REQUEST UNDER THE FREEDOM OF INFORMATION ACT

February 25, 2022

Office of Science and Technology
Old Executive Office Building
Attn: FOIA Officer (Barbara Ann Ferguson)
Old Executive Office Building Room 431
Washington, DC 20502

RE: FOIA Request – Seeking certain *work-related emails* from Eric Lander's email accounts used for policy/OSTP-related correspondence

BY ELECTRONIC MAIL– ostpfoia@ostp.eop.gov

Dear OSTP FOIA Staff,

On behalf of Energy Policy Advocates, a non-profit public policy institute incorporated in Washington State with research, investigative journalism and publication functions, as part of a transparency initiative seeking public records relating to environmental and energy policy and related activities at various agencies at all levels of government, which includes an active campaign of broad dissemination of public information obtained under open records and freedom of information laws to the broader population, I hereby request the following records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq*.

Please provide copies of all emails sent or from Eric Lander's official email account(s) (including also as cc: or bcc:), **and/or** to, from or copying any non-official email account used for work-related correspondence at any time, that are: i) dated at any time from January 1, 2022 through February 25, 2022, inclusive, and ii) are also sent to one or more of a) Naomi Oreskes, b) Katherine Hayhoe, c) Shahzeen Attari, d) Gernot Wagner, e) Marshall Shepherd, and/or f) Michael Mann.

Background to this Records Request

Correspondence made or received by federal officials in connection with the transaction

of public business is in fact covered by FOIA[1], which has the broadest definition of "record" of all relevant federal statutes.[2] Mr. Lander was obligated to copy his OSTP account on any correspondence relevant to his OSTP employment sent or received by any account. OSTP had and has the obligation to preserve all such correspondence.

A widespread pattern has been established of federal government employees using private emails and equipment that, regardless of intent, evades (but does not, as a legal matter, defeat) federal record-keeping and other transparency laws including the Presidential Records Act, Federal Records Act and FOIA. Using a non-official account for work-related correspondence — regardless whether that account is how, e.g., Mr. Lander had been corresponding with any other party prior to rejoining government service — does not make that correspondence less work-related. It is well-established that an employee who chooses to perform public business on private accounts or equipment thereby makes that account or equipment subject to FOIA. Mr. Lander has a continuing obligation to provide those records, either electronically orin paper format. OSTP is subject to National Archives Records Administration (NARA) rules. OSTP is required to obtain and produce responsive correspondence as it would were the records properly preserved in or on an OSTP account/system.

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[1] *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d180, 186 (D.C. Cir. 2013), and discussion, *infra*.

[2] 44 U.S.C 3301. Because EPA has more fulsomely documented its obligations than most agencies, *see also, e.g.*, EPA acknowledging that "[t]he definition of a record under the Freedom of Information Act (FOIA) is broader than the definition under the Federal Records Act." *See*, *e.g.,* Environmental Protection Agency, *What Is a Federal Record?*, http://www.epa.gov/records/tools/toolkits/procedures/part2.htm. *See, e.g.*, *Frequent Questions about E-Mail and Records*, United States Environmental Protection Agency ("**Can I use a non-EPA account to send or receive EPA e-mail?** No, do not use any outside e-mail system to conduct official Agency business. If, during an emergency, you use a non-EPA e-mail system, you are responsible for ensuring that any e-mail records and attachments are saved in your office's recordkeeping system.") (emphasis in original) (available at www.epa.gov/records/faqs/email.htm).

After one OSTP employee was exposed to be engaging in this practice, reaffirmed that forwarding is mandatory, former director John Holdren's May 2010 memo to all staff[3] stated in pertinent part:

> If you receive communications relating to your work at OSTP on any personal email account, you must promptly forward any such emails to your OSTP account, even if you do not reply to such email. Any replies should be made from your OSTP account. In this way, all correspondence related to government business—both incoming and outgoing—will be captured automatically in compliance with the FRA. In order to minimize the need to forward emails from personal accounts, please advise email senders to correspond with you regarding OSTP-related business on your OSTP account only.[4]

The short version of the applicable legal principles is that **using private assets to perform public business while impermissible does not succeed in making that any less the public's business**. As the House Committee on Oversight and Government Reform has noted, "The technological innovations of the last decade have provided tools that make it too easy for federal employees to circumvent the law and engage in prohibited activities."[5]

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[3] Jessica Guynn, "Watchdog Group Requests White House Official's E-mail After Google Buzz Mishap," *Los Angeles Times Technology Blog*, April 1, 2010, http://www.consumerwatchdog.org/story/watchdog-group-requests-white-house-officials-e-mail-after-google-buzz-mishap.

