, time of fishing, or similar information relevant to commercial fishing.

2. Information on takes of protected species:

* NMFS will presume that the release of the following information associated with incidental takes of marine mammals or ESA-listed species will not disclose the identity or business of any person:

- o the name and description of the fishery;
- o the species of each marine mammal or ESA-listed species incidentally killed or injured;
- o the date, time, and geographic location of the take; and
- o non-proprietary information regarding gear used in the take.

* This presumption applies only if the following information thresholds are satisfied.

- o For information associated with the take of an ESA-listed species, there must be at least three participants in the relevant fishery.
- o For information associated with the take of a marine mammal, there must be at least three participants in the fishery under the most recent MMPA List of Fisheries.

NOTE: For ESA biological opinions, information that does not qualify for release under the above process must be placed in the privileged section of the administrative record for the biological opinion.

3. Any office within NMFS may use confidential information for fisheries conservation and management, but may not release this information to the public without aggregating or summarizing as described in (1&2).

Questions on data aggregation and summarization may be directed to Keith Hagg (GCF), Jason Forman (GCF), Steven Koplín (ST), and Samantha Brooke (ST/National Observer Program).

Ned Cyr
Director, Office of Science and Technology