

May 10, 2011

VIA ELECTRONIC MAIL & FACSIMILE (202-690-0068)

Ravoyne Payton
U.S. Department of Agriculture
Freedom of Information Act Officer
Room 408W, Whitten Bldg.
Washington DC 20250, Tel. 202-720-8755

RE: *Freedom of Information Act Request*

Dear Ms. Payton:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, the Environmental Working Group (EWG) requests copies of the following records¹ located within the U.S. Department of Agriculture (USDA):

1. All correspondence and communications regarding the USDA Pesticide Data Program from August 1, 2010 to the present (including, but not limited to, dates of meetings, lists of attendees, agendas, minutes of meetings, e-mails, letters, notes, memoranda, records of phone calls, cell phone call records and text messages) involving on the one hand, the USDA's Office of the Secretary and/or the Agricultural Marketing Service and its Director Rayne Pegg, and on the other hand, representatives of the United Fresh Produce Association and/or member organizations of the Alliance for Food and Farming (AFF), including, but not limited to, the California Strawberry Commission President Mark Murai (Vice Chair of the Alliance for Food and Farming); Rick Tomlinson, Director of Government Affairs for the California Strawberry Commission (former AFF board member); the California Grape and Tree Fruit League President Barry Bedwell (AFF Board member); and Western Growers Association President Tom Nasiff and Executive Vice President Matt McInerney (Chair of the AFF Board of Directors);
2. All correspondence and communications regarding the Agricultural Marketing Service's Pesticide Data Program from August 1, 2010 to the present (including, but not limited to, dates of meetings, lists of attendees, agendas, minutes of meetings, e-mails, letters, notes,

¹ For purposes of this request, "records" means information of any kind, including writings, memoranda, e-mails, text messages, letters, notes, minutes of meetings, documents, drawings, graphs, charts, photographs, electronic and magnetic recordings of meetings, records of telephone conversations, including cell phone records, and any other compilation of data from which information can be obtained.

memoranda, records of phone calls, cell phone call records and text messages) involving Secretary Vilsack's agricultural advisor Sarah Bittleman, who, upon information and belief, is a covered branch official under the Lobbying Disclosure Act, and the United Fresh Produce Association and/or any member organizations of the AFF, including but not limited to the Western Growers Association, California Strawberry Commission and the California Grape and Tree Fruit League; and

3. All correspondence and communications of the Agricultural Marketing Service or USDA employees concerning a \$180,000 federal agricultural marketing grant awarded by the California Department of Agriculture to the AFF from August 2010 to present (including, but not limited to, dates of meetings, lists of attendees, agendas, minutes of meetings, e-mails, letters, notes, memoranda, records of phone calls, cell phone call records and text messages).

EWG respectfully requests that USDA make every effort to provide the requested records within the 20-day limit required by your regulations. Responsive copies should be mailed within 20 days of receipt of this letter to:

Heather White, General Counsel
Environmental Working Group
1436 U Street NW, Suite 100
Washington, DC 20009

If you determine that portions of the records requested are exempt from disclosure, please segregate the exempt portions and mail the remaining records within the statutory time limits. For any records or portions of records that you determine to be exempt, please provide a specific description of the record or portion of the record exempted along with a particularized description of the exemption.

The Environmental Working Group is a 501(c)(3) nonprofit organization that uses the power of information to inform the public on environmental health and sustainable agriculture issues. EWG is engaged in public education and the review of the government's implementation of its statutory mandates. For more than decade, EWG has published a free, online "Shopper's Guide to Pesticide Residues on Food" to help consumers make informed choices on what fruits and vegetables to buy organic and what to buy conventional. We encourage Americans to eat more fruit and vegetables, and our "Clean 15" and "Dirty Dozen" lists provide guidance to consumers on produce with the lowest and highest pesticide residues. This information is especially helpful in light of the recent official advice of the President's Cancer Panel, which recommended that consumers take every step possible to eat foods without pesticides. The panel stated: "Exposure to pesticides can be decreased by choosing, to the extent possible, food grown without pesticides or chemical fertilizers and washing conventionally grown produce to remove residues."

President's Cancer Panel, 2008-2009 Annual Report: Reducing Environmental Cancer Risk: What We Can Do Now 112 (2010),

<http://deainfo.nci.nih.gov/advisory/pcp/annualReports/index.htm>. As both an environmental

advocacy and scientific organization, EWG clearly falls into the U.S. Department of Justice (DOJ) FOIA category of “news media, educational, or scientific requester.”

EWG will use the requested records to evaluate USDA’s present exercise of authority and its management of the Agricultural Marketing Service and its national Pesticide Data Program (PDP). Specifically, the requested records are expected to bring to light attempts of the chemical agriculture lobby to pressure the Agency to change how the PDP releases its annual test results. In addition the records will help determine whether a \$180,000 taxpayer-funded grant issued to AFF may have been improperly awarded to support industry lobbying efforts. Therefore, EWG’s request is consistent with the purposes of the FOIA, namely a citizen’s right to know the actions of the government. See U.S. Dept. Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 772 (1989). EWG seeks a fee waiver because the “disclosure of the information is in the public interest because it is likely to contribute significantly to the public understanding of the operations of government.” See 5 U.S.C. § 552(a) (4)(A)(iii). This request squarely fits into the factors outlined in the DOJ’s FOIA guide to determine whether fee waivers are appropriate. See U.S. Dept. Justice, Freedom of Information Act Guide (May 2004), <http://www.usdoj.gov/oip/fees.htm#wavier>.