[4] Memo from OSTP Director John Holdren to all OSTP staff, titled "Subject: Reminder: Compliance with the Federal Records Act and the President's Ethics Pledge," May 10, 2010, http://assets.fiercemarkets.com/public/sites/govit/ostp-employees.pdf. *See also, e.g.,* September 11, 2012 letter from DoE Deputy General Counsel Eric J. Fygi to Chairman Darrell Issa of the House Committee on Oversight and Government Reform, affirming that communications to andfrom non-official, personal email accounts referring or relating to the Department's [programs]...or any other official business of the Department ...[that] relate to official business and thus are potential federal agency records." (*See also* September 11, 2012 letter from the Department of Energy's Morgan Wright to Chairman Issa, affirming the records' status and that he has thereforeprovided all responsive records to the Department for purposes of having them produced, as agency records).

[5] Statement, House Committee on Oversight and Government Reform, "The Hatch Act: The Challenges of Separating Politics from Policy," June 21, 2011, http://oversight.house.gov/ hearing/the-hatch-act-the-challenges-of-separating-politics-from-policy/. This statement was made in the context of a law precluding federal employees from using taxpayer-provided resources, including time, phones, computers, etc., to engage in certain unofficial activity, specifically politicking. It seems nearly everyone in Washington has their own anecdotal stories of observing Hatch Act violations, federal employees using private email accounts to perform political activity on official time.

Per NARA and the Government Accountability Office, "[A]gencies are required to establish policies and procedures that provide for appropriate retention and disposition of electronic records. In addition . . . agency procedures must specifically address e-mail records: that is, the creation, maintenance and use, and disposition of federal records created by individuals using electronic mail systems."[6] "Agencies are also required to address the use of external e-mail systems that are not controlled by the agency (such as private e-mail accounts oncommercial systems such as Gmail, Hotmail, .Mac, etc.). Where agency staff have access to external systems, agencies must ensure that federal records sent or received on such systems arepreserved in the appropriate recordkeeping system and that reasonable steps are taken to captureavailable transmission and receipt data needed by the agency for recordkeeping purposes."[7]

OSTP must establish safeguards against the removal or loss of records and making requirements and penalties known to agency officials and employees (44 U.S.C. 3105); it also must notify the National Archivist of any actual, impending, or threatened unlawful destruction of records and assist in their recovery (44 U.S.C. 3105).

We are confident that OSTP has taken notice that Obama-Biden administration employees — beyond merely the OSTP employee in the above-referenced incident of which OSTP is inescapably aware — had been found to be regularly using private email to conduct public business. Other examples include even the *New York Times* acknowledging the practice of using

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[6] Government Accountability Office, "Federal Records: National Archives and Selected AgenciesNeed to Strengthen E-Mail Management," GAO-08-742, June 2008, http://www.gao.gov/assets/ 280/276561.pdf, p. 6.

[7] *Id*., at p. 37.

private email accounts as the preferred means of contacting lobbyists.[8] We also have seen that employees deciding to use unofficial email accounts for public business typically choose, to little surprise, to not forward copies of any such mail to their government email account for proper retention and preservation according to the rules.

As one British media outlet put it after a Cameron administration figure was found to have used a private email account to conduct public business, "It would seem that as the UK has followed the US in its freedom of information laws, so our politicians seem to have alsofollowed their Washington DC colleagues in their attempts to evade the law."[9]

Employees are discouraged but not prohibited from on occasion using private email accounts or personal computers, on an honor code, despite the obvious conflict of leaving it to the employee to decide what to turn over and also other sound arguments, for example that this constitutes unlawful use of voluntary or personal services banned by the Anti-Deficiency Act. As one U.S. consultant notes in this context, "If you work for a government agency ... sending official information on your personal account would place it outside of the controls in place to protect and retain email communications. Doing so is not only a compliance violation, but also gives the appearance of a willful and intentional attempt to circumvent the system and covertly hide your communications."[10]

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[8] Eric Lichtblau, "Across From White House, Coffee With Lobbyists," *New York Times*, June 24,2010, http://www.nytimes.com/2010/06/25/us/politics/25caribou.html?_r=1&scp=4&sq=caribou&st=cse.

[9] *See*, "Interim Report: Investigation of Possible Presidential Records Act Violations." Preparedfor Chairman Henry A. Waxman, United States House of Representatives Committee on Oversight and Government Reform Majority Staff, June 2007, available at http://usspi.org/ resources-emailsgone/interim-report.pdf.

