

FREEDOM OF INFORMATION ACT REQUEST

August 25, 2020

U.S. Environmental Protection Agency
Records, FOIA and Privacy Branch
1200 Pennsylvania Avenue, NW (2822T)
Washington, D.C. 20460

Via Email to: hq.foia@epa.gov and submitted via FOIA Online

RE: FOIA Request – Certain Agency records (Region 10): Kowalski

To whom it may concern:

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 request for records. We hereby request copies of the following email correspondence of EPA Region 10 employee Donald Kowalski, dated at any time from September 1, 2018 through the date EPA processes this request, inclusive:

I. which contains a) the word “Lighthouse”, *and/or* b) the word “Millennium” anywhere in the text of the correspondence, whether in the subject line or body of or attachment to any email correspondence;

And,

II. which was sent to or from any address which includes “@ecy.wa.gov”.

We request entire “threads” of which any responsive electronic correspondence is a part, regardless whether any portion falls outside of the above time parameter.

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 published or docketed materials, including pleadings, regulatory comments, ECF notices, 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 format**, with specific reference to the U.S. Securities and Exchange Commission Data Delivery Standards.¹ The covered information we seek includes 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).

¹ <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 SEC Data Standards. All produced PDFs must be text searchable.

We request USEPA 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' 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 Energy Policy Advocates's own site EPAdvocates.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 of the federal government and the state of Washington to regulate exports from Washington State terminals of materials which are mined in the states of Montana and Wyoming. The Supreme Court of the United States currently has before it a

motion filed by the States of Wyoming and Montana for leave to file a Bill of Complaint before that court, sitting in its original jurisdiction. The relevant Bill of Complaint alleges that Washington State actors are contravening either federal law or the Dormant Commerce Clause to penalize Wyoming, Montana, and their respective residents. 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, ” to include but not limited to informing the public understanding of a rare case which has recently been filed in the Supreme Court's original jurisdiction.

*** 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.**

Energy Policy Advocates 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, Energy Policy Advocates 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.

Energy Policy Advocates 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, Energy Policy Advocates requests waiver of its fees on the basis it is a media outlet. See the discussion, above.

U.S. 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 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*. 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 U.S. 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