



July 26, 2002

Betty A. Lopez, National FOIA Officer
Office of Environmental Records, Privacy & FOIA Staff Office
1200 Pennsylvania Ave., N.W.
Mail Code 2822T
Washington, DC 204660

VIA CERTIFIED MAIL (RETURN RECEIPT REQUESTED)

**Re: FREEDOM OF INFORMATION ACT APPEAL,
FOIA No. HQ-RIN-01332-02**

Dear Ms. Lopez:

This is an appeal under the Freedom of Information Act. Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, I hereby appeal the constructive denial of the requested records under items 1, 2, 3, and 5 of my request. I do not appeal the denial of records under item 4. I have enclosed a copy of my request letter and the denial that I have received.

FACTS

On April 5, 2002, EWG requested documents pertaining to meetings between the Office of the Administrator's staff and Monsanto lobbyists under the Freedom of Information Act (FOIA). EWG's request was assigned the following identification number: HQ-RIN-01332-02. EWG requested the following documents from the Environmental Protection Agency (EPA) (emphasis added):

1. Dates of meetings, lists of attendees, agendas, minutes of meetings and correspondence, including letters, notes, emails, and memoranda, involving communications with EPA Administrator Christine Todd Whitman, Jessica Furey, and/or Eileen McGinnis **and representatives or lobbyists from Monsanto, Inc., Solutia, Inc., or Pharmacia, Inc. (hereinafter collectively referred to as "Monsanto")** from January 20, 2001 to the present about Anniston, Alabama.
2. Dates of meetings, agendas, lists of attendees, and minutes of meetings among Jessica Furey, Eileen McGinnis, and/ or any other official in the Office of the Administrator **and Monsanto representatives or lobbyists** from January 20, 2001 to the present about Anniston, Alabama.
3. Dates of meetings, agendas, lists of attendees, minutes of meetings, and all correspondence, including letters, notes, emails, and memoranda, concerning Deputy Administrator Linda Fisher's decision to recuse herself from considering the Anniston, Alabama consent decree from January 20, 2001 to the present.

4. All memoranda from the EPA Office of General Counsel to EPA Office of the Administrator involving meetings with Monsanto lobbyists or representatives about Anniston, Alabama from January 20, 2001 to the present.
5. All dates of meetings, lists of attendees, minutes of meetings, and correspondence, including letters, notes, emails, and memoranda, among EPA Administrator Christine Todd Whitman, Jessica Furey, Eileen McGinnis, and the Office of the Administrator about Anniston, Alabama from January 20, 2001 to the present.

See attached electronic FOIA (attached as Exhibit 1). On April 5, 2002, the EPA FOIA office denied EWG's request for a fee waiver, despite the fact that EWG had outlined why it should receive a fee waiver in three detailed single-spaced pages. See letter from EPA FOIA Officer, Cynthia Floyd-Coleman (attached as Exhibit 2). EWG immediately responded to the EPA FOIA Office to express its concerns that the denial of the fee waiver reflected an arbitrary and capricious decision before actually reviewing the FOIA request, or worse, an attempt by the Administration to delay responding to this FOIA request. See letter to EPA FOIA Officer, Cynthia Floyd-Coleman (attached as Exhibit 3). On April 9, 2002, the EPA FOIA office granted EWG's request for a fee waiver. See letter from EPA Officer, Cynthia Floyd-Coleman (attached as Exhibit 4).

On April 19, 2002, the Senate VA-HUD Committee held a hearing on the "Partial" Consent Decree with Monsanto regarding the Anniston, Alabama PCB site.

On Friday, May 3, 2002, Ms. Trina Porter of EPA's office sought an extension of the statutory 20-day FOIA response period. The response was due by May 17, 2002. Brendan DeMelle, analyst for EWG, called Ms. Porter on May 3, 2002. Ms. Porter stated that the documents would be mailed that week. *See email to Brendan DeMelle from Trina Porter (attached as Exhibit 5).* EWG was not notified of any additional delays. The public comment period to the Anniston "Partial" Consent Decree ended on June 3, 2002.