[10] Tony Bradley, "Mixing Business and Personal Email: Is It a Good Idea?," About.com NetworkSecurity, September 19, 2008, http://netsecurity.about.com/od/newsandeditoria2/a/ palinemail.htm. *See also* 44 U.S.C. Sections 3105, 3106, which prohibit the actual, pending or threatened, removal, defacing, alteration or destruction of documents, including documents or records of a Federal Agency and set forth procedures

It is up to the head of the agency learning of possible destruction or removal of records to notify the Archivist and initiate action against the employee; if he does not within a reasonable period of time, the Archivist "shall" ask the attorney general to do so (Criminal penalties, including fines or jail time for the unlawful destruction of records or documents, can be found in 18 USC § 2071 - Concealment, removal, or mutilation generally).

NARA regulations also state, "Agencies that allow employees to send and receive official electronic mail messages using a system not operated by the agency must ensure that Federal records sent or received on such systems are preserved in the appropriate agency recordkeeping system."[11]

Thanks to then-Congressman Henry Waxman we have established that the use of private emailto conduct official business violates federal record-keeping and preservation requirements (the Presidential Records Act or the Federal Records Act, depending on the office involved), and is a serious matter as is any effort to evade the law.[12]

OSTP Owes Energy Policy Advocates a Reasonable Search, Which Includes a Non-Conflicted Search.

FOIA requires an agency to make a reasonable search of records, judged by the specific facts surrounding each request. *See, e.g., Itrurralde 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).

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

in these events. *See also*, 18 USC § 2071 - Concealment, removal, or mutilation generally.

[11] 36 C.F.R. § 1236.22(a), "What are the additional requirements for managing electronic mailrecords?," http://www.archives.gov/about/regulations/part-1236.html.

[12] *See*, "Interim Report: Investigation of Possible Presidential Records Act Violations." Preparedfor Chairman Henry A. Waxman, United States House of Representatives Committee on Oversight and Government Reform Majority Staff, June 2007, available at http://usspi.org/ resources-emailsgone/interim-report.pdf.

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)). 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*.

A search must be "reasonably calculated to uncover all relevant documents." *See, e.g., Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). In determining whether or not a search is "reasonable," courts have been mindful of the purpose of FOIA to bring about the broadest possible disclosure. *See Campbell v. DOJ*, 164 F.3d 20, 27 (D.C. Cir. 1999) ("reasonableness" is assessed "consistent with congressional intent tilting the scale in favor of disclosure"). *See also, e.g., Landmark Legal Foundation v. EPA*, No. 12-1726, 2013 WL 4083285 (D.D.C. Aug. 14, 2013), 2013 WL 4083285, *5 (summary judgment precluded due to inadequate search where "EPA did not search the *personal* email accounts of the Administrator, the Deputy Administrator, or the Chief of Staff," but rather only searched only "accounts *that were in its possession and control*," despite the existence of "evidence that upper-level EPA officials conducted official business from their personal email accounts") (italics in original); *id.* at *8 (noting that "the possibility that unsearched personal email accounts may have been used for official business raises the possibility that leaders in the EPA may have purposefully attempted to skirt disclosure under the FOIA."); Michael D. Pepson & Daniel Z. Epstein, *Gmail.Gov: When Politics Gets Personal, Does the Public Have a Right to Know?*, 13 Engage J. 4, 4 (2012) (FOIA

covers emails sent using private email accounts); Senate EPW Committee, Minority Report, *A Call for Sunshine: EPA's FOIA and Federal Records Failures Uncovered* (Sept. 9, 2013) at 8 (FOIA "includes emails sent or received on an employee's personal email account" if subject "relates to official business"), http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=513a8b4f-abd7-40ef-a43b-dec0081b5a62; *accord Mollick v. Township of Worcester*, 32 A.3d 859, 872-73 (Pa.Cmwlth 2011) (officials' private email addresses covered under open-records laws); *Barkeyville Borough v. Stearns*, 35 A.3d 91, 95-96(Pa.Cmwlth 2012) (same).

