



## **FREEDOM OF INFORMATION ACT APPEAL**

June 5, 2012

Assistant General Counsel for Administration (Office)  
Room 5898-C  
U.S. Department of Commerce  
14th Street and Constitution Avenue, N.W.  
Washington, D.C. 20230

**BY ELECTRONIC MAIL–** [FOIAAppeals@doc.gov](mailto:FOIAAppeals@doc.gov)

**RE: Appeal of Initial “No Records” Determination, Freedom of  
Information Act Request NOAA Reference FOIA No. 2012-00333**

Dear NOAA AGC for Administration,

I write to appeal the National Oceanic and Atmospheric Administration’s (NOAA) initial determination dated June 5, 2012 denying the Competitive Enterprise Institute’s (CEI) Request for information by refusing to provide identified documents responsive to our Freedom of Information Act (FOIA) Request of May 4, 2012, NOAA Reference # FOIA No. 2012-00333 (attached and to be considered Exhibit 1; a copy of the initial determination is attached and should be considered Exhibit 2).

By citing the existence identified records, but asserting that all are “personal” and therefore there are no responsive agency records, NOAA provides a “no records” response pursuant to 15 CFR Part §4.7(b).

### **I. Jurisdictional Statement**

The underlying FOIA was properly filed under 5 U.S.C. 552 (West 2010). Pursuant to 15 CFR Part §4.10 you have jurisdiction “If a request for records is initially denied, in whole or in part...or if a requester receives an adverse initial determination regarding any other matter under this subpart (as described in §4.7(b))”, provided certain procedural requirements are met.

Although “NOAA did identify documents” described in our Request, it denied production of them by denying these are agency records, stating instead, “However, they are personal records.” (Ex. 2, p. 1).

This constitutes a “no records response” or otherwise “an adverse initial determination regarding any other matter”, giving you jurisdiction over this Appeal.

## **II. Proceedings Below**

On May 4, 2012, pursuant to the Freedom of Information Act, 5 U.S.C. 552 *et seq.*, the Competitive Enterprise Institute filed a Request with the National Oceanic and Atmospheric Administration, seeking electronic mail produced, held, sent or received by six individual NOAA employees (Mr. Thomas Karl, Dr. Thomas J. Bogdan, Dr. Wassila Thiaw, Ahsha N. Tribble, Dr. Richard D. Rosen, Dr. Louis W. Uccellini), “using official resources in the work-related American Meteorological Society (AMS) Information Statement on Climate Change.”

On June 5, 2012, CEI received NOAA’s response, stating in pertinent part:

NOAA has no records responsive to your request. NOAA did identify documents related to the American Meteorological Society Information Statement on Climate Change. However, they are personal records.

## **III. NOAA’s Denial of Responsive Documents Should Be Reversed**

### **a. NOAA is Inappropriately Withholding Responsive Documents**

NOAA did not expressly dispute our assertion that such records represent “using official resources in the work-related American Meteorological Society (AMS) Information Statement on Climate Change”, but instead flatly declares that all records identified in response to this Request are “personal”. This implies a NOAA position that they are therefore not agency records, that is, that AMS-related activities conducted on agency resources are not in fact work-related as we posit and as the facts suggest. NOAA’s position does not withstand scrutiny, for reasons including the following.

The AMS-related records NOAA identified but withholds under its initial determination are on NOAA’s computer system because the employees chose to use NOAA’s system for this sort of work; the employees did so for the reason that the below also manifests as being true: they considered AMS-related correspondence to be work-related correspondence. They so considered this correspondence as such because NOAA considers it to be such, as we believe an examination of the records cited, *infra*, affirms.

Factors for the employees' obvious belief include that NOAA says of AMS, "The American Meteorological Society is a cooperating organization" with NOAA (<http://www.erh.noaa.gov/aly/NROW/nrow11.htm>, <http://www.erh.noaa.gov/aly/NROW/nrow12.htm>, <http://www.erh.noaa.gov/aly/NROW/nrow13.htm>). Why is this noteworthy and indeed how can this be so while NOAA professionals' AMS-related work is not related to their NOAA work?

It is related, of course. We also see NOAA publication of the "BAMS State of the Climate Report" (see, e.g., <http://www.ncdc.noaa.gov/bams-state-of-the-climate/>). Also, NOAA and AMS co-sponsor each other's events (see, e.g., <http://www.cpc.ncep.noaa.gov/products/outreach/CDPW36.shtml>). NOAA professionals' work on AMS-related matters is plainly work-related, and the identified records are agency records.

