

FREEDOM OF INFORMATION ACT REQUEST

December 14, 2021

National Oceanic and Atmospheric Administration
Public Reference Facility (SOU1000)
1315 East-West Highway (SSMC3) Room 9719
Silver Spring, Maryland 20910

By Electronic Mail: FOIA@noaa.gov

Dear NOAA FOIA Staff:

On behalf of Energy Policy Advocates, a non-profit public policy institute, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, I hereby request copies of the following information which are dated any time during the **three-day period December 12, 2021 through December 14, 2021**, inclusive:

All i) emails, text messages and **Teams, Zoom, Skype, and/or Adobe Connect Chats** (including a) entire conversations, one-to-one or group, b) ***not limited to those associated with Teams meetings, but covering all Chats***: this requires processing *both* a) chats from calls, and b) chats not from calls, which are separately stored on the respective program/application), ii) sent to or from a) **Lori Arguelles** and/or b) **Richard Spinrad**, and iii) containing a) **Criswell** and/or b) **Kentucky**.

If NOAA does not classify this request for three days' worth of certain described correspondence as a "simple" request, please explain why it is not. If processing this request using the ERDMS system would produce the results quicker, we request that you please use that system.

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.

DATA DELIVERY STANDARDS

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 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.¹ 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 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

¹ <https://www.sec.gov/divisions/enforce/datadeliverystandards.pdf>.

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 Agency 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 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.*

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.² 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 Twitter, Facebook, and other similar platforms.

Through these means, EPA will ensure: (1) that the information requested contributes

² See, e.g., recent coverage at Editorial, *Wall Street Journal*, "Biden's 'BackDoor' 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.

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 from the release of the requested records.

The Subject of the Request Concerns “the Operations or Activities of the Government”.

This request concerns the what Agency officials were saying about the leading news item/matter of public interest over the three covered days, that being the tornado disaster in Kentucky which took the lives of many dozens of Americans after which administration officials, including the FEMA Director and President of the United States attributed to climate change as further reason to adopt their preferred policy agenda. Equally important, it seeks information that, to EPA's knowledge is not in the public domain as the media for creating these records, e.g., Microsoft Teams, Skype or Adobe Chat messages, is new and not typically the subject of FOIA requests. However, EPA has recently become aware of this means of communicating outside of the more well-understood and typically accessed media such as email.

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 helping the public further and better understand claims about a weather disaster made by high government officials demanding certain sacrifices of Americans, including a class of records of a sort that to EPA’s knowledge has not yet been released by the agency and which obscurity suggests the real possibility that Teams and similar messaging programs contain previously untapped resources of much information that will educate the public on “what its government is up to.” 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 regulatory, policy and enforcement decisions are reached. 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.³

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

³ 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.

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 Agency refuses to waive our fees under the “significant public interest” test, which Requester would then appeal while requesting the Agency 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 FOIA⁴. 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 Agency 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 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

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