FREEDOM OF INFORMATION ACT REQUEST

April 25, 2022

U.S. Securities & Exchange Commission
Office of FOIA Services
100 F Street NE
Washington D.C. 20549-2736

RE: Certain Commission records: named officials' third-party correspondence

Public Records Officer,

On behalf of the Energy Policy Advocates (EPA), I hereby submit this request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq*. EPA is a non-profit public policy institute incorporated in Washington State with research, publication and other media functions, as well as a transparency initiative seeking public records relating to environmental and energy policy and how policymakers use public resources, all of which include broad dissemination of public information obtained under open records and freedom of information laws. EPA therefore also requests a fee waiver, on two bases in the alternative, as described below, both of which SEC must address if it denies fee waiver.

Please provide us, within twenty working days,[1] copies of **all electronic mail a)** sent to, from or which copies (whether as cc: or bcc:) **i) Gary Gensler, ii) Allison Herren Lee, iii) Frank Buda, iv) Prashant Yerramalli, and/or v) Angelica Annino, b)** which is also sent to, from of which copies (again, whether as cc: or bcc:) ***or*** **includes, anywhere in an email 'thread', whether as a co-correspondent's address or otherwise in the body of, e.g., a forwarded email, i) @nrdc.org, ii) @sustainableFERC.org, and/or iii) @EF.org**, which are dated at any time from **September 1, 2021 through April 22, 2022**, inclusive.

This request seeks the described records on any email account, whether officially assigned to the named staff, or any other (so not only but @sec.gov but, e.g., garygensler@hotmail.com, garygensler@sbcglobal.net, allisonlee@yahoo.com, noorsaber@yahoo.com, allisonlee59@live.com, frankbuda@gmail.com, pyerramalli@gmail.com, pyerramalli@jenner.com, angelica.annino@gmail.com, azannino@mac.com, az_annino@yahoo.com, angelicaannino@sbcglobal.net, etc.): Any records meeting this description, on whatever email account they were sent or received are for obvious reasons presumptively inherently SEC-related.

That the above-described messages are in fact public records whatever device or account is used is well-established as is the obligation of an agency to obtain them.

[1] *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013).

All such devices and accounts must all be searched, and in a non-conflicted manner.

This request thereby also requires a credible and non-conflicted search not only of all devices and accounts assigned by SEC to the named staff but also any devices and accounts which the named staff has used at any time for work-related purposes. Indeed, the scope of the request makes it highly likely that any correspondence meeting the search parameters, on any device or account, is responsive to this request. This is particularly true given the extensively disclosed practice during the Obama-Biden administration of federal government employees conducting official correspondence on unofficial devices and accounts.

Any records responsive to this request are of great public interest given the Washington "revolving door" and history of influence by outside groups on policy, particularly in the wake of SEC's controversial push to compel speech in the name of "climate risk".

Entire Threads/Reachback: This request seeks those described records which are dated at any time from September 1, 2021 through April 22, 2022, inclusive. However, SEC should not truncate any email "threads" containing any correspondence meeting this description, should any portion of that thread extend back in time further than September 1, 2021: we specifically seek the entirety of any email "threads" containing any correspondence meeting this description, however far back in time any portion of that thread extends.

We seek *records*, specifically, and therefore request SEC not engage in the practice of redacting information it declares "non-responsive", which is not an enumerated exemption under FOIA.

These search parameters are sufficiently narrow and precise in their clear delineation for described correspondence over specific dates sent to or from specified SEC employees.

Please note that, EPA will receive any claim by SEC that it is consolidating this request with any request preceding it as a consolidation of this request with the earlier request's date of sending and receipt, not the later (*i.e.*, EPA will deem SEC as accepting that this request was also sent and received on the date that prior, purportedly consolidated request was sent).

Our request for fee waiver is in the alternative, first for reasons of public interest, and second, on the basis of EPA's status as a media outlet.[2] We do not seek the information for a commercial purpose. EPA is organized and recognized by the Internal Revenue Service as a 501(c)3 educational organization. It has an active publishing function as well as a major effort in broadly disseminating public information, particularly as involves the "climate" agenda, energy and environment policy, and the intersection of these matters with activist lobbies. As such, the requester has no commercial interest possible in these records.