The reasonableness of the search activity is determined ad hoc but there are rules, including that the search must be conducted free from conflict of interest. (In searching for relevant documents, agencies have a duty "to ensure that abuse and conflicts of interest do not occur." *Cuban v. S.E.C.*, 744 F.Supp.2d 60, 72 (D.D.C. 2010). See also *Kempker-Cloyd v. Department of Justice*, No. 97-cv-253, 1999 U.S. Dist. LEXIS 4813, at *12, *24 (W.D. Mich. Mar. 12, 1999) (holding that the purpose of FOIA is defeated if employees can simply assert that records are personal without agency review; faulting Department of Justice for the fact that it "was aware that employee had withheld records as 'personal' but did not require that 'he submit those records for review' by the Department.").

For these reasons EPA expects this search of the above-cited account be conducted free from conflict of interest. Regarding any non-official accounts, the departed Mr. Lander remains the most conflicted person imaginable to conduct the search and is therefore the inappropriate person to so search. Any search of those accounts must be supervised, which we are aware has occurred in the past in such situations.

Withholding and Redaction

If you or your office have destroyed or determine to withhold any records that could be reasonably construed to be responsive to this request, I ask that you indicate this fact and the reasons therefore in your response.

Under the FOIA Improvement Act of 2016, agencies are prohibited from denying requests for information under the FOIA unless the agency 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.

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

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.

If OSTP claims any records or portions thereof are exempt under one of FOIA's discretionary exemptions we request you exercise that discretion and release them consistent with statements by the 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**. Such releases are possible for records covered by a number of FOIA exemptions, including Exemptions 2, 5, 7, 8, and 9, but they will be most applicable under Exemption 5." (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 records is exempt from disclosure, please inform us of the basis of any partial denials or redactions. In the event that some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable, non-exempt portions of the requested records. See 5 U.S.C. §552(b).

Further, we request that you provide us with an index of those documents as required under V*aughn 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 210, 223-24 (D.C. Cir. 1987).

We remind OSTP that it cannot withhold entire documents rather than producing their "factual content" and redacting the confidential advice and opinions. As the D.C. 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." *Id.* at 254 n.28. As an example of how entire records should not be withheld when there is reasonably segregable information, we note that basic identifying information (who, what, when) is not "deliberative". As the courts have emphasized, "the deliberative process privilege directly protects advice and opinions and *does not permit the nondisclosure of underlying facts* unless they would indirectly reveal the advice, opinions, and evaluations circulated within the agency as part of its decision-making process." *See Mead Data Central v. Department of the Air Force*, 566 F.2d 242, 254 n.28 (D.C. Cir. 1977) (emphasis added).

That means, do not redact the requesting party and the Office's initial determination,or grounds there-for, in the event that determination was a denial. For example, OSTP must ceaseits historic pattern and others of over-broad claims of b5 "deliberative process" exemptions to withhold information which is not in fact truly antecedent to the adoption of an agency policy (*see Jordan v. Do*J, 591 F.2d 753, 774 (D.C. Cir. 1978)), but merely embarrassing or inconvenient to disclose.

If it is your position that a document contains non-exempt segments and that those non-exempt 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 at 261.

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

Satisfying this Request contemplates providing copies of documents, in electronic format if you possess them as such, otherwise photocopies are acceptable.

Please provide responsive documents in complete form, with any appendices or attachments as the case may be.

DATA DELIVERY STANDARDS

Format of Requested Records

Under FOIA, you are obligated to provide records in a readily accessible electronic format and inthe 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 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.[13] 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

[13] https://www.sec.gov/divisions/enforce/datadeliverystandards.pdf.

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 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.

REQUEST FOR WAIVER OR REDUCITON OF FEES

Energy Policy Advocates requests a waiver or substantial reduction of fees associated with processing this 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. The Office 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.

We do not seek the information for a commercial purpose. Energy Policy Advocates is a non-profit policy organization, which actively publishes and broadly disseminates public records pertaining to energy and environmental policymaking and does so without commercial interest.

The below clearly demonstrate:

1. The subject of this request concerns "the operations or activities of the government;
2. The disclosure is "likely to contribute" to an understanding of government operations and activities;
3. The disclosure is likely to contribute to the "public understanding" of government operations and activities; and
4. The public's understanding of the subject will be enhanced to a significant extent as compared to its prior understanding.

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 reflects how senior government officials, and particularly political appointees given their often highly ideological and activist backgrounds (as in this case), perform their duties.

Public oversight and enhanced understanding of the Administration's performance of its 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 theinformation, because "[n]othing in FOIA, the [agency] regulation, or our case law require[s] suchpointless specificity." *Judicial Watch*, 326 F.3d at 1314. It is sufficient for

EPA to show how it distributes information to the public generally. *Id*.

Nonetheless, 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.[14] EPA intends to publish information from requested records on its website, distribute the records and expert analysis to its followers through social media channels including Facebook and other similar 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.