The subject matter of the requested records concerns the management of the PDP and the chemical agriculture industry’s efforts to derail this 20 year-old program that provides critical information to the public on pesticide residues found on “agricultural commodities in the U.S. food supply, with an emphasis on **those commodities highly consumed by infants and children.**” U.S. Dept. Agric., PDP program description, www.usda.gov (last visited May 10, 2011) (emphasis added). Specifically, the requested records relate to a coordinated campaign orchestrated by the chemical agriculture lobby, including the industry front group AFF and its member organizations, to pressure USDA to limit the public’s access to annual information on produce pesticide residue data. The requested records also will shed light on the potential misuse of a taxpayer-funded agricultural marketing grant to reduce transparency and influence policymakers.

According to its 2009 tax return, the AFF’s purpose is to “promote food safety and the **benefits of agricultural chemicals** in ensuring safe, affordable food supply for consumers...” See AFF 2009 990-Tax Form (attached as Exhibit A) (emphasis added). AFF is a nonprofit 501(c)(5) organization that received \$162,000 in nongovernmental grants in 2009 and \$175,000 in 2008. In 2010, the California Department of Food and Agriculture (CDFA) gave AFF a \$180,000 USDA specialty crop marketing grant, nearly doubling AFF’s budget. CDFA said the federally funded grant was awarded to:

Correct the misconception that some fresh produce items contain excessive amounts of pesticide residues. Claims by activist groups about unsafe levels of pesticides have been widely reported in the media for many years, but have largely gone uncontested. Continued media coverage of this misleading information is damaging to producers of California specialty crops and may also have a negative impact on public health. Utilizing sound science backed by a team of nutrition and toxicological experts, the Alliance for Food and Farming will seek to provide the media, the public and various target audiences with

information about the safety of fresh fruits and vegetables. The goal is to generate more balanced media reporting and change public perception about the safety of produce when it comes to pesticide residues.

See Cal. Dept. Food & Agric., 2010 Specialty Crop Block Grant Program: Project Abstracts, www.cdffa.ca.gov/exec/pdfs/grantrecipients2010.pdf.

The AFF does not publish the list of its more than 50 member organizations, but its website claims that “the Alliance for Food and Farming is not involved in regulatory or legislative affairs.” See About the Alliance for Food & Farming, <http://www.safefruitsandveggies.com/faq/about-the-alliance> (last visited May 10, 2011). According to press accounts, however, in the fall of 2010 the United Fresh Produce Association, which may be a member organization of the AFF, met with USDA advisor Sarah Bittleman and EPA advisor Larry Elsworth to urge them to limit public access to the Pesticide Program Data results. See Tom Karst, United Fresh Meets with Federal Officials on Residue Worries, *The Packer*, Oct. 22, 2010, <http://thepacker.com/United-Fresh-meets-with-federal-officials-on-residue-worries/Article.aspx?oid=1275945&fid=PACKER-TOP-STORIES&aid=117>. And, on April 27, 2011, eighteen agricultural commodity groups wrote to Secretary Vilsack urging him “do everything he can to prevent mischaracterization of pesticide residue data.” See Tom Karst, Industry Seeks USDA Support with Pesticide Residue Report, *The Packer*, Apr. 28, 2010, <http://thepacker.com/Industry-seeks-USDA-support-with-pesticide-residue-report/Article.aspx?oid=1320065&fid=PACKER-TOP-STORIES&aid=117>.

The April 27 letter to Secretary Vilsack was signed by AFF Vice Chair Mark Murai (President of the California Strawberry Commission), AFF Board Member Barry Bedwell (President of the California Grape and Tree Fruit League), and Tom Nasiff of the Western Growers Association, whose Executive Vice President Matt McInerney serves as Chair of the Board of Directors of AFF. Because the AFF does not list its members, it is unclear how many other signatories are AFF members. The letter states: “We believe this [PDP] report has, in previous years, been mischaracterized repeatedly by environmental activists and news media to the extent that it has discouraged people from consuming fresh produce.” *Id.* The letter contains messaging similar to the language of the AFF grant and website and raises the question of whether federal dollars are being used to support industry’s lobbying efforts to undermine the PDP program. The public has a right to know if the AFF grant’s reference to “various target audiences” referred to Obama Administration officials, such as Ms. Bittleman and Mr. Elsworth, both of whom are likely “covered officials” as defined by the Lobbying Disclosure Act of 1995. See Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, 109 Stat. 691 (1995), § 3(3)(F) (codified as amended at 2 U.S.C. § 1602(3)(F)), <http://lobbyingdisclosure.house.gov/lda.html>.