We suggest that a review of certain other records in NOAA's possession would further confirm that NOAA clearly considers and encourages these activities as being work-related. For example, for a NOAA official to sign a ruling on appeal upholding NOAA's initial determination, that official would thereby attest that a review of Karl's travel and reimbursement records would show *no* authorization or approval for travel to AMS-related functions as being work-related, *no* comp-time travel, and *no* reimbursement of such travel. If such authorizations, approvals or reimbursements have occurred, NOAA's initial determination must be overturned.

Having observed NOAA professionals' involvement with AMS over the years we believe the absence of any such authorizations, approvals or reimbursements is unlikely, and we note that these records, such as the CD-81 and reimbursement records and related email and memoranda are also available by FOIA to verify the accuracy of such an attestation. (See also, e.g., [http://www.wfm.noaa.gov/pdfs/comptime\\_travel.pdf](http://www.wfm.noaa.gov/pdfs/comptime_travel.pdf), and [http://hr.commerce.gov/s/groups/public/@doc/@cfoasa/@ohrm/documents/content/prod01\\_006723.pdf](http://hr.commerce.gov/s/groups/public/@doc/@cfoasa/@ohrm/documents/content/prod01_006723.pdf)).

If only for this reason, alone, NOAA should proceed with deliberation on this appeal.

The same holds true of the employees' internal performance evaluations or appraisals, not available under FOIA but available for internal processes including, we suggest, the instant matter. *If NOAA as an institution is aware that any of these employees' evaluations recognize participation in AMS activities as a positive in their job evaluation, then once again, as is the case if NOAA has reimbursed AMS-related travel or allowed AMS-related comp time, upholding the initial determination is impermissible.*

We believe it is also likely that employee performance plans (and evaluations, the latter not available under FOIA) reveal how NOAA considers and encourages these activities as being work-related, as other evidence indicates it clearly does, at least four years of

which plans NOAA has for each employee (see <http://www.wfm.noaa.gov/performancegmt/maintainepf.html>).<sup>1</sup>

More specifically, consider the first individual listed in our Request, Thomas R. Karl, who has served in senior positions with AMS including Fellow, President-elect and President, as NOAA has for some reason taken pains to promote as somehow relevant to his work for NOAA (see, e.g., <http://www.publicaffairs.noaa.gov/releases2003/feb03/noaa03r217.html>).

As we see in AMS's posted biography of Mr. Karl, here <http://www.ametsoc.org/boardpges/cwce/docs/profiles/KarlThomasR/profile.html> (captured June 6, 2012), AMS for whatever reasons also firmly views Karl's participation and service as deriving from his position at NOAA, and advertise him *as* NOAA. Notice -- as if it were possible to miss -- identification of Karl by using his NOAA business card.

As a Member, Fellow and former AMS President, is it possible that Karl's protestations went unheeded? And that his card was obtained by happenstance? Karl, like and with the encouragement of his employer NOAA, views AMS work as NOAA work-related.

It is difficult to imagine evidence being any more obvious that AMS has elevated Karl to his position because of his work and position with NOAA, and not his only other relevant work, "a brief TV/radio weather forecasting position" ("After a brief TV/radio weather forecasting position at the beginning of his career, Tom joined NOAA in 1975." <http://ametsoc.org/amsnews/bios/karl.html>). Or his honorary doctorate in humane letters.

There simply are no other reasons for his position and participation with AMS than work-related reasons. To deny this is *prima facie* arbitrary and capricious.

All of these considerations translate to assessment of the work-related nature of any AMS-related records for any of the individuals cited in the Request at issue in this Appeal, for the reason that they had similar roles on agency time, using agency resources, clearly viewed by the agency as work-related when contributing to the AMS statement.

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<sup>1</sup> For example, toward that end we note, *inter alia*, the evaluation criteria including "External Awareness: Identifies and keeps up to date on key national and international policies and economic, political, and social trends that affect the organization." Individual Development Planning (IDP), U.S. Department of Commerce, Office of Human Resources Management, Competency List Definitions, p. 13, [http://hr.commerce.gov/s/groups/public/@doc/@cfoasa/@ohrm/documents/content/dev01\\_000413.pdf](http://hr.commerce.gov/s/groups/public/@doc/@cfoasa/@ohrm/documents/content/dev01_000413.pdf).

