

FREEDOM OF INFORMATION ACT REQUEST

December 12, 2022

U.S. Commodities Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

By Email: FOIASubmissions@cftc.gov

Re: FOIA Request – CFTC Transition-related records

Dear Records Officer,

On behalf of Energy Policy Advocates (“EPA”), I hereby submit this request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* EPA is a non-profit public policy institute organized under the laws of Washington State and with research, publication and other media functions, as well as a transparency initiative seeking public records relating to environmental and energy policy and how policymakers use public resources, all of which include broad dissemination of public information obtained under open records and freedom of information laws. EPA therefore also requests a fee waiver, on two bases in the alternative, as described below, both of which CFTC must address if it denies fee waiver.

Please provide us, within twenty working days,¹ copies of

- **All transition-related letters, plans and memos directed to the Commission’s executive leadership — for these purposes, Chairman Rostin Benham, Commissioner Dan Berkovitz, and/or the head of the Office of General Counsel during the covered period of time — from a member of the Biden administration transition team and/or the Biden campaign, however ultimately *delivered* to any such agency official, and received at any time from Nov. 4, 2020 through February 1, 2021, inclusive; and**
- **All other electronic correspondence received by the Commission’s executive leadership (see above) at any time from Nov. 4, 2020 through February 1, 2021, inclusive, from any email address originating from or including anywhere in it any email address ending in @jrbpt.org.**

CFTC is an independent commission. The transition team is not a government agency. There is a public interest in knowing both of any coordination or consultation on CFTC’s regulatory initiatives with the presidential transition team, and no reasonable claim of exemption by reason of the information representing predecisional and deliberative material.

Please note that this is a discrete request, and that EPA will receive any claim by CFTC that it is consolidating this request with any request preceding it as a consolidation of this request with the earlier request’s date of sending and receipt, not the later (*i.e.*, EPA will deem CFTC as accepting that this request was also sent and received on the date that prior, purportedly consolidated request was sent).

¹ See *Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013).

Under the FOIA Improvement Act of 2016, agencies are prohibited from denying requests for information under the FOIA unless the CFTC reasonably believes release of the information will harm an interest that is protected by the exemption. FOIA Improvement Act of 2016 (Public Law No. 114-185), codified at 5 U.S.C. § 552(a)(8)(A).

Should you decide to invoke a FOIA exemption, please include sufficient information for us to assess the basis for the exemption, including any interest(s) that would be harmed by release. Please include a detailed ledger which includes:

1. Basic factual material about each withheld record, including the originator, recipients, date, length, general subject matter, and location of each item; and
2. Complete explanations and justifications for the withholding, including the specific exemption(s) under which the record (or portion thereof) was withheld and a full explanation of how each exemption applies to the withheld material. Such statements will be helpful in deciding whether to appeal an adverse determination. Your written justification may help to avoid litigation.

If you should seek to withhold or redact any responsive records or parts thereof, we request that you: (1) identify each such record with specificity (including date, author, recipient, and parties copied); (2) explain in full the basis for withholding responsive material; and (3) provide all segregable portions of the records for which you claim a specific exemption. 5 U.S.C. § 552(b). Please correlate any redactions with specific exemptions under FOIA.

As noted, EPA is willing to receive records on a rolling basis, but only within the requirements of FOIA.

These search parameters are sufficiently narrow and precise in their clear delineation for described records over specific dates sent to or from specified CFTC employees.

In the interests of expediting the search and processing of this Request, EPA is willing to provisionally pay fees up to \$200 in the event CFTC denies our fee waiver *requests* detailed, *infra*, as we appeal such a determination. Please provide an estimate of anticipated costs in the event that fees for processing this Request will exceed \$200. To keep costs and copying to a minimum **please provide copies of all productions to the email used to send this request.** Given the nature of the records responsive to this request, all should be in electronic format, and therefore there should be no photocopying costs (see discussion, *infra*).

CFTC Owes Requester a Reasonable Search

FOIA requires an agency to make a reasonable search of records, judged by the specific facts surrounding each request. *See, e.g., Itruralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003); *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994). In this situation, there should be no difficulty in finding these documents.