In particular, EWG seeks these records for their informative value to evaluate: 1) whether Administration officials are considering an overhaul of the 20 year-old PDP program to limit the public’s access to pesticide residue information on produce because of chemical agriculture’s lobbying efforts; 2) whether federal taxpayer dollars for agricultural marketing were improperly used to support the lobbying efforts of AFF member organizations; and 3) whether the Administration awarded the \$180,000 marketing grant to AFF with the knowledge that it would

support efforts to convince the public that chemical pesticides on produce are not harmful, even to children – despite the fact that the Administration has made transparency and access to healthy food top priorities. Therefore, this FOIA request clearly relates to “identifiable operations or activities of the government.” U.S. Dept. Justice, Freedom of Information Act Guide (May 2004), <http://www.usdoj.gov/oip/fees.htm#wave> (DOJ fee waiver factor No. 1).

The requested records are “likely to contribute” to an understanding of the Agricultural Marketing Service because the documents may expose the improper influence on the USDA of industrial agriculture front groups, and they are not otherwise in the public domain. Likewise, complete records of communications and meetings of the trade groups with USDA are not generally accessible other than through a FOIA request. These documents are “meaningfully informative” with respect to understanding the actions of Secretary Vilsack or members of his staff in response to efforts by chemical agriculture’s front groups to pressure USDA officials to prevent the release of important public health information on pesticide residues on foods primarily eaten by children. When entities that manufacture pesticides or spray pesticides on food ask the federal government to alter how it publishes its pesticide test results, the public has a right to know. Id. (DOJ fee waiver factor No. 2).

Disclosure of the information requested will contribute to the understanding of the “public at large,” as opposed to that of a narrow segment of interested persons. EWG has a long-standing interest in pesticide residues on produce and maintains active environmental health and sustainable agriculture programs toward this end. EWG and its supporters are particularly concerned with promoting a healthy food system and limiting the number of pesticides on food. EWG disseminates the information it receives through FOIA regarding these government operations and activities through analysis and releases to the media, as well as by direct distribution through mailings, posting on EWG’s website and emailing the organization’s more than one million supporters and like-minded interested parties nationally. In addition, EWG disseminates information through congressional testimony, comments to administrative agencies, and, where necessary, through the judicial system.

EWG unquestionably has the “specialized knowledge” and “ability and intention” to disseminate the information requested in the broad manner outlined above and to do so in a manner that contributes to the understanding of the “public-at-large.” EWG will use the data to evaluate whether the pesticide data program at USDA has been undermined. As the DOJ guidance indicates, distribution through media channels alone is presumptively sufficient to satisfy this requirement. EWG has demonstrated beyond question that the information requested in this case will contribute to the understanding of the public at large. Id. (DOJ fee waiver factor No. 3).

Disclosure of the information requested also will contribute “significantly” to the public’s understanding of how USDA manages the Agricultural Marketing Service. The specific records requested are identified for further examination precisely because they involve serious questions of how fairly the USDA conducts its science and reports pesticide residue data. The disclosure of the requested FOIA records will help the public evaluate whether USDA has been pressured to change its data reporting system for this important public right-to-know program. The requested USDA records will also unveil the actions of the United Produce Association, and member

organizations of the AFF, including the Western Growers, the California Strawberry Commission, and the California Grape and Tree Fruit League, to alter how the Administration releases its data on pesticide residues, with the intent of undermining an extremely popular external guide based on USDA data. More information, not less, about industry's use of pesticides should be compiled and analyzed by federal agencies. Also, the requested records will help reveal the possible improper use of a \$180,000 taxpayer-funded grant to AFF to support the lobbying communications of its member organizations. If corporate farming interests seek to dissuade consumers from buying organic or low-pesticide food, they ought to spend their own money to do it – not taxpayer dollars. Id. (DOJ fee waiver factor No. 4).

Finally, the disclosure of this information is not in the commercial interest of EWG. EWG has no intention of using this information in a manner that “furthers a commercial, trade, or profit interest as those terms are commonly understood.” Any publication of any analysis of the requested information would be for the sole purpose of dissemination to the public to educate and to advocate for transparency on how industry influence may affect pesticide data residue results and how government dollars are spent under the Agricultural Marketing Service's specialty crop block grant program. Id. (DOJ commercial interest factor).

For the foregoing reasons, it is clear that the disclosure of the information requested is in the public interest because it is likely to contribute significantly to the public's understanding of the USDA's programs to inform the public about pesticide residues on produce and of the Agricultural Marketing Service. Therefore, please waive processing and copying fees pursuant to 5 U.S.C. § 552(a)(4). In any event, the request for a fee waiver should not be construed an extension of time in which to reply to this FOIA request.

Thank you for your consideration. If you have any questions, please do not hesitate to call me at (202) 667-6982.

Sincerely,

A handwritten signature in cursive script that reads "Heather White".

Heather White
General Counsel
Environmental Working Group

cc: Valerie L. Emmer-Scott - FOIA/PA Officer for the Agricultural Marketing Service