Similarly, we note NOAA's Executive Personnel Policy Manual, "Standard of Senior Executive Excellence," including *inter alia*, "Performance requirement definitions for the levels are: ... Outstanding: ... The senior executive has exerted a major positive influence on the organization through innovative and effective management practices, procedures and program implementation, building partnerships and coalitions, being responsive to internal and external customers, ..." (p. 19, [http://hr.commerce.gov/s/groups/public/@doc/@cfoasa/@ohrm/documents/content/prod01\\_009532.pdf](http://hr.commerce.gov/s/groups/public/@doc/@cfoasa/@ohrm/documents/content/prod01_009532.pdf)).

For example, we note that NOAA touted not only Karl being honored by AMS as relevant somehow to his NOAA job, but also saw Dr. Louis Uccellini's AMS service as sufficiently work-related to issue this announcement, [http://www.noaanews.noaa.gov/stories2011/20110124\\_uccellini.html](http://www.noaanews.noaa.gov/stories2011/20110124_uccellini.html) (captured June 6, 2012). That statement also reflected the interrelationship between the two organizations:

Founded in 1919, AMS promotes the development and dissemination of information and education on the atmospheric and related oceanic and hydrologic sciences and the advancement of their professional applications. AMS has a membership of more than 14,000 professionals, professors, students and weather enthusiasts.

NOAA's National Weather Service is the primary source of weather data, forecasts and warnings for the United States and its territories. NOAA's National Weather Service operates the most advanced weather and flood warning and forecast system in the world, helping to protect lives and property and enhance the national economy.

And so on. To claim that AMS activities by NOAA professionals are not work related activities defies common sense, NOAA's own assertions, and the entirety of the record.

We also suggest, again, that a review of travel and reimbursement records cited above would affirm this, and that it is NOAA's responsibility to affirm this if it seeks to uphold the initial determination.

We could continue providing NOAA with information from its own website, all available simply by searching for "American Meteorological Society", as well as citing NOAA's own personnel, travel and reimbursement policies and forms. But the case is clear: NOAA professionals working on AMS-related activity on agency time and resources do so for the obvious reason that these activities are considered work-related.

Judicial precedent makes plain that the burden is on the agency to demonstrate the records are not properly subject to FOIA, and the agency has done no such thing. Through FOIA, Congress "sought to open agency action to the light of public scrutiny."<sup>2</sup> By so doing, Congress guaranteed access to information that may be publicly disclosed without unwarranted harm. Therefore, in FOIA cases, the burden of proof is on the agency, and all doubts must be resolved in favor of disclosure.<sup>3</sup> FOIA's golden rule is that "[a]n agency seeking to withhold information under an exemption to FOIA has the

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<sup>2</sup> *Department of Justice v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (internal citations omitted).

<sup>3</sup> See, e.g., *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 352 (1979).

burden of proving that the information falls under the claimed exemption.”<sup>4</sup> That is because the act carries “a strong presumption in favor of disclosure.”

As such, these records are agency records, subject to FOIA. They are responsive. NOAA’s initial determination is in error and should be reversed on this Appeal.

Further, while NOAA provided no indication of what was identified, we suggest the agency consider, if in fact these individuals all have AMS-related records on their emails accounts, why would that remarkable coincidence be, if not for the fact that the employees themselves believed the records to be work-related?<sup>5</sup>

#### **IV. Conclusion**

The withheld responsive records should be made available and NOAA’s denial of the records was in error.

NOAA acknowledges identifying some unspecified number of responsive documents that would be responsive if these records, which were produced or received and held on agency time and resources, are found to be agency records.

These are inescapably agency records. If they are responsive, barring some valid rationale for their withholding, which has not been provided, they must be produced. The initial decision of constructive denial should be reversed for the reasons stated above.

Respectfully submitted,

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<sup>4</sup> *GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1113 (9th Cir. 1994); see also *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir.1987). See also, *EPA v. Mink*, 410 U.S. at 93, citing to 5 U.S.C. 552(a)(3), “The burden is, of course, on the agency resisting disclosure.”

<sup>5</sup> *Local 598 v. Department of Army Corps of Engineers*, 841 F.2d 1459, 1463 (9th. Cir. 1988).