CFTC Must Err on the Side of Disclosure

It is well-settled that Congress, through FOIA, “sought ‘to open agency action to the light of

public scrutiny.” *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the “general philosophy of full agency disclosure” that animates the statute. *Rose*, 425 U.S. at 360 (quoting S.Rep. No. 813, 89th Cong., 2nd Sess., 3 (1965)). Accordingly, when an agency withholds requested documents, the burden of proof is placed squarely on the agency, with all doubts resolved in favor of the requester. See, e.g., *Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 352 (1979). This burden applies across scenarios and regardless of whether the agency is claiming an exemption under FOIA in whole or in part. See, e.g., *Tax Analysts*, 492 U.S. 136, 142 n. 3 (1989); *Consumer Fed’n of America v. Dep’t of Agriculture*, 455 F.3d 283, 287 (D.C. Cir. 2006); *Burka*, 87 F.3d 508, 515 (D.C. Cir. 1996). The act is designed to “pierce the veil of administrative secrecy and to open agency action to the light of scrutiny.” *Department of the Air Force v. Rose*, 425 U.S. 352 (1976). It is a transparency-forcing law, consistent with “the basic policy that disclosure, not secrecy, is the dominant objective of the Act.” *Id.*

Withholding and Redaction

Please identify and inform us of all responsive or potentially responsive records within the statutorily prescribed time, and the basis of any claimed exemptions or privilege and to which specific responsive or potentially responsive record(s) such objection applies. Pursuant to high-profile and repeated promises and instructions from the previous President and Attorney General we request CFTC err on the side of disclosure and not delay production of this information of great public interest through lengthy review processes over which withholdings they may be able to justify. In the unlikely event that CFTC claims any records or portions thereof are exempt under any of FOIA’s discretionary exemptions, we request you exercise that discretion and release them consistent with statements by a recent-past President and Attorney General, *inter alia*, that “**The old rules said that if there was a defensible argument for not disclosing something to the American people, then it should not be disclosed. That era is now over, starting today**” (President Barack Obama, January 21, 2009), and “**Under the Attorney General’s Guidelines, agencies are encouraged to make discretionary releases. Thus, even if an exemption would apply to a record, discretionary disclosures are encouraged.**” (Department of Justice, Office of Information Policy, OIP Guidance, “Creating a ‘New Era of Open Government’”).

Nonetheless, if your office takes the position that any portion of the requested record(s) may be exempt from disclosure, please inform us of the basis of any partial denials or redactions, and provide the rest of the record, all reasonably segregable, non-exempt information, withholding only that information that is properly exempt under one of FOIA’s nine exemptions. See 5 U.S.C. §552(b). We remind CFTC that it cannot withhold entire documents rather than producing their “factual content” and redacting any information that is legally withheld under FOIA exemptions. As the D.C. Circuit Court of Appeals noted, the agency must “describe the factual content of the documents and disclose it or provide an adequate justification for concluding that it is not segregable from the exempt portions of the documents.” *King v. Department of Justice*, 830 F.2d 210, at 254 n.28 (D.C. Cir. 1987). **As an example of how entire records should not be withheld when there is reasonably segregable information, we note that at bare minimum basic identifying information (that is “who, what, when” information, e.g., To,**

From, Date, and typically Subject) is not “deliberative”.

If it is your position that a document contains non-exempt segments and that those nonexempt segments are so dispersed throughout the documents as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. See *Mead Data Central v. Department of the Air Force*, 455 F. 2d 242, 261. Further, we request that you provide us with an index all such withheld documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1972), with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA” pursuant to *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959(D.C. Cir. 1979), and “describ[ing] each document or portion thereof withheld, and for each withholding it must discuss the consequences of supplying the sought-after information.” *King v. Department of Justice*, 830 F.2d at 223-24.

Claims of non-segregability must be made with the same practical detail as required for claims of exemption in a Vaughn index. If a record is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

Please provide responsive documents in complete form. Any burden on CFTC will be lessened if it produces responsive records without redactions and in complete form.

Format of Requested Records

Under FOIA, you are obligated to provide records in a readily accessible electronic format and in the format requested. See, e.g., 5 U.S.C. § 552(a)(3)(B) (“In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.”). “Readily accessible” means text-searchable and OCR-formatted. See 5 U.S.C. § 552(a)(3)(B).

