

**DISSENTING STATEMENT OF  
COMMISSIONER ROBERT M. MCDOWELL**

Re: *National Legal and Policy Center; On Request for Inspection of Records*, FOIA Control Nos. 2010-026, 2010-027, 2010-028, 2010-098, and 2010-135

I respectfully dissent from this Memorandum Opinion and Order (“Order”) because it takes an unnecessarily restrictive approach to the Freedom of Information Act (“FOIA”) fee waivers afforded under 5 U.S.C. § 552(a)(4)(A)(iii). That provision directs agencies to give certain FOIA requesters a full or partial fee waiver “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 government and is not primarily in the commercial interest of the requester.” In my view, the denial of the request by the National Law and Policy Center (“NLPC”) is not compelled by the statutory language or FCC implementing rules, 47 C.F.R. §§ 0.470(a)(2) and 0.470(e).

There is no dispute here with respect to the requester’s status as a nonprofit foundation or its history as a self-appointed government watchdog which uses its own website, among other outlets, to disseminate information to the public about government activities that the requester believes warrant public attention. The Order’s outcome turns, essentially, on a determination that the requester was not specific enough about what it expected to find or how that information, if found, would contribute to the public’s understanding of FCC operations.

This result is troubling in several respects. Not the least of these is that the Order puts the Commission in the constitutionally awkward position of deciding whether the subject of a FOIA request is one of “wide public attention” – *i.e.*, newsworthy – or not. Moreover, in an era in which the Commission itself has been at the forefront of recognizing and tracking the roiling of traditional news media business models and the rise of new sources of information, it seems inconsistent for us to continue to insist on a sharp distinction in the context of FOIA fee waivers between a “news media” requester, for whom fee waivers are practically automatic, and other requesters who fulfill the same information-dissemination function but do not fit within the traditional rubric.

I would have preferred that the Order follow the philosophy of statutory construction set forth in *Citizens for Responsibility and Ethics in Washington v. United States Dep’t of Health and Human Services*, 481 F. Supp. 2d 99 (D.D.C. 2006). Such an approach also would be in keeping with President Obama’s January 2009 directive on FOIA. *See* Executive Office of the President, “Freedom of Information Act,” 74 Fed. Reg. 4683 (Jan. 21, 2009). Although not specifically addressed to fee waivers, the Presidential Memorandum states that FOIA “should be administered with a clear presumption: In the face of doubt, openness prevails.” Construing the statute to recognize the effect of FOIA costs on nonprofit government watchdog entities would be consistent with that spirit.

I appreciate the work of the Office of the General Counsel to address my concerns. Although I could not in the end vote for the Order, I thank the OGC staff for improving upon the original draft by clarifying the standard that nonprofit requestors must satisfy in order to obtain a fee waiver.