

FREEDOM OF INFORMATION ACT REQUEST

March 6, 2020

U.S. Environmental Protection Agency
Records, FOIA and Privacy Branch
1200 Pennsylvania Avenue, NW (2822T)
Washington, D.C. 20460
Email: hq.foia@epa.gov

RE: FOIA Request – Certain Agency records (Schmidt, Sasser, Koerber)

On behalf of Energy Policy Advocates, recognized by the Internal Revenue Service as a non-profit public policy institute under § 501(c)(3) of the Internal Revenue Code, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, please consider the following three requests, all identical except for the EPA employee named. These requests are for copies of all electronic correspondence, and any accompanying information (see discussion of SEC Data Delivery Standards, *infra*), including also any attachments:

1. a) sent to or from or copying (whether as cc: or bcc:) **Lorie Schmidt (OGC)** at any email account, whether .gov or otherwise,¹ that also b) is to, from, or copies (again whether as cc: or bcc:), or includes anywhere, whether in the sent, to, from, cc, bcc or Subject fields, or otherwise, including also in any attachments, or the body of an email including anywhere in an email “thread”, i) johnbachmann@bellsouth.net, ii) jgoffman@law.harvard.edu, iii) joegoffman@gmail.com and/or iv) joegoffman@aol.com, and c) is dated any time from **November 1, 2019** through the date you process this request, inclusive;

¹ Any records meeting these descriptions are presumptively work-related by virtue of the parties involved.

2. a) sent to or from or copying (whether as cc: or bcc:) **Erika Sasser (OAR)** at any email account, whether .gov or otherwise, that also b) is to, from, or copies (again whether as cc: or bcc:), or includes anywhere, whether in the sent, to, from, cc, bcc or Subject fields, or otherwise, including also in any attachments, or the body of an email including anywhere in an email “thread”, i) johnbachmann@bellsouth.net, ii) jgoffman@law.harvard.edu, iii) joegoffman@gmail.com and/or iv) joegoffman@aol.com, and c) is dated any time from **November 1, 2019** through the date you process this request, inclusive; and
3. a) sent to or from or copying (whether as cc: or bcc:) **Michael Koerber (OAR)**, at any email account, whether .gov or otherwise, that also b) is to, from, or copies (again whether as cc: or bcc:), or includes anywhere, whether in the sent, to, from, cc, bcc or Subject fields, or otherwise, including also in any attachments, or the body of an email including anywhere in an email “thread”, i) johnbachmann@bellsouth.net, ii) jgoffman@law.harvard.edu, iii) joegoffman@gmail.com and/or iv) joegoffman@aol.com, and c) is dated any time from **November 1, 2019** through the date you process this request, inclusive.

To narrow this request, please consider as non-responsive electronic correspondence that merely receives or forwards newsletters or press summaries or ‘clippings’, such as news services or stories or opinion pieces, **if** that correspondence has no comment or no substantive comment added by a party other than the original sender in the thread (an electronic mail message that includes any expression of opinion or viewpoint would be considered as including

substantive comment; examples of non-responsive emails would be those forwarding a news report or opinion piece with no comment or only “fyi”, or “interesting”).

Additionally, please consider all other published or docketed materials, including pleadings, regulatory comments, ECF notices, published scientific journal articles, news articles, and/or newsletters, as non-responsive, **unless** forwarded to or from the named persons with substantive commentary added by the sender.

Energy Policy Advocates requests records on your system, e.g., its backend logs, and does not seek only those records which survive on an employee’s own machine or account. We do not demand your office produce requested information in any particular form, instead **we request records in their native form**, with specific reference to the U.S. Securities and Exchange Commission Data Delivery Standards.² The covered information we seek is electronic information, this includes electronic *records*, and other public *information*.

To quote the SEC Data Delivery Standards, “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).

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

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

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 SEC Data Standards. All produced PDFs must be text searchable.

We request EPA waive or substantially reduce any fees associated with this request. **Our request for fee waiver is in the alternative, first for reasons of significant public interest, and second, on the basis of Energy Policy Advocates' (herein "EPA", vs USEPA) status as a media outlet.** We do not seek the information for a commercial purpose. Energy Policy Advocates is organized and recognized by the Internal Revenue Service as a 501(c)3 educational organization. It actively publishes and broadly disseminates public records pertaining to energy and environmental policymaking. As such, the requester has no commercial interest possible in these records.

The below clearly demonstrates that:

The requested information is of widespread public, media and legislative interest.

Requester is a non-profit classified as such by the Internal Revenue Service.

Requester does not seek these records for a commercial purpose and has no commercial interest possible in these records.

*** Requester intends to broadly disseminate the information requested.** You can see from EPA's own site EPAAdvocates.org and the site on which its work and related news is published, ClimateLitigationWatch.org, requester has both the intent and the ability to convey any information obtained through this request to the public. The work EPA regularly publishes is frequently cited in newspapers and trade and political publications, see <http://epadvocates.org/news/>. EPA intends to broadly disseminate public information obtained under this FOIA as it has other information relevant to its mission and work.

*** Disclosure is "likely to contribute" to an understanding of specific government operations or activities because the releasable material will be meaningfully informative in relation to the subject matter of the request.** The requested records, if they exist, likely pertain to efforts to impose a national ambient air quality standard for carbon dioxide which, if pursued as appears to be the case from other public records, will be an issue and undertaking 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".

*** The disclosure will contribute to the understanding of the public at large, as opposed to merely that of the requester or a narrow segment of interested persons.**

Regular media coverage of USEPA, and the “climate” issue leave no doubt that this is an issue of interest to the general public and not some small subset.

EPA is dedicated to and has a documented record of promoting the public interest, advocating sensible policies to protect human health and the environment, broadly disseminating information relevant to the policy issues on which its experts work.

With a demonstrated interest and record in the relevant policy debates and expertise in the subject of energy- and environment-related regulatory policies, EPA unquestionably has the “specialized knowledge” and “ability and intention” to disseminate the information requested in the broad manner, and to do so in a manner that contributes to the understanding of the “public at-large.”

*** The disclosure will contribute “significantly” to public understanding of government operations or activities.** *We repeat and incorporate here by reference the arguments above from the discussion of how disclosure is “likely to contribute” to an understanding of specific government operations or activities.*

As such, requester has stated “with reasonable specificity that its request pertains to operations of the government,” and that it intends to broadly disseminate responsive records.

EPA first seeks waiver of any fees under FOIA on the above significant public interest basis. Disclosure of records responsive to this request will contribute “significantly” to public understanding of government operations or activities. 5 U.S.C. § 552(a)(4)(A)(iii) (“Documents shall be furnished without any charge...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 government and is not primarily in the commercial interest of the requester”).

In the alternative, EPA requests waiver of its fees on the basis it is a media outlet. See the discussion, above.

EPA 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.

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. Again, as EPA 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*. Alternately and only in the event EPA refuses to waive our fees under the “significant public interest” test, which we would then appeal while requesting EPA proceed with processing on the grounds that we are a media organization, we request 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...”).

We look forward to your response. If you have any questions, do not hesitate to contact me by email at MatthewDHardin@protonmail.com.

Sincerely,

Matthew D. Hardin