



March 21, 2002

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Re: Appeal – Fee Waiver Denial –
FOIA Request 2001-61

Dear Ms. Sripathy:

This responds to your letter of February 27, 2002, appealing LSC's denial of your fee waiver request accompanying your FOIA request of November 16, 2001 (LSC FOIA Reference Number 2001-61). Upon review of the record, I must deny your appeal.

Background

On November 16, 2001, you filed a FOIA request with LSC requesting public comments received and relied on by LSC in developing the revised final rule on restriction on legal assistance to aliens, 45 CFR Part 1626 (from the publication of the August 29, 1996 interim rule, and the April 27, 1997, final and interim rule) and public comments reviewed by and relied upon by the Erlenborn Commission in the development of its report of findings. In a letter dated December 27, 2001, LSC sent you a response providing documents responsive to your request. You do not appeal the substantive response to your request.

As part of the November 16, 2001, request for documents, the Brennan Center requested a fee waiver. The December 27, 2001, letter providing the response to your request also informed you that the fee waiver request was being denied. You appealed the fee waiver denial decision by letter of February 27, 2001.

Analysis

Under LSC's FOIA regulations at 45 CFR §1602.13(f), a fee waiver will be granted "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 Corporation or Federal Government and is not primarily in the commercial interest of

the requester.” In applying this standard, LSC looks to four factors related to whether disclosure is in the public interest, and, if that prong of the test is satisfied; two factors relating to whether the request is primarily in the commercial interest of the requester.

The four factors of the first prong of the fee waiver standard are: (1) whether the subject of the requested records concerns the operations of the Corporation; (2) the informative value of the documents relative to contributing to the understanding of the operations of the Corporation; (3) whether the disclosure will contribute to public understanding; and (4) whether any contribution to public understanding will be significant. 45 CFR 45 CFR §1602.13(f)(1)(i)-(iv). I will address these factors separately for the 1626 rulemaking documents and for the Erlenborn Commission documents.

As part of the rulemaking process, LSC publishes proposed (and sometimes interim) rules for comment. After consideration of the comment received, LSC publishes a final rule, the preamble to which discusses the comments received and explains LSC’s actions in adopting the final version of the rule being promulgated. As such, documents such as the comments relied upon by LSC in developing the 1997 revisions to LSC’s rule at Part 1626, appear to reflect on the operations of the Corporation, thus satisfying the first factor.

Is it doubtful, however, that disclosure of the comments is likely to contribute to an understanding of the operations of the Corporation. The content of the comments, and LSC’s response to them, is discussed at length in the preamble to the rules published. As the Corporation’s basis for its actions is thus a matter of public record in documents already publicly available, it is unclear, how disclosure of the comments will add to an understanding of LSC’s operations.

Further, even if the documents had sufficient informative value, the disclosure to the Brennan Center will not contribute to “public understanding” of the Corporation’s activities. Your original request states that the Brennan Center intends to use the information in the documents to help it participate in the ongoing Negotiated Rulemaking considering revisions to Part 1626. This is not a purpose that will contribute to public understanding of the Corporation’s operations. Although your request also mentions your capacity to further disseminate this information, you do not indicate any specific intention to do so. Moreover, your E-lert audience is only a small segment of the legal community, and an even smaller segment of the population at large. Such dissemination does not benefit the public-at-large’s understanding of the Corporation’s activities.

Finally, given the dubious nature of the informative value of the documents and the determination that the disclosure will not contribute to public understanding of the Corporation’s operations, any possible contribution to public understanding in this situation would not be “significant,” as required by the fourth factor of this prong of the test.

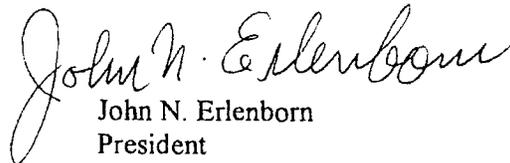
Thus, the disclosure of the 1626 documents does not satisfy the first prong of the fee waiver standard test.¹ Accordingly, a fee waiver is not justified for those documents.

Turning to the Erlenborn Commission documents, the disclosures similarly fail the public interest prong of the test. The Erlenborn Commission, although organized and financed by LSC, was an independent Commission charged with making findings of fact and developing legal analysis for consideration by LSC. The Commission had no authority to bind or direct LSC activities or operations in any way. As such, the testimony and comments considered by the Commission in carrying out its work do not directly concern Corporation operations and activities. Thus, the first factor of the public interest test is not satisfied.

Moreover, even if the documents could be said to directly concern LSC operations, the informative value of the documents is dubious at best. As with the 1626-related documents, the comments received were discussed at length in the Commission's report. The Report was published both the LSC and the Georgetown Immigration Law Journal, and is, thus, widely publicly available. In addition, as noted above, as the Commission had no authority to direct LSC activities, their disclosure is not likely to contribute to an understanding of the Corporation's operations or activities. Similarly, as the disclosures would, at best, inform a limited segment of the public, the disclosure will not contribute to public understanding, and any possible contribution would not be significant. Accordingly, a fee waiver is not justified for the Erlenborn Commission-related documents.

If you believe that this determination is in error, you may seek judicial review of this decision in an appropriate district court of the United States as provided in 5 U.S.C. §552(a)(4).

Sincerely,


John N. Erlenborn
President

¹ As the first prong of the test is not satisfied, it is not necessary for me to make a determination regarding whether the disclosure would primarily benefit the Brennan Center. However, it appears that the primary benefit of the disclosures in this case do inure to the Brennan Center in its efforts to participate in the negotiated rulemaking.