Energy Policy Advocates does not seek only those records which survive on an employee’s own machine or account (re: the electronic communications), or purely electronic records. We do not demand your office produce requested information in any particular form, instead **we request records in their native format**, with specific reference to the U.S. Securities and Exchange Commission Data Delivery Standards. The covered information we seek is electronic information, this includes electronic *records*, and other public *information*.

We seek responsive records in their native form, with specific reference to CFTC’s Data Delivery Standards. The covered information we seek is electronic information, this includes electronic *records*, and other public *information*. To quote the CFTC Data Delivery Standards,² “Electronic files must be produced in their native format, *i.e.*, the format in which they are ordinarily used and maintained during the normal course of business. For example, an MS Excel file must be produced as an MS Excel file rather than an image of a spreadsheet. (**Note: An Adobe PDF file is not considered a native file unless the document was initially created as a PDF.**)” (emphases in original).

² <https://www.sec.gov/divisions/enforce/datadeliverystandards.pdf>.

In many native-format productions, certain public information remains contained in the record (e.g., metadata). Under the same standards, to ensure production of all information requested, if your production will be de-duplicated it is vital that you 1) preserve any unique metadata associated with the duplicate files, for example, custodian name, and 2) make that unique metadata part of your production.

Native file productions may be produced without load files. However, native file productions must maintain the integrity of the original meta data and must be produced as they are maintained in the normal course of business and organized by custodian-named file folders. A separate folder should be provided for each custodian.

In the event that necessity requires your office to produce a PDF file, due to your normal program for redacting certain information and such that native files cannot be produced as they are maintained in the normal course of business, in order to provide all requested information each PDF file should be produced in separate folders named by the custodian, *and* accompanied by a load file to ensure the requested information appropriate for that discrete record is associated with that record. The required fields and format of the data to be provided within the load file can be found in Addendum A of the above-cited CFTC Data Standards. All produced PDFs must be text searchable.

We appreciate the inclusion of an index.

Fee Waiver Request

Our request for fee waiver is in the alternative, first for reasons of significant public interest, and second, on the basis of the Energy Policy Advocates' status as a media outlet. CFTC must address both of these requests for fee waiver in the event it denies one; failure to do so is *prima facie* arbitrary and capricious.

FOIA was designed to provide citizens a broad right to access government records. FOIA's basic purpose is to "open agency action to the light of public scrutiny," with a focus on the public's "right to be informed about what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). In order to provide public access to this information, FOIA's fee waiver provision requires that "[d]ocuments shall be furnished without any charge or at a [reduced] charge," if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). FOIA's fee waiver requirement is "liberally construed." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

The 1986 fee waiver amendments were designed specifically to provide non-profit organizations such as EPA access to government records without the payment of fees. Indeed, FOIA's fee waiver provision was intended "to prevent government agencies from using high fees to discourage certain types of requesters and requests," which are "consistently associated with requests from journalists, scholars, and non-profit public interest groups." *Ettlinger v. FBI*, 596 F.Supp. 867, 872 (D. Mass. 1984) (emphasis added). As one Senator stated, "[a]gencies

should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information” 132 Cong. Rec. S. 14298 (statement of Senator Leahy).

I. EPA Qualifies for a Fee Waiver.

Under FOIA, a party is entitled to a fee waiver when “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 [Federal] government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). See also, 17 CFR § 200.80.

First, as explained herein, the federal government acknowledges EPA’s status as a media requester. Further, in the alternative thus, CFTC must consider four factors to determine whether a request is in the public interest: (1) whether the subject of the requested records concerns “government operations or activities,” (2) whether the disclosure “is likely to contribute” to an understanding of government operations or activities, (3) whether the disclosure “is likely to contribute to public understanding” of a reasonably broad audience of persons interested in the subject, and (4) whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities. 17 CFR § 200.80. As shown below, EPA and this request meet each of these factors.

A. The Subject of This Request Concerns “the Operations and Activities of the Government.”

The subject matter of this request concerns the operations and activities of senior officials. This request asks for transition plans etc. sent to senior CFTC personnel, prior to the CFTC embarking on the administration’s “whole of government” approach to advancing a “climate change” agenda, including a matter on which the agencies cannot issue joint regulations, but which a quick internet search confirms is the subject of great public and media interest.³

B. Disclosure is “Likely to Contribute” to an Understanding of Government Operations or Activities.

As described, above, the requested records are meaningfully informative about government operations or activities and will contribute to an increased understanding of those operations and activities by the public.