On June 26, 2002, (three weeks after the Anniston Consent Decree comments were due and three months after the initial FOIA was filed), EWG received a response to its request in a letter signed by Ray E. Spears, Deputy Chief of Staff for the Office of the Administrator. The FOIA response enclosed two records: 1) a background paper on Anniston with redacted sections and 2) a chronology of the EPA's involvement with the Anniston PCB Site that was sent to Senator Shelby and is available on his website. All other responsive documents were not disclosed because of the "deliberative process" exemption under FOIA. *See attached FOIA response from EPA's Office of the Administrator, Mr. Ray Spears (dated Jun. 18, 2002, and postmarked Jun. 20, 2002)(attached as Exhibit 6).*

On July 10, 2002, EWG sent an email to Ms. Linda Fisher's office to ask whether she recused herself from considering the Anniston consent decree and whether this troubling FOIA response meant that there were no records to reflect her refusal. EWG called Ms. Fisher's office on Thursday, July 12, 2002. Ms. Fisher's Chief of Staff Claudia McMurray left a voicemail in which she encouraged EWG to file an appeal. Ms. McMurray also stated that Ms. Fisher had a general refusal, but not a specific refusal for Anniston. She said that since the FOIA did not request a general refusal, it was not included in the request.

On July 18, 2002, Ray Spears, Deputy Chief of Staff for the Office of the EPA Administrator called EWG. He stated that he would send EWG Ms. Fisher's general refusal and would clarify whether "no records" exist to document meetings with Monsanto officials and EPA Office of Administrator staff.

Given that the Office of the Administrator has not yet released the general refusal and other requested documents, EWG appeals the denial of its request. See 40 C.F.R. § 2.114 (2002). Specifically, EWG appeals the denial of requested items # 1, 2, 3, and 5 of the FOIA. A copy of EWG's FOIA request and the agency determination that is the subject of this appeal is attached for your convenience. (Attached as Exhibit 6).

GROUND FOR APPEAL

The denial letter did not indicate an estimate of the amount of denied information, nor did it explicitly state that there were no records with respect to Requested Items # 1, 2, 3 and 5. The Department of Justice FOIA manual states:

When an agency denies an initial request in full or part, it must provide the requester with certain specific information about the action taken on the request -- including an estimate of the amount of denied information, unless doing so would undermine the protection provided by an exemption. Additionally, the Electronic FOIA Amendments require agencies to indicate the amount of information excised at the point in the record where the excision was made, whether it is "technically feasible" to do so.

U.S. Dept. of Justice, Freedom of Information Act Guide (May 2002) at 5.

The two documents that were disclosed do not involve meetings with Monsanto officials. The records provided include a background paper that Region IV EPA sent to Senator Shelby and a background paper with a redacted "background" sections. The Office of the Administrator stated that "all records" were provided. It was unclear what item the enclosed records were meant to address. Specifically, there were no documents that enclosed dates of meetings, minutes of meetings, or emails with Whitman, Furey, McGinnis, and Monsanto, Solutia,

and/or Pharmacia representatives. There were no documents that reflected dates of meetings of Jessica Furey and/or Eileen McGinnis with representatives or lobbyists from Monsanto. Yet, there was no clear indication that "no records" existed for the requested items in # 1, 2, 3, and 5. Furthermore, a general "deliberative process" exemption was claimed, but it was not clear for what requested items and what records.

I. Appeal of FOIA Denial for Requested Information in Items # 1 & 2

A. Exemption 5 does not apply because the requested records in items # 1 & 2 involve documentation of meetings between EPA and Monsanto lobbyists not inter-agency or intra-agency deliberations.

Government records that respond to items # 1 & 2 of EWG's FOIA request must be disclosed because these public documents do not involve interagency deliberative process. Where the outside party is not acting on behalf of the agency, the exemption does not apply. *See, e.g., County of Madison NY v. Dept. of Justice*, 641 F.2d 1036, 1040-42 (1st Cir. 1980). Items # 1 and 2 specifically request documents that evidence meetings held between EPA Administrator staff and Monsanto (a.k.a Solutia, Pharmacia) officials, including dates of meetings, lists of attendees, agendas, minutes of meetings and correspondence including letters, notes, e-mails, and memoranda involving communications with EPA officials and Monsanto lobbyists. None of these records seek drafts of deliberative documents or any intra-agency correspondence. In fact, the records sought should reflect meetings with a nongovernmental party and therefore would not fall under this FOIA exemption. If there were no meetings between the Office of the Administrator and Monsanto from January 20, 2001 to the present about Anniston, Alabama, EWG requests that the Agency clarify that there are "no records."