EPA first seeks waiver of any fees under FOIA on that 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

[2] See EPA's webpage at www.epadvocates.org to view other information relevant to this determination.

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.

SEC 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 SEC refuses to waive our fees under the "significant public interest" test, which we would then appeal while requesting SEC 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…").

Definition of Information Sought/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 Commission in that form or format."). "Readily accessible" means text-searchable and OCR-formatted. See 5 U.S.C. § 552(a)(3)(B).

Please consider as responsive entire email "threads" containing any information responsive to this request, regardless whether any part of that thread falls outside the cited time parameters.

As this matter involves a significant issue of public interest, please produce responsive information as it becomes available on a rolling basis but consistent with the Act's prescribed timelines.

In the interests of expediting the search and processing of this Request, EPA is willing to provisionally pay fees up to $200 in the event SEC denies our fee waiver *requests* detailed, *infra*, as we appeal such a determination. Please provide an estimate of anticipated costs in the event that fees for processing this Request will exceed $200. To keep costs and copying to a minimum **please provide copies of all productions to the email used to send this request.** Given the nature of the records responsive to this request, all should be in electronic format, and therefore there should be no photocopying costs (see discussion, *infra*).

We request records on your system or the devices which sent/received emails on

any account used at any time for work-related correspondence, e.g., its backend logs, and do not seek only those records which survive on an employee's particular 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.**[3] 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 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.

In the context of some government agencies' demonstrated practice of taking the effort to physically print, then poorly scan electronic mail into low-resolution, non-searchable PDF files, we note that production of electronic records necessitates no such additional time, effort or other resources, and no photocopying expense. Any such effort as described is most reasonably viewed as an effort to frustrate the requester's use of the public information.

FOIA requests require no demonstration of wrongdoing, and the public interest prong of a FOIA response is the only aspect to which these factors are relevant; we address the public interest in the issue as relates to EPA's **requests for fee waiver in the alternative** in detail,

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

infra, and respectfully remind SEC that EPA is a public interest organization as such that, at most, EPA can be charged the costs of copying these records (for electronic records, those costs should be *de minimis*).

SEC Owes Requester a Reasonable 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). In this situation, there should be no difficulty in finding these documents. While the exact location the documents are held is unknown to requester, SEC doubtless knows where to find correspondence of specific, identified employees and is in a position to ascertain whether its employees sent or received correspondence on a particular day.

SEC Must Err on the Side 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). 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.*

Withholding and Redaction

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. Pursuant to high-profile and repeated promises and instructions from the previous President and Attorney General we request SEC err on the side of disclosure and not delay production of this information of great public interest through lengthy review processes over which withholdings they may be able to justify. In the unlikely event that SEC claims any records or portions thereof are exempt under any of FOIA's discretionary exemptions, we request you exercise that discretion and release them consistent with statements by the immediate-past 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." (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 record(s) may be exempt from disclosure, please inform us of the basis of any partial denials or redactions, and provide the rest of the record, all reasonably segregable, non-exempt information, withholding only that information that is properly exempt under one of FOIA's nine exemptions. *See* 5 U.S.C. §552(b). We remind SEC that it cannot withhold entire documents rather than producing their "factual content" and redacting any information that is legally withheld under FOIA exemptions. As the D.C. Circuit 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." *King v. Department of Justice*, 830 F.2d 210, at 254 n.28 (D.C. Cir. 1987). **As an example of how entire records should not be withheld when there is reasonably segregable information, we note that at bare minimum basic identifying information (that is "who, what, when" information, e.g., To, From, Date, and typically Subject) is not "deliberative".**

If it is your position that a document contains non-exempt segments and that those nonexempt 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 242, 261. Further, we request that you provide us with an index all such withheld documents as required under *Vaughn 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 at 223-24.

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

Please provide responsive documents in complete form. Any burden on SEC will be lessened if it produces responsive records without redactions and in complete form.

Requests for Fee Waiver in the Alternative

As this matter involves a significant issue of public interest, please produce responsive information as it becomes available on a rolling basis but consistent with FOIA's timelines.

In the interests of expediting the search and processing of this Request, EPA is willing to provisionally pay fees up to $200 in the event SEC denies our fee waiver *requests* detailed, *infra*, as we appeal such a determination. Please provide an estimate of anticipated costs in the event that fees for processing this Request will exceed $200. To keep costs and copying to a minimum **please provide copies of all productions to the email used to send this request.** Given the nature of the records responsive to this request, all should be in electronic format,

and therefore there should be no photocopying costs (see discussion, *infra*).