The requested records pertain to the sweeping environmental regulatory agenda of the Biden Administration, which is of major media, public and policy interest.

Any records responsive to this request therefore are likely to have an informative value and are “likely to contribute to an understanding of Federal government operations or activities”. We note President Biden's environmental agenda has been the subject of substantial media interest and promotional efforts.³

³ <https://www.washingtonpost.com/climate-environment/2021/01/26/biden-environmental-justice-climate/> and <https://www.epa.gov/newsreleases/epa-welcomes-members-biden-harris-leadership-team> (last assessed April 8, 2021).

Disclosure of the requested records will allow EPA to convey to the public information about the coordination between agencies, specifically, an agency of jurisdiction helping another to advance an unprecedented foray by the other into that “space.” Once the information is made available, EPA will analyze it and present it to its followers and the general public in a manner that will meaningfully enhance the public’s understanding of this topic.

Thus, the requested records are likely to contribute to an understanding of government operations and activities.

C. Disclosure of the Requested Records Will Contribute to a Reasonably Broad Audience of Interested Persons’ Understanding of the Ethics Obligations of a Non-Career Appointee

For reasons already described, the requested records will contribute to public understanding of the advice provided to an independent agency by a non-governmental organization. As explained above, the records will contribute to public understanding of this topic. *See W. Watersheds Proj. v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004) (“... find[ing] that WWP adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the BLM and also how ... management strategies employed by the BLM may adversely affect the environment.”).

Through EPA’s synthesis and dissemination (by means discussed in Section II, below), disclosure of information contained and gleaned from the requested records will contribute to a broad audience of persons who are interested in the subject matter. *Ettlinger v. FBI*, 596 F.Supp. at 876 (benefit to a population group of some size distinct from the requester alone is sufficient); *Carney v. Dep’t of Justice*, 19 F.3d 807, 815 (2d Cir. 1994), cert. denied, 513 U.S. 823 (1994) (applying “public” to require a sufficient “breadth of benefit” beyond the requester’s own interests); *Cnty. Legal Servs. v. Dep’t of Hous. & Urban Dev.*, 405 F.Supp.2d 553, 557 (E.D. Pa.2005) (in granting fee waiver to community legal group, court noted that while the requester’s “work by its nature is unlikely to reach a very general audience,” “there is a segment of the public that is interested in its work”).

Indeed, the public does not currently have an ability to easily evaluate any aspect of the particular coordination reflected in the requested records. We are also unaware of any previous release to the public of these or similar records. *See Cnty. Legal Servs. v. HUD*, 405 F.Supp.2d 553, 560 (D. Pa. 2005) (because requested records “clarify important facts” about agency policy, “the CLS request would likely shed light on information that is new to the interested public.”). As the Ninth Circuit observed in *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987), “[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations”.

Disclosure of these records is not only “likely to contribute,” but is certain to contribute, to public understanding of this described coordination. The public is always well served when it knows how the government conducts its activities. Hence, there can be no dispute that disclosure of the requested records to the public will educate the public about the potential conflicts of interest and recusal obligations of non-career appointees.

D. Disclosure is Likely to Contribute Significantly to Public Understanding of Government Operations or Activities.

EPA is not requesting these records merely for their intrinsic informational value. Disclosure of the requested records will significantly enhance the public's understanding of the potential conflicts of interest and likelihood of an appearance of bias in decision-making as compared to the level of public understanding that exists prior to the disclosure. Indeed, public understanding will be significantly increased as a result of disclosure.

II. EPA has the Ability to Disseminate the Requested Information Broadly.

EPA is dedicated to obtaining and disseminating information relating to energy and environmental public policy. A key component of being able to fulfill this mission and educate the public about these duties is access to information that articulates what obligations exist for senior government officials. EPA has both the intent and the ability to convey any information obtained through this request to the public. Energy Policy Advocates publishes its findings regularly through the organization's website, www.epadvocates.org. This work is frequently cited in newspapers and trade and political publications.⁴ EPA intends to publish information from requested records on its website, distribute the records and expert analysis to its followers through social media platforms.

