

June 30, 2021

Freedom of Information Act Request

FOIA/PA Officer
NNSA/Office of the General Counsel
P.O. Box 5400
Albuquerque, NM 87185

Via Electronic Mail: foiofficer@nnsa.doe.gov
Re: Certain agency records (correspondence)

Dear FOIA Officer,

On behalf of Energy Policy Advocates (“EPA”), recognized by the Internal Revenue Service as a non-profit public policy institute under § 501(c)(3) of the Internal Revenue Code, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, please provide copies of the records as described herein.

Records Requested

EPA requests the following records from the National Nuclear Security Administration’s (“NNSA”) Lawrence Livermore National Laboratory. These parameters are *not* case-sensitive:

1. Please provide all electronic correspondence, whether email, SMS, text, direct message or other instant message, Signal, WhatsApp, Telegram or otherwise, which was sent to or from (including copying, whether as cc: or bcc) Charles Koven, was sent or received at any time from June 1, 2020 through June 28, 2021, inclusive, and which includes one or more of the following, *anywhere*, whether in a Subject field, body of an email, or attachment: i) ClimateFeedback (whether as part of e.g., a url, such as <https://climatefeedback.org>, or otherwise), ii) "Climate Feedback" (quotations merely delineate the search term), iii) Lomborg, iv) Koonin, and/or v) Shellenberger;
2. Please also provide all electronic correspondence, whether email, SMS, text, direct message or other instant message, Signal, WhatsApp, Telegram or otherwise, which was sent to or from (including copying, whether as cc: or bcc:) Charles Koven, sent or received at any time from June 1, 2020 through June 28, 2021, inclusive, and was also sent to, from, or copying, whether cc: or bcc:, Emmanuel Vincent.

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.

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).

We seek responsive 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.

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

Native file productions may be produced without load files. However, native file productions must maintain the integrity of the original meta data, and must be produced as they are maintained in the normal course of business and organized by custodian-named file folders. A separate folder should be provided for each custodian.

In the event that necessity requires your office to produce a PDF file, due to your normal program for redacting certain information and such that native files cannot be produced as they are maintained in the normal course of business, in order to provide all requested information each PDF file should be produced in separate folders named by the custodian, *and* accompanied by a load file to ensure the requested information appropriate for that discrete record is associated with that record. The required fields and format of the data to be provided within the load file can be found in Addendum A of the above-cited SEC Data Standards. All produced PDFs must be text searchable.

We appreciate the inclusion of an index.

Fee Waiver 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.

FOIA was designed to provide citizens a broad right to access government records. FOIA's basic purpose is to "open agency action to the light of public scrutiny," with a focus on the public's "right to be informed about what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). In order to provide public access to this information, FOIA's fee waiver provision requires that "[d]ocuments shall be furnished without any charge or at a [reduced] charge," if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). FOIA's fee waiver requirement is "liberally construed." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

The 1986 fee waiver amendments were designed specifically to provide non-profit organizations such as EPA access to government records without the payment of fees. Indeed, FOIA's fee waiver provision was intended "to prevent government agencies from using high fees to discourage certain types of requesters and requests," which are "consistently associated with requests from journalists, scholars, and non-profit public interest groups." *Ettlinger v. FBI*, 596 F.Supp. 867, 872 (D. Mass. 1984) (emphasis added). As one Senator stated, "[a]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information" 132 Cong. Rec. S. 14298 (statement of Senator Leahy).

I. EPA Qualifies for a Fee Waiver.

Under FOIA, a party is entitled to a fee waiver when "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 the [Federal] government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). The Department of Energy FOIA regulations at 10 C.F.R. § 1004.9(a)(8) establish the same standard.

First, as explained herein, the federal government acknowledges EPA’s status as a media requester. Further, in the alternative thus, the Agency must consider four factors to determine whether a request is in the public interest: (1) whether the subject of the requested records concerns “the operations or activities of the Federal government,” (2) whether the disclosure is “likely to contribute” to an understanding of government operations or activities, (3) whether the disclosure “will contribute to public understanding” of a reasonably broad audience of persons interested in the subject, and (4) whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities. 10 C.F.R. § 1004.9(a)(8). As shown below, EPA meets each of these factors.