FOIA requests require no demonstration of wrongdoing, and the public interest prong of a FOIA response is the only aspect to which these factors are relevant; we address the public interest in the issue as relates to EPA's **requests for fee waiver in the alternative** in detail, infra, and respectfully remind SEC that EPA is a public interest organization as such that, at most, EPA can be charged the costs of copying these records (for electronic records, those costs should be *de minimis*).

This extended fee waiver discussion is detailed as a result of documented experience of agencies improperly using denial of fee waivers to impose an economic barrier to access, an improper means of delaying or otherwise denying access to public records to groups whose requests are, apparently, unwelcome, including and particularly EPA. *It is only relevant if SEC considers denying our fee waiver request*.

Disclosure would substantially contribute to the public at large's understanding of governmental operations or activities, on a matter of demonstrable public interest.

EPA's principal request for waiver or reduction of all costs is pursuant to 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").

EPA does not seek these records for a commercial purpose. Requester is organized and recognized by the Internal Revenue Service as 501(c)3 educational organization. As such, requester also has no commercial interest possible in these records. If no commercial interest exists, an assessment of that non-existent interest is not required in any balancing test with the public's interest.

As a non-commercial requester, EPA 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. Nov. 30, 2010). The public interest fee waiver provision "is to be liberally construed in favor of waivers for noncommercial requesters." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F. 2d 1284, 2184 (9th Cir. 1987). The Requester need not demonstrate that the records would contain any particular evidence, such as of misconduct. Instead, the question is whether the requested information is likely to contribute significantly to public understanding of the operations or activities of the government, period. *See Judicial Watch v. Rosotti*, 326 F. 3d 1309, 1314 (D.C. Cir 2003).

FOIA is aimed in large part at promoting active oversight roles of watchdog public advocacy groups. "The legislative history of the fee waiver provision reveals that it was added to FOIA 'in an attempt to prevent government agencies from using high fees to discourage certain types of requesters, and requests,' in particular those from journalists, scholars and nonprofit public interest groups." *Better Government Ass'n v. State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986) (fee waiver intended to benefit public interest watchdogs), citing to *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D.Mass. 1984); S. COMM. ON THE JUDICIARY, AMENDING the FOIA, S.

REP. NO. 854, 93rd Cong., 2d Sess. 11-12 (1974)).[4] "This is in keeping with the statute's purpose, which is 'to remove the roadblocks and technicalities which have been used by… agencies to deny waivers.'" *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Educ.*, 593 F. Supp. 261, 268 (D.D.C. 2009), citing to *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th. Cir. 1987) (quoting 132 Cong. Rec. S16496 (Oct. 15, 1986) (statement of Sen. Leahy).

Requester's ability — as well as many nonprofit organizations, educational institutions and news media that will benefit from disclosure — to utilize FOIA depends on its ability to obtain fee waivers. For this reason, "Congress explicitly recognized the importance and the difficulty of access to governmental documents for such typically under-funded organizations and individuals when it enacted the 'public benefit' test for FOIA fee waivers", a waiver provision added to FOIA in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests including, most importantly for our purposes, nonprofit public interest groups. *Better Government Ass'n v. State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986). Congress made clear its intent that fees should not be utilized to discourage requests or to place obstacles in the way of such disclosure, forbidding the use of fees as '"toll gates" on the public access road to information. *Id.*

As the *Better Government* court also recognized, public interest groups employ FOIA for activities "essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions." *Id.* Congress enacted FOIA clearly intending that "fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information." *Ettlinger v. F.B.I.*, 596 F. Supp. 867, 872 (D. Mass. 1984), citing Conf. Comm. Rep., H.R. Rep. No. 1380, 93d Cong., 2d Sess. 8 (1974) at 8. Refusal of fees as a means of withholding records from a FOIA requester constitutes improper withholding. *Id.* at 874.