Through these means, EPA will ensure:

- (1) that the information requested contributes significantly to the public's understanding of the government's operations or activities;
- (2) that the information enhances the public's understanding to a greater degree than currently exists;
- (3) that EPA possesses the expertise to explain the requested information to the public; (4) that EPA possesses the ability to disseminate the requested information to the general public;
- (5) and that the news media recognizes EPA as a reliable source in the field of government officials' conduct.

Public oversight and enhanced understanding of the Administration's duties is absolutely necessary. In determining whether disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the information to a reasonably broad audience of persons interested in the subject. *Carney v. U.S. Dept. of Justice*, 19 F.3d 807 (2nd Cir. 1994). EPA need not show how it intends to distribute the information, because "[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity." *Judicial Watch*, 326 F.3d at 1314. It is sufficient for EPA to show how it distributes information to the public generally. *Id.*

III. Obtaining the Requested Records is of No Commercial Interest to the Requester

Access to government records, disclosure forms, and similar materials through FOIA requests is essential to EPA's role of educating the general public. EPA is a 501(c)(3) nonprofit public policy institute dedicated to transparency in public energy and environmental policy. Due to its nonprofit mission, EPA has no commercial interest and will realize no commercial benefit from

the release of the requested records.

Therefore, **Energy Policy Advocates first seeks waiver of any fees** under FOIA on the above significant public interest basis.

In the alternative, Energy Policy Advocates requests a waiver or reduction of fees as a representative of the news media. The provisions for determining whether a requesting party is a representative of the news media, and the “significant public interest” provision, are not mutually exclusive. As Energy Policy Advocates is a non-commercial requester, it is entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*, 754 F.Supp.2d. 1 (D.D.C. 2010). Alternately and only in the event the refuses to waive our fees under the “significant public interest” test, which Requester would then appeal while requesting the proceed with processing on the grounds that Energy Policy Advocates is a media organization, a designation the federal government has acknowledged for the purposes of FOIA, the must explain any denial of treatment of EPA as a media outlet.⁴ Requester asks for a waiver or limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii) (“fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by a representative of the news media...”).

CFTC must address both of these requests for fee waiver in the event it denies one; failure to do so is *prima facie* arbitrary and capricious.

Conclusion

We request the CFTC to provide particularized assurance that it is reviewing some quantity of records with an eye toward production on some estimated schedule, so as to establish some reasonable belief that it is processing our request. 5 U.S.C.A. § 552(a)(6)(A)(i); see also *CREW v. FEC*. The CFTC must at least inform us of the scope of potentially responsive records, including the scope of the records it plans to produce and the scope of documents that it plans to withhold under any FOIA exemptions; FOIA specifically requires the CFTC to immediately notify EPA with a particularized and substantive determination, and of its determination and its reasoning, as well as EPA’s right to appeal; further, FOIA’s unusual circumstances safety valve to extend time to make a determination, and its exceptional circumstances safety valve providing additional time for a diligent CFTC to complete its review of records, indicate that responsive documents must be collected, examined, and reviewed in order to constitute a determination. *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013). *See also, Muttitt v. U.S. Central Command*, 813 F. Supp. 2d 221; 2011 U.S. Dist. LEXIS 110396 at *14 (D.D.C. Sept. 28, 2011)(addressing “the statutory requirement that [agencies] provide estimated dates of completion”).

We request a rolling production of records, such that the CFTC furnishes records to my attention as soon as they are identified, preferably electronically, but as needed then to my attention, at the

⁴ See, e.g., Securities & Exchange Commission Requests No. 21-00769-FOIA, No. 21-01234- FOIA, 22-00557-FOIA, 22-01573-FOIA; Department of the Interior Request No. DOI-OS- 2021-003335.

address below. We inform the CFTC of our intention to protect our appellate rights on this matter at the earliest date should the CFTC not comply with FOIA per, e.g., *CREW v. Fed. Election Comm'n*, 711 F.3d 180 (D.C. Cir. 2013).

Energy Policy Advocates looks forward to your response. If you have any questions, please contact me at the below email address. All records and any related correspondence should be sent to my attention at the address below. If you have any questions, please contact me at the below email address.

Sincerely,

A handwritten signature in black ink, appearing to read 'Rob Schilling', with a long horizontal flourish extending to the right.

Rob Schilling, Executive Director Energy Policy
Advocates Schilling@allhookedup.com