B. Given that Exemption 5 does not apply to items 1 & 2, the search for records that document meetings between the Office of the Administrator staff and Monsanto lobbyists was inadequate.

The search for documents that reflect meetings between Monsanto lobbyists and the Office of the Administrator staff was inadequate. The agency is required to conduct an adequate search for the requested records. "To prevail in a FOIA action, the agency must show that it made 'a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.'" *See National Magazine v. United States Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995)(quoting *Oglesby v. United States Dep't of the Army*, 920 F.2d 57,68 (D.C. Cir. 1990)). Furthermore, "if any agency has reason to know that certain places might well contain responsive documents, it is obligated under FOIA to search [those places] barring an undue burden." *Valencia-Lucena v. United States Coast Guard*, 180 F.3d 321,327 (D.C. Cir. 1999); *see Juda v. United States Customs Serv.*, No. 99-5333, 2000 WL 1093326, at ** 1-2 (D.C. Cir. June 19, 2000)(per curiam)(reversing grant of summary judgment where

agency "fail[ed] to pursue clear leads to other existing records"). No dates of meetings, minutes of meetings, notes, or emails of meetings were found. If, indeed, EPA's Office of the Administrator takes the position that there are no records that reflect meetings with Office of the Administrator staff and Monsanto lobbyists, EWG appeals the adequacy of the search for these requested records.

II. Appeal of FOIA Denial of Requested Information in #3

A. Because FOIA requires that the Administration broadly interpret each FOIA request, the Administration's decision not to release information about Ms. Fisher's general recusal from Monsanto matters was unlawful.

Based upon a review of the four corners of the FOIA request, Ms. Fisher's general recusal from involvement with Monsanto matters would be responsive to this request. The FOIA is "not a withholding statute but a disclosure statute . . ." S. Rep. No. 1218, 88th Cong., 2d Sess. 11 (1954), *cited in County of Madison, New York v. Dept. of Justice*, 641 F.2d 1036, 1040 (1st Cir. 1981). "The agency must be careful not to read the request so strictly that the requester is denied information the agency well knows exists in its files, albeit in a different form anticipated by the requester. To conclude otherwise would frustrate the central purpose of the [FOIA]." *Hemenway v. Hughes*, 601 F. Supp. 1002, 1005 (D.C. 1985). There were no documents enclosed that reflected any written evidence whatsoever that Ms. Linda Fisher, a former General Counsel of Monsanto and now Deputy Administrator, recused herself from considering the Consent Decree with Monsanto and EPA at the Anniston, Alabama PCB site. *But see* Mike Grunwald, "Proposed Settlement in PCB Case Denounced: Activists, State Officials Attack the Deal as a Last Minute Reprieve for Corporate Polluters," *The Washington Post* (Mar. 24, 2002)(stating that Ms. Fisher recused herself from considering the Anniston Consent Decree).

The Office of the EPA Administrator declared in its FOIA response letter: "[We are] releasing all of the records after redacting portions of the document, which are not responsive to your request." Yet, after inquiries to the Office of the Deputy Administrator, both Mr. Spears (Deputy Chief of Staff to the Administrator) and Ms. McMurray (Chief of Staff to the Deputy Administrator) informed EWG that EPA did not disclose the general recusal because EWG requested documentation regarding Ms. Fisher's recusal from the Anniston consent decree, not general Monsanto matters. Ms. McMurray stated that if EWG had asked for a general recusal, then EWG would have gotten it. Mr. Spears stated that each request is "interpreted literally," and since the request did not seek a general recusal, it was not produced.

This interpretation of FOIA is unlawful. Upon reading the four corners of the request, it is clear that a general recusal from all matters involving Monsanto would have been responsive to the request. Also, given that there is a general

recusal, it seems unlikely that there would not be a note, email, or memorandum that concerned Ms. Fisher's decision to recuse herself from considering the high-profile Anniston case. On July 18, 2002, Mr. Spears indicated that he would disclose the general recusal. EWG has not received this information. EWG appeals the FOIA denial.