Therefore, "insofar as… [agency] guidelines and standards in question act to discourage FOIA requests and to impede access to information for precisely those groups Congress intended to aid by the fee waiver provision, they inflict a continuing hardship on the non-profit public interest groups who depend on FOIA to supply their lifeblood -- information." *Better Gov't v. State* (internal citations omitted). The courts therefore will not permit such application

[4] This was grounded in the recognition that the two plaintiffs in that merged appeal were, like Requester, public interest non-profits that "rely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions." *Better Gov't v. State*. They therefore, like Requester, "routinely make FOIA requests that potentially would not be made absent a fee waiver provision", requiring the court to consider the "Congressional determination that such constraints should not impede the access to information for appellants such as these." *Id*.

of FOIA requirements that "'chill' the ability and willingness of their organizations to engage in activity that is not only voluntary, but that Congress explicitly wished to encourage." *Id*. As such, agency implementing regulations may not facially or in practice interpret FOIA's fee waiver provision in a way creating a fee barrier for Requester.

Courts have noted FOIA's legislative history to find that a fee waiver request is likely to pass muster "if the information disclosed is new; supports public oversight of agency operations, including the quality of agency activities and the effects of agency policy or regulations on public health or safety; or, otherwise confirms or clarifies data on past or present operations of the government." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d at 1284-1286 (9th Cir. 1987).

This information request meets that description, for reasons both obvious and specified. As previously discussed, the information sought will provide important insights into the (independent) Commission's interactions with the White House on a recent, transformative Commission proposal and the Chairman's representations regarding same. The requested records will provide the public with original source knowledge concerning the above-described issue. The requested records thus clearly concern the operations and activities of government.

1) **The subject matter of the requested records specifically concerns identifiable operations or activities of the government**. Potentially responsive records will provide important insights into the (independent) Commission's work with the White House and interested, outside parties.

The subject matter of this request therefore concerns the operations and activities of senior officials. This request asks for correspondence between certain Commission personnel who have worked together on part of the administration's "whole of government" approach to advancing a "climate change" agenda, which a quick internet search confirms is the subject of great public and media interest. It expressly extends to certain means of corresponding that, the public record also confirms, government officials have turned to in recent years, which however personally owned the account or device, does not make the correspondence any less public. 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". We note President Biden's environmental agenda has been the subject of substantial media interest and promotional efforts.[5]

The Department of Justice Freedom of Information Act Guide concedes that this threshold is easily met. There can be no question that it is met here and that potentially responsive records unquestionably reflect "identifiable operations or activities of the government" with a connection that is direct and clear, not remote.

2) Requester intends to broadly disseminate responsive information. As demonstrated herein requester has both the intent and the ability to convey any information obtained through this

[5] https://www.washingtonpost.com/climate-environment/2021/01/26/biden-environmental- justice-climate/ and https://www.epa.gov/newsreleases/epa-welcomes-members-biden-harris-leadership-team (last assessed April 8, 2021).

request to the public. EPA regularly publishes works and it and its experts are regularly cited in newspapers and trade and political publications, and appear on radio and television to discuss their work, and Requester intends to broadly disseminate public information obtained under this FOIA as it has other information relevant to its mission and work.

For reasons already described, the requested records will contribute to public understanding of the workings of senior government officials including on non-official accounts, to help ensure future actions, decisions, and deliberations of career and non-career appointees are conducted in a compliant manner. As explained above, the records will contribute to public understanding of this topic. *See W. Watersheds Proj. v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004) ("... find[ing] that WWP adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the BLM and also how ... management strategies employed by the BLM may adversely affect the environment.").

Through EPA's synthesis and dissemination (by means discussed in Section II, below), disclosure of information contained and gleaned from the requested records will contribute to a broad audience of persons who are interested in the subject matter. *Ettlinger v. FBI*, 596 F.Supp. at 876 (benefit to a population group of some size distinct from the requester alone is sufficient); *Carney v. Dep't of Justice*, 19 F.3d 807, 815 (2d Cir. 1994), cert. denied, 513 U.S. 823 (1994) (applying "public" to require a sufficient "breadth of benefit" beyond the requester's own interests); *Cmty. Legal Servs. v. Dep't of Hous. & Urban Dev.*, 405 F.Supp.2d 553, 557 (E.D. Pa. 2005) (in granting fee waiver to community legal group, court noted that while the requester's "work by its nature is unlikely to reach a very general audience," "there is a segment of the public that is interested in its work").

