



Environmental Law Center  
American Tradition Institute

## NOTICE REGARDING EPA DENIAL OF FOIA FEE WAIVER REQUEST

October 12, 2012

National Freedom of Information Office  
U.S. EPA  
FOIA and Privacy Branch  
1200 Pennsylvania Avenue, N.W. (2822T)  
Washington, DC 20460

RE: Request Numbers: HQ-FOI-01052-12, HQ-FOI-01058-12  
(Appeal Numbers HQ-APP-00175-12, HQ-APP-00176-12)

**By Electronic Mail to [hq.foia@epa.gov](mailto:hq.foia@epa.gov)**

We are in receipt of your October 4, 2012 ruling on our appeal dated August 29, 2012, denying our appeal of EPA's failure to waive fees associated with the above-cited requests.

We remind EPA of the fact, noted in both our appeal for failure to respond substantively and for failure to provide an initial determination on our requests for fee waiver, that in addition to failing to substantively respond to our requests, generally, EPA never responded to our requests for fee waiver. Under the OPEN Government Act of 2007 ("2007 Amendments"), agencies that do not respond to requests within the statutory time period are precluded from charging search fees (or copying fees for media requesters, who are not subject to search fees).

We refer EPA to *Bensman v. Nat'l Park Serv.*, No. 10-1910, 806 F. Supp. 2d 31 (D.D.C. Aug. 10, 2011) ("To underscore Congress's belief in the importance of the statutory time limit, the 2007 Amendments declare that '[a]n agency shall not assess search fees . . . if the agency fails to comply with any time limit' of FOIA. § 552(a)(4)(A)(viii)"). EPA has already ruled on our

appeal, agreeing that it failed to respond as required (dated August 8, 2012). See also, *Lawyers Comm. for Civil Rights of the San Francisco Bay Area v. U.S. Dep't of the Treasury*, No. 07-2590, 2009, WL 2905963, 2009 U.S. Dist. LEXIS 86348 (N.D. Cal. Sept. 8, 2009)(Defendant waived its right to object to plaintiff's request for a fee waiver where it failed to respond within twenty days of the request.). *And see*, Reporters Committee for Freedom of the Press, Federal Open Government Guide, Response Times, <http://www.rcfp.org/federal-open-government-guide/federal-freedom-information-act/response-times>.

We note that in its refusal to rule in any way on our request for fee waiver EPA did not attempt to assess fees in this matter, at least until the denial of our appeal for the failure to provide an initial determination. That is admittedly one step short of assessing fees, which would on its face appear to represent an effort by EPA to circumvent FOIA as amended.

If you have any questions please do not hesitate to contact us. In the meantime, we look forward to EPA promptly producing responsive records, pursuant to the aforementioned Agency agreement with us on appeal for constructive denial of our requests, for failing to produce responsive records. Please inform us or have your program office(s) inform us of the quantity of records it is reviewing toward production on what schedule. See generally, *Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, 839 F. Supp. 2d 17, 25 (D.D.C. 2011).

Sincerely,



Christopher C. Horner, Esq.  
[chris.horner@atinstitute.org](mailto:chris.horner@atinstitute.org)  
202.262.4458 (M)