

FREEDOM OF INFORMATION ACT APPEAL

April 6, 2022

Office of Science and Technology
Old Executive Office Building
Attn: Chief FOIA Officer
Old Executive Office Building Room 431
Washington, DC 20502

Attn: Chief FOIA Officer

Via Email to: OSTPFOIA@ostp.eop.gov

RE: FOIA Appeal – Request OSTP-FOIA-22-044, OSTP-FOIA-22-048

To whom it may concern:

Please consider this appeal of the above-cited and re-attached request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, and 32 CFR 2402.7 *et seq.* I submit this appeal on behalf of Energy Policy Advocates, which is a non-profit public policy institute organized under the laws of Washington State.

Please note the letter uses 22-044 in the caption, and also states in the body, “For processing efficiency, the two requests have been consolidated into one and assigned OSTP FOIA number: 22-048.”

We appeal on the following grounds: *First*, the agency has withheld numerous records by redacting them in substantive full as “deliberative” but which redactions, which are of the entirety of the text, indicate by their size that the withheld messages are likely four or fewer words and highly unlikely to satisfy the legal requirement as representing exempt “deliberative process” information. *Second*, the agency has failed to demonstrate that its redactions/withholdings are narrowly tailored to cover only truly exempt information, as opposed to all information on a page or portion of a page, without regard to whether such information is

properly exempt. *Third*, the agency has failed to adequately demonstrate that any applicable FOIA exemption applies to the withheld records, at all.

We incorporate by reference here all information provided in the original request, which we re-attach. This appeal for *de novo* review should be construed as challenging each and every withholding that the agency has made, and any examples cited herein are cited as examples only.

I. JURISDICTIONAL STATEMENT

The underlying FOIA request was properly filed under 5 U.S.C. § 552. You have jurisdiction pursuant to 32 CFR 2402.7. Energy Policy Advocates has complied with all procedural rules, including that the instant appeal is filed within 30 days of March 23, 2022 (the date of the agency's adverse determination).

II. PROCEEDINGS BELOW

This appeal involves two FOIA Requests, sent by electronic portal submission to the agency's FOIA office on February 25, 2022, seeking copies of all:

emails sent or from Jane Lubchenco'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 *including but not limited to* lubchenco@oregonstate.edu (again, also including as cc: or bcc:) (Ms. Lubchenco's history includes continuing to use the Oregon State account after joining the federal government, for work-related correspondence), 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, and/or e) Marshall Shepherd.

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.

On March 23, 2022, the agency partially denied Energy Policy Advocates' FOIA Request, stating in relevant part that records were being redacted pursuant to Exemption 5 and Exemption 6 of the Freedom of Information Act.

III. Standards of Review: All Doubts Must be Resolved in Favor 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).

These disclosure obligations are to be accorded added weight in light of the fact these were produced under a recent presidential directive to executive agencies to comply with FOIA to the fullest extent of the law. *Presidential Memorandum For Heads of Executive Departments and Agencies*, 75 F.R. § 4683, 4683 (Jan. 21, 2009). As President Obama once emphasized, “a democracy requires accountability, and accountability requires transparency,” and “the Freedom of Information Act... is the most prominent expression of a profound national commitment to ensuring open Government.” Accordingly, agencies have been directed that FOIA “be

administered with a clear presumption: In the face of doubt, openness prevails” and that a “presumption of disclosure should be applied to all decisions involving FOIA.”

IV. The Agency Failed to Explain its Determinations that the Information Withheld is Properly Withheld as “b5 “Deliberative” Material; Context Suggests These Claims are Generally Implausible

In its final determination letter, the agency conclusorily stated that Exemptions 5 and 6 protect the redacted and withheld records from disclosure. But the agency failed to explain how the exemptions applied at all, and also failed to apply the exemptions narrowly. Because the context suggests that some of the withholdings are not likely to be credibly classified as deliberative, but instead is simply commentary about people accepting an invitation to participate, Requester appeals the b5 withholdings on PDF pp. 1-3 of 15.

Exemption 5 of the Freedom of Information Act protects “inter-agency or intraagency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5) Courts have construed this somewhat opaque language to “exempt those documents, and only those documents that are normally privileged in the civil discovery context.” See DOJ Guide to the Freedom of Information Act, available online at: <https://www.justice.gov/oip/page/file/1197816/download>.

Exemption 6 protects information about individuals in "personnel and medical files and similar files” when the disclosure of such information “would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). Although Requester is operating “in the dark” on this, given what is known about the correspondents it is likely that the email addresses of the outside parties are in fact publicly available (in fact, OSTP managed to obtain them). Publicly available information such as this is highly unlikely to rise to the level of b6 exempt material, but regardless the agency has not satisfied its burden to withhold that information here.

In this case, the agency appears to have made no effort to satisfy its burden of explaining how exemptions 5 or 6 protect the withheld information from disclosure. The agency made no attempt to explain why the records or portions of records that it is withholding would not traditionally be available in litigation, nor has the agency explained why the records might be deliberative in nature. And even assuming for the sake of argument that the agency had made a claim of deliberative process protection for the records at issue, the agency failed to explain what sort of decision the agency was deliberating, and further failed to identify the post-deliberation decision that the agency made.

Further, even assuming that Exemption 5 applies in some fashion, to some of these three pages 1-3, the agency's redactions appear to have been applied far too broadly, including by withholding nearly all content discussing RSVPs in their entirety or substantive full. It has been well-settled for over 40 years that "[t]wo exceptions... to the non-disclosability under FOIA of intra-agency deliberative memoranda are for (1) those parts of such memoranda that are purely factual in nature, and (2) memoranda adopted by the agency as the basis of its decision." *Nat'l Courier Asso. v. Bd. of Governors of Fed. Reserve Sys.*, 170 U.S. App. D.C. 301, 516 F.2d 1229, 1242 (1975), citing *American Mail Line, Ltd. v. Gulick*, 133 U.S.App.D.C. 382, 411 F.2d 696, 699-703 (1969), *EPA v. Mink*, 410 U.S. 73 (1973), *Soucie v. David*, 145 U.S.App.D.C. 144, 448 F.2d 1067, 1077-78 (1971), and *American Mail Line, Ltd. v. Gulick*, 133 U.S.App.D.C. 382, 411 F.2d 696, 699-703 (1969).

The agency appears not to have considered that portions of the withholdings might be "purely factual" in nature, or simply viewed as embarrassing (not an exemption).

VI. CONCLUSION

For the aforementioned reasons, the OSTP's March 23, 2022 partial denial of Energy Policy Advocates' request violated the agency's obligations under FOIA. By statute and

regulation, the agency is obligated to reverse this initial determination, grant the request in full, and provide non-exempt content of responsive records unless withholding is justified by an express exemption from FOIA. To the extent that the agency continues to believe that any information is exempt, the agency must explain how the records are exempt under any claim, rather than merely cite the statutory exemptions that might apply in an abstract sense.

If you have any questions, please do not hesitate to contact the undersigned. We look forward to your timely response.

Respectfully submitted,

/s/ Matthew D. Hardin

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