Indeed, the public does not currently have an ability to easily evaluate any aspect of the particular coordination reflected in the requested records. We are also unaware of any previous release to the public of these or similar records. See *Cmty. Legal Servs. v. HUD*, 405 F.Supp.2d 553, 560 (D. Pa. 2005) (because requested records "clarify important facts" about agency policy, "the CLS request would likely shed light on information that is new to the interested public."). As the Ninth Circuit observed in *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987), "[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations".

Disclosure of these records is not only "likely to contribute," but is certain to contribute, to public understanding of this described coordination. The public is always well served when it knows how the government conducts its activities, particularly matters touching on ethics questions. Hence, there can be no dispute that disclosure of the requested records to the public will educate the public about the potential conflicts of interest and recusal obligations of government officials.

3) 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. Requester intends to broadly disseminate

responsive information. The requested records have an informative value and are "likely to contribute to an understanding of Federal government operations or activities," and as noted above this issue is of significant and increasing public interest.

However, **the Department of Justice's Freedom of Information Act Guide makes it clear that, in the DoJ's view, the "likely to contribute" determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain**. It cannot be denied that, to the extent the requested information is available to any parties, it appears likely that this is information held only by SEC, is therefore clear that the requested records are "likely to contribute" to an understanding of your agency's decisions because they are not otherwise accessible other than through a FOIA request.

Thus, disclosure and dissemination of this information will facilitate meaningful public participation in the policy debate, therefore fulfilling the requirement that the documents requested be "meaningfully informative" and "likely to contribute" to an understanding of your agency's dealings with interested parties outside the Commission.

EPA is not requesting these records merely for their intrinsic informational value. Disclosure of the requested records will significantly enhance the public's understanding of the potential conflicts of interest and likelihood of an appearance of bias in decision-making as compared to the level of public understanding that exists prior to the disclosure. Indeed, public understanding will be significantly increased as a result of disclosure.

The records are also certain to shed light on the Administration's compliance with its own ethics proclamations in that they pertain to officials covered by ethics disclosure and recusal obligations. Such public oversight of Commission action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. Thus, EPA meets this factor as well.

4) 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 and activist group expressions of concern over the subject of this request — the (independent) Commission's work with interested, outside parties — demonstrate 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."

Further, 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 articulates what obligations exist for senior government officials. 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.[6] 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 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.

Public oversight and enhanced understanding of the Administration's 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*.

5) **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*.

Only by the SEC releasing this information will public interest groups such as Requester, other media, and the public at large see these terms first hand and draw their own conclusions concerning the (independent) Commission's work with interested, outside parties. The significance of this to the public understanding is vast, as it will allow the public to examine the details of these interactions to ascertain the degree of control outside actors might have over agency deliberations. Because EPA has no commercial interests of any kind, disclosure can only result in serving the needs of the public interest.

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.

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[6] *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.

"[T]he informative value of a request depends not on there being certainty of what the documents will reveal, but rather on the requesting party having explained with reasonable specificity how those documents would increase public knowledge of the functions of government." *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Health and Human Services*, 481 F. Supp. 2d 99, 107-109 (D.D.C. 2006). We note that federal agencies regularly waive fees for substantial productions arising from requests expressing the same intention using the same language as used in the instant request.[7]

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 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 Commission refuses to waive our fees under the "significant public interest" test, which Requester would then appeal while requesting the Commission proceed with processing on the grounds that Energy Policy Advocates is a media organization, the Commission must explain any denial of treatment of EPA as a media outlet.[8] 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 Commission 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.

Further, we note EPA's regular recognition by federal agencies', including the SEC, of EPA's status as a media requester under FOIA.[9]