A. The Subject of This Request Concerns “The Operations and Activities of the Government.”

The subject matter of this request concerns the operations and activities of the Agency. This request asks for correspondence of an official involved in providing a “fact-checking” service employed by major news and social media outlets to limit circulation and/or discredit certain speech pertaining to an issue on which the official works for the federal government and does so citing to his official position with the federal government. You can confirm this at climatefeedback.org.

B. Disclosure is “Likely to Contribute” to an Understanding of Government Operations or Activities.

As described, above, the requested records are meaningfully informative about government operations or activities and will contribute to an increased understanding of those operations and activities by the public.

Disclosure of the requested records will allow EPA to convey to the public information about the official’s public advocacy for and/or on behalf of a non-governmental entity if expressly as a federal government official. Once the information is made available, EPA will analyze it and present it to its followers and the general public in a manner that will meaningfully enhance the public’s understanding of this topic.

Thus, the requested records are likely to contribute to an understanding of National Nuclear Security Administration’s operations and activities.

C. Disclosure of the Requested Records Will Contribute to a Reasonably Broad Audience of Interested Persons’ Understanding of the National Nuclear Security Administration.

For reasons already described, the requested records will contribute to public understanding of the official’s public advocacy for and/or on behalf of a non-governmental entity. As explained above, the records will contribute to public understanding of this topic.

Ensuring the avoidance of the appearance of bias is of interest to a reasonably broad segment of the public. EPA will use the information it obtains from the disclosed records to educate the public at large about the influence of federal officials on the federal judiciary. *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); *Cnty. 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 the requested records, which concern an official’s public advocacy for and/or on behalf of a non-governmental entity. We are also unaware of any previous release to the public of these or similar records. *See Cnty. 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 the above-described matter, involving the use of an official position for a private interest. Hence, there can be no dispute that disclosure of the requested records to the public will educate the public about the above-cited use of an official position for a private interest.

D. Disclosure is Likely to Contribute Significantly to Public Understanding of Government Operations or Activities.

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 use of an official position for a private interest. Indeed, public understanding will be significantly increased as a result of disclosure.

II. 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. 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 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 use of an official position for a private interest. 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.*

III. 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's role of educating the general public on the use of government resources. EPA is a 501(c)(3) 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.

Expedited Processing

Given the urgency of the specific facts involved here as described, *supra*, and the importance of the public's need to know about the use of an official position for a private interest. EPA requests expedited processing. To facilitate this request, we request that the FOIA office use the email Enterprise Records and Document Management System (eERDMS) to search and process this request.

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 (last accessed April 8, 2021).

Expedited processing of requests requires a “compelling need”, a need that can be demonstrated by “[a]n urgency to inform the public about an actual or alleged Federal government activity, if the information is requested by a person primarily engaged in disseminating information to the public.” 10 C.F.R. § 1004.5(d)(6). The regulation requires a requester show both an “urgency to inform” and that the requester is “primarily engaged in disseminating information to the public.”

As stated in the fee waiver discussion, *supra*, EPA is “primarily engaged in disseminating information to the public.” EPA regularly disseminates records obtained on social media and its website and records obtained by EPA have provided essential background for work produced by a newspaper of record and energy industry publications.³ Finally, EPA has received prior recognition as a media requester for FOIA purposes.⁴

There is an “urgency to inform” the public of the information requested as it relates to this use of an official position for a private interest, and the potential implications of future decisions on government policy are therefore a matter of which there is an “urgency to inform”.

Conclusion

For all of the foregoing reasons, EPA qualifies for expedited processing and a full fee waiver. We hope that the Agency will immediately grant this fee waiver request and begin to search and disclose the requested records without any unnecessary delays.

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.


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

³ See footnote 2

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