B. Exemption 5 does not apply because the information requested in Question 3 seeks documentation regarding Ms. Linda Fisher's recusal from considering the Anniston Consent Decree (where Monsanto was the Potentially Responsible Party), it does not request "deliberative" documents.

The Office of the Administrator's response letter states: "Documents that were in draft form or were internal communications between program offices and agencies pertaining to Anniston, Alabama have been withheld as part of the deliberative process." Yet, according to FOIA, "mere conclusory assertion by an agency that material sought is protected by Exemption 5 is not sufficient to invoke protection from disclosure. FOIA requires that agencies bear the burden of proving their right to withhold documents." See Kristi A. Miles, *The Freedom of Information Act: Shielding Agency Deliberations from FOIA disclosure*, 57 Geo. Wash. L. Rev. 1326, 1333 (1989). Exemption 5 allows a federal agency to withhold "inter-agency or intra-agency memoranda or letters, which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552 (a)(3). For Exemption 5's deliberative process privilege to apply the information sought must 1) be antecedent to the adoption of agency policy; 2) must be a "direct part" of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." See U.S. Dep't of Justice FOIA Policy Manual. Ms. Fisher was required to recuse herself. See 5 CFR §2635.502 (stating that the standard determining whether a government employee has a conflict of interest is whether "the circumstances would case a reasonable person with knowledge of the relevant facts to question his own impartiality"). This recusal is not antecedent to agency policy, nor would it reflect part of the deliberative process on policy matters. Emails, notes, and memoranda that demonstrate or discuss the recusal would not fall under the "deliberative process" exemption.

C. Given that Exemption 5 does not apply to Request 3, the search for records that document meetings between the Office of the Administrator staff and Monsanto lobbyists was inadequate.

The search for agency records "must be reasonably calculated to uncover relevant documents." See U.S. Dep't. of Justice FOIA Policy Manual, part 23, at 10. According to EPA Office of the Administrator staff, there is not a specific recusal with respect to the Anniston Consent Decree. If the Office of the Administrator's position is that there was no email, no memoranda, no note, and no meeting that

discussed her recusal with respect to this consent decree, then EWG challenges the adequacy of the search.

III. Appeal of FOIA Denial of Requested Information in #5

A. *Exemption 5 does not apply to request number 5, because this information is not deliberative.*

FOIA's theme is one of prodisclosure -- release of requested information is mandatory unless one of the nine exemptions applies. See US Dep't of Justice, Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act iii-iv (1967). Exemption 5 allows a federal agency to withhold "inter-agency or intra-agency memoranda or letters, which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552 (a)(3). For Exemption 5's deliberative process privilege to apply the information sought must 1) be antecedent to the adoption of agency policy; 2) must be a "direct part" of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." See U.S. Dep't of Justice FOIA Policy Manual. The information requested involves communications between Administrator Whitman and her staff about the Anniston PCB site, including meetings with a nonparty governmental agency. The central purpose of this request is to determine whether meetings were held and what transpired at those meetings. Communications that reflect what transpired at meetings with a nongovernmental organization would not involve the "deliberative process", because the documents should reflect meetings with outside, non-governmental parties. If such documents were notes from meetings or a summary of meetings with an outside party, for example, such notes would not reflect a "deliberative process" or a recommendation on legal or policy matters. Minutes of meetings, lists of attendees, and notes would simply show a fact of a meeting, not open a door to the "deliberative process." Even if some of the requested documents about Anniston fell under the "deliberative process" exemption, the Administration could redact those portions that fell under the exemption.

CONCLUSION

For the foregoing reasons, EWG appeals the denial of its FOIA request.

I also include a telephone number at which I can be contacted during the hours of 9-6 -p.m. if necessary, to discuss any aspect of my appeal.

Thank you for your consideration of this appeal. I expect a response within 20 working days, as the law provides.

Sincerely,



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After August 16, 2002, EWG's address will be:

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cc: Ray E. Spears, Office of the Administrator, Deputy Chief of Staff