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[7] *See, e.g*., no fees required by other agencies for processing often substantial numbers of records on the same or nearly the same but less robust waiver-request language include: **DoI** OS-2012-00113, OS-2012-00124, OS-2012-00172, FWS-2012-00380, BLM-2014-00004, BLM-2012-016, BLM: EFTS 2012-00264, CASO 2012-00278, NVSO 2012-00277; **NOAA** 2013-001089, 2013-000297, 2013-000298, 2010-0199, and "Peterson-Stocker letter" FOIA (August 6, 2012 request, no tracking number assigned, records produced); **DoL** (689053, 689056, 691856 (all from 2012)); **FERC** 14-10; **DoE** HQ-2010-01442-F, 2010-00825-F, HQ-2011-01846, HQ-2012-00351-F, HQ-2014-00161-F, HQ-2010-0096-F, GO-09-060, GO-12-185, HQ-2012-00707-F; **NSF** (10-141); **OSTP** 12-21, 12-43, 12-45, 14-02.; **EPA** HQ-2013-000606, HQ-FOI-01087-12, HQ-2013-001343, R6-2013-00361, R6-2013-00362, R6-2013-00363, HQ-FOI-01312-10, R9-2013-007631, HQ-FOI-01268-12, HQ-FOI-01269, HQ-FOI-01270-12, HQ-2014-006434. These latter examples involve EPA either waiving fees, not addressing the fee issue, or denying fee waiver but dropping that posture when requester sued.

[8] See, e.g., Securities & Exchange Commission Requests No. 21-00769-FOIA, No. 21-01234-FOIA, 22-00557-FOIA, 22-01573-FOIA, 22-01626-FOIA; Department of the Interior Request No. DOI-OS-2021-003335.

[9] See, e.g., Securities & Exchange Commission Requests No. 21-00769-FOIA, No. 21-01234-FOIA, 22-00557-FOIA, 22-01573-FOIA, 22-01626-FOIA; Department of the Interior Request No. DOI-OS-2021-003335.

The key to "media" fee waiver is whether a group publishes, as EPA most surely does. *See supra*. In *National Security Archive v. Department of Defense*, 880 F.2d 1381 (D.C. Cir. 1989), the D.C. Circuit wrote:

> The relevant legislative history is simple to state: because one of the purposes of FIRA is to encourage the dissemination of information in Government files, as Senator Leahy (a sponsor) said: "It is critical that the phrase `representative of the news media' be broadly interpreted if the act is to work as expected.... If fact, *any person or organization which regularly publishes or disseminates information to the public ... should qualify for waivers as a `representative of the news media.'"*

Id. at 1385-86 (emphasis in original).

As the court in *Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003) noted, this test is met not only by outlets in the business of publishing such as newspapers; instead, citing to the *National Security Archives* court, it noted one key fact is determinative, the "*plan to act, in essence, as a publisher*, both in print and other media." *EPIC v. DOD,* 241 F.Supp.2d at 10 (*emphases* added). "In short, the court of appeals in National Security Archive held that '[a] representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience.'" *Id*. at 11. *See also, Media Access Project v. FCC*, 883 F.2d 1063, 1065 (D.C. Cir. 1989).

For these reasons, requester qualifies as a "representative[] of the news media" under the statutory definition, because it routinely gathers information of interest to the public, uses editorial skills to turn it into distinct work, and distributes that work to the public. *See EPIC v. Dep't of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003)(non-profit organization that gathered information and published it in newsletters and otherwise for general distribution qualified as representative of news media for purpose of limiting fees). Courts have reaffirmed that non-profit requesters who are not traditional news media outlets can qualify as representatives of the new media for purposes of the FOIA, particularly after the 2007 amendments to FOIA. *See ACLU of Washington v. U.S. Dep't of Justice*, No. C09-0642RSL, 2011, 2011 U.S. Dist. LEXIS 26047 at *32 (W.D. Wash. Mar. 10, 2011). *See also Serv. Women's Action Network v. DOD*, 2012 U.S. Dist. Lexis 45292 (D. Conn., Mar. 30, 2012).

Accordingly, any fees charged must be limited to duplication costs. The records requested are available electronically and are requested in electronic format, so there should be no costs.

Conclusion

We expect the SEC to release within the statutory period of time all responsive records, withholding only segregable portions of any that might contain properly exempt information, and to provide information that may be 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 former 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 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 including the search for responsive records be processed free from conflict of interest (i.e., the Commission should not simply rely upon a request of the party/ parties whose correspondence is at issue in the request what they might have that is responsive).

We request the SEC to 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); see also *CREW v. FEC*. The SEC 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 the SEC 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 the SEC of our intention to protect our appellate rights on this matter at the earliest date should the SEC not comply with FOIA per, *e.g.*, *CREW v. Fed. Election Comm'n*, 711 F.3d 180 (D.C. Cir. 2013).

If you have any questions please do not hesitate to contact me. I look forward to your timely response.

Sincerely,

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