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 fulfilling its role of educating the general public. EPA is a 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 fromthe release of the requested records.

The Subject of the Request Concerns "the Operations or Activities of the Government".

This request concerns the official correspondence of a senior official about ***a matter of demonstrable public interest (See, e.g., "White House science office to hold first event on***

[14] *See*, e.g., recent coverage at Editorial, *Wall Street Journal*, "Biden's 'Back Door' Climate Plan," March 17, 2021, https://www.wsj.com/articles/bidens-backdoor-climate-plan-11616020338, and Stuart Parker, "Conservative Group Says States' Ozone Suit 'Trojan Horse' for GHG Limits," Inside EPA, February 24, 2021.

countering climate change denial," Washington Post, February 24, 2022). More important, it seeks information that, to EPA's knowledge is not in the public domain as the media for creating these records. As such, this request is particularly important as it likely breaks new ground in terms of accessing information.

The Disclosure of the Records is "Likely to Contribute" to an Understanding of Government Operations.

The requested records, if they exist, reflect correspondence of a sort that to EPA's knowledge has not yet been released by the agency and which obscurity suggests the real possibility that non-official accounts contain previously untapped resources of much information that will educate the public on "what its government is up to." These records also likely pertain to meeting with parties outside the Office and are likely to reflect the policy priorities of a senior Office official and those outside parties. 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 of the Records is Likely to Contribute to the "Public Understanding" of Government Operations and Activities.

The Requester has both the intent and the ability to convey any information obtained through this request to the public. Energy Policy Advocates publishes its finding regularly through the organization's website, www.epadvocates.org. This work is frequently cited in newspapers and trade and political publications. Requester intends to broadly disseminate public information obtained under this FOIA as it has other information relevant to its mission and work. As noted earlier in this request, EPA is a non-profit public policy organization dedicated to informing the public of developments in the areas of energy and environmental issues and relationships between governmental and non-governmental entities as they relate to those issues. EPA's ability to obtain fee waivers is essential to this work. EPA intends to use any responsive information to continue its work

highlighting the nexus between interested non-governmental entities and government agency decision-making. The public is both interested in and entitled to know how decisions are reached to use official resources. EPA ensures the public is made aware of its work and findings via media and its website epadvocates.org. The public information obtained by EPA have been relied upon by established media outlets, including the Washington Times and Wall Street Journal editorial page.[15]

The Public's Understanding of the Subject will be Enhanced to a Significant Extent as Compared to its Prior Understanding.

The Requester repeats and incorporates 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.

The Requester has stated "with reasonable specificity that its request pertains to operations of the government," and that it intends to broadly disseminate responsive records. Therefore, **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 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

[15] See, e.g., EPA In the News at http://epadvocates.org/news/; see also, e.g., Stuart Parker, "Conservative Group Says States' Ozone Suit 'Trojan Horse' for GHG Limits," Inside EPA, February 24, 2021, and https://www.wsj.com/articles/bidens-backdoor-climate-plan-11616020338?mod=opinion_lead_pos1.

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 Office refuses to waive our fees under the "significant public interest" test, which Requester would then appeal while requesting the Office 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[16]. 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…")

The Office 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.

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

CONCLUSION

We expect OSTP to release within the statutory period of time all responsive records, including all segregable portions of responsive records containing properly exempt information, and to provide information that maybe withheld under FOIA's discretionary provisions and otherwise proceed with a bias toward disclosure, consistent with the law's clear intent, judicial precedent affirming this bias, and President Obama's directive to all federal agencies on January 26, 2009. Memo to the Heads of Exec. Offices and Agencies, Freedom of Information Act, 74

[16] See, e.g., Securities & Exchange Commission Request No. 21-00769-FOIA, No. 21-01234-FOIA; Department of the Interior RequestNo. DOI-OS-2021-003335.

Fed. Reg. 4683 (Jan. 26, 2009) ("The Freedom of Information Act should be administered with a clear presumption: in the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, or because of speculative or abstract fears").

We expect all aspects of this request be processed free from conflict of interest. We request OSTP 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). OSTP 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 OSTP 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 agency 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 agency furnishes records to my attention as soon as they are identified, preferably electronically, but as needed then to my attention, at the address below. We inform OSTP of our intention to protect our appellate rights

on this matter at the earliest date should OSTP not comply with FOIA per, *e.g.*, *CREW v. FEC*.

If you have any questions, please contact me at the below email address.

